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Case No: CO/716/2020
CO/4291/2020
CO/4413/2020
CO/3687/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street, Birmingham, B4 6DS

Date: 23/04/2021

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

THE QUEEN (ON THE APPLICATION OF ABDELMOTALIB ELKUNDI)	**Claimant**
- and -	
BIRMINGHAM CITY COUNCIL	**Defendant**
THE QUEEN (ON THE APPLICATION OF ROBERTA ROSS)	**Claimant**
-and -	
BIRMINGHAM CITY COUNCIL	**Defendant**
THE QUEEN (ON THE APPLICATION OF CALI HAAJI AHMED)	**Claimant**
-and-	
BIRMINGHAM CITY COUNCIL	**Defendant**
THE QUEEN (ON THE APPLICATION OF ABDULWARETH AL-SHAMERI)	**Claimant**
-and-	
BIRMINGHAM CITY COUNCIL	**Defendant**

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- -

Zia Nabi and Joseph Markus (instructed by **Community Law Partnership**) for the **Claimants**
Jonathan Manning, Annette Cafferkey, Stephanie Lovegrove and Annabel Heath (instructed by **Birmingham City Council**) for the **Defendant**

Hearing dates: 9 - 12 March 2021

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Approved Judgment

Mrs Justice Steyn :

A. Introduction

1. The four claimants have each applied to Birmingham City Council ("the Council") for accommodation under the homelessness provisions contained in Part VII of the Housing Act 1996 ("HA 1996"). The Council accepts that Mr Elkundi, Mr Ahmed and Mrs Ross are owed the main housing duty under section 193(2). The Council had also accepted that it was subject to the same duty in Mr Al-Shameri's case, but due to developments during the course of the proceedings the Council contends that, in his case, the section 193(2) duty has been discharged.

2. In *Elkundi*, permission was granted on appeal by Andrews LJ, by an order dated 3 November 2020. Saini J granted permission in *Ross* and *Ahmed* by orders dated 6 January 2021. HHJ Worster granted permission in *Al-Shameri* by order dated 7 January 2021.

3. Each of the claimants allege the Council is in breach of its duty to them under section 193(2) to secure suitable accommodation is available for their occupation (**Ground 1**). This is the sole ground of challenge in *Elkundi* and *Ross*.

4. In *Ahmed*, the claimant has permission to pursue the following additional ground (**Ground 2**):

> "The Defendant has adopted an unlawful informal system whereby it will accept that accommodation is unsuitable within the meaning of sections 206(1) and 210 HA 1996 but then go on to say that the accommodation is not unreasonable for continued occupation, over an inherently uncertain timescale, until alternative accommodation can be provided ('Ground 2'). The Claimant accordingly seeks a declaration that the Defendant is operating an unlawful system for the performance of its duty under section 193(2) HA 1996."

In amended grounds filed and served with the permission of HHJ Worster granted on 7 January 2021, Mr Al-Shameri also seeks to pursue Ground 2. In his case, Ground 2 has proceeded as a rolled up hearing, pursuant to Morris J's order, and so a question arises as to whether he should be granted permission.

5. A further ground raised in *Al-Shameri* (in the original statement of grounds) is that the Council has acted in breach of the claimant's legitimate expectation, arising from the Council's letter of 27 April 2018, that he would be made an offer of suitable accommodation (**Ground 3**).

6. By his orders of 6 January 2021, Saini J made directions for *Ross* and *Ahmed* to be heard together in the week commencing 15 February 2021. On 21 January 2021, I made an order that *Elkundi* should be heard together with *Ross* and *Ahmed* at the hearing which was listed on 16 February 2021, with an increased time estimate. On 15 February 2021, Morris J vacated the hearing on 16 and 17 February, directed that *Al-Shameri* should be heard with *Elkundi*, *Ahmed* and *Ross*, and re-listed the hearing for four days from 9-12 March 2021.

7. The hearing took place using Microsoft Teams, in accordance with arrangements adopted in consequence of the COVID-19 pandemic. I heard oral submissions on behalf of the claimants from Mr Zia Nabi on all issues, save for relief in Mrs Ross's case which was addressed by Mr Joseph Markus. On behalf of the Council, Ms Annette Cafferkey addressed the nature of the section 193(2) duty, Mr Manning addressed the practice and policy issues, and I heard oral submissions on the case-specific issues in *Ahmed* and *Al-Shameri* from Mr Manning, in *Ross* from Ms Cafferkey and in *Elkundi* from Ms Stephanie Lovegrove. I am very grateful to all Counsel for the assistance provided to me in their skeleton arguments and oral submissions.

8. I have considered all the evidence and arguments put before me when reaching my conclusions, although it is impossible (even in a judgment of this length) to do more than summarise the matters I consider to be most material to my decisions. Unless otherwise stated, all references in this judgment to statutory provisions are references to the Housing Act 1996.

B. The issues

9. The issues to which these grounds, and the parties' submissions, give rise are these:

In all four cases

10. *(1) What is the nature of the main housing duty under section 193(2)?* Is it, as the claimants contend, an immediate, unqualified and non-deferrable duty to secure suitable temporary accommodation? Or is it, as the Council contends, a duty to secure the availability of suitable accommodation within a reasonable period of time, the reasonableness of the period depending on the circumstances of each case and on what accommodation is available? This gives rise to a sub-issue: should this court follow *R (M) v Newham London Borough Council* [2020] EWHC 327 (Admin) ("*M v Newham*")? The claimants contend the analysis of the nature of the main housing duty in *M v Newham* is correct and, in any event, applying *Willers v Joyce (No.2)* [2016] UKSC 44 [2018] AC 843 *("Willers v Joyce (No.2)")* at [9], there is no powerful reason not to follow it. Whereas the Council contends *M v Newham* is wrong and should not be followed.

Elkundi, Ahmed* and *Ross

11. *(2) In Elkundi, Ahmed and Ross, did the Council decide that the claimant's accommodation was unsuitable?* The Council made statutory review decisions on the claimants' requests for a review of the suitability of their temporary accommodation. These claimants contend the Council decided, in clear terms, that their accommodation was unsuitable and the Council is not permitted to adduce evidence to seek to go behind those decisions or to retract them. The Council contends that, properly understood, its decisions were that the accommodation was suitable temporary accommodation in the short to medium-term, but not suitable in the long-term.

12. *(3) In Elkundi, Ahmed and Ross, is the Council in breach of the main housing duty?* Whatever the nature of the duty, if I were with the Council on the meaning of the review decisions, it would follow the Council is not in breach as the accommodation secured would be (subject to the court reaching a contrary decision on a statutory appeal) suitable. Whereas if I were with the Council on the nature of the duty, but not on the meaning of the review decisions, then the question whether the Council is fulfilling its duty would

be closely linked to the issues that arise in respect of Ground 2. The Council acknowledges that if I find for the claimants on both the nature of the duty and the meaning of each of the statutory review decisions, it would follow that the Council has breached its duty under section 193(2). However, sub-issues were raised which potentially impact on whether the Council is in *on-going* breach of section 193(2). *First*, since the review decisions, has the Council made (or purported to make) decisions in these claimants' cases that their current accommodation is suitable? S*econd*, if so, does a 'one way *functus officio* rule' apply, prohibiting the Council from reversing a decision that an applicant's accommodation is *unsuitable*, other than by making an (appealable) offer of that same accommodation?

Al-Shameri

13. *(4) Should the court determine whether the Council has breached and/or is in on-going breach of section 193(2)? If so, what is the answer?*

14. *(5) Did the Council's letter of 27 April 2018 create a legitimate expectation that the Council would make the claimant an offer of suitable accommodation and, if so, is the Council in breach of that legitimate expectation (as the claimant contends)?*

15. The claimant relies on the Council's decision on his homeless application of 27 April 2018 in support of both the contention that the Council decided his accommodation was unsuitable (and failed to provide suitable alternative accommodation) and his claim to a substantive legitimate expectation. The Council contends no decision as to suitability was made on 27 April 2018, and in any event Mr Al-Shameri chose to remain homeless at home, so there is no basis for a finding of a past breach. Nor was any representation capable of founding a legitimate expectation made. In respect of the alleged ongoing breach, the claimant contends the court should find the Council's decision that the offer made on 16 November 2020 was suitable accommodation is irrational. The Council contends that the decision is not challenged in this claim (indeed the review decision was made after the hearing had finished) and the claimant has a suitable alternative remedy in the form of a statutory appeal.

Ahmed and Al-Shameri

16. *(6) Is the Council operating an unlawful system for the performance of its duty under section 193(2)? And should Mr Al-Shameri be permitted to pursue this ground?* The answer to the latter question does not affect the substance of the argument, only the question whether it is pursued by two claimants or one.

In all cases

17. *(7) What relief (if any) should be granted? In particular, in respect of Ground (1), in each case, should a mandatory order requiring the Council to secure suitable temporary accommodation be made?*

C. Preliminary matters

18. Each party objects to the other being permitted to rely on various statements and submissions, giving rise to the following issues. *First*, did the claimants' Reply filed in *Al-Shameri* on 2 March 2021 raise a new ground of challenge or matters relevant to

relief? *Second*, in either case, should the claimants be permitted to rely on those paragraphs? *Third*, should the claimants be permitted to rely on the witness statement of Michael McIlvaney, dated 2 March 2021 (filed in *Al-Shameri*)? *Fourth*, if the claimants are permitted to rely on §§14-22 of their Reply and/or Mr McIlvaney's statement, should the parties be permitted to rely on the following submissions and evidence filed after the hearing: (a) the Council's supplementary submissions, and a statement of Gary Messenger, both filed on 1 April 2021; (b) the claimants' reply to those supplementary submissions and Mr Messenger's evidence, filed on 4 April 2021; and (c) the Council's response to the Claimant's reply filed on 7 April 2021?

19. The claimants' Reply and the second statement of Mr McIlvaney were filed in *Al-Shameri* on 2 March 2021, in accordance with the order of Morris J made following a case management conference on 15 February 2021. These documents respond to statements made by Ms Pumphrey and Ms Bell that were filed on 17 February 2021 and 22 February 2021, again, in accordance with Morris J's order. Paragraphs 14-22 of the claimants' Reply refer to the Council's duty under section 1 of the Homelessness Act 2002 to formulate a homelessness strategy and states that the Council's "*homelessness strategy identifies a need for more accommodation but does not address how accommodation is to be procured*". The Council objects that these paragraphs raise a new ground of review. I accept Mr Nabi's submission that they do not: no allegation of breach of section 1 of the Homelessness Act 2002 is alleged. Rather the claimants rely on the broader context in support of their claim for relief. While the timetable left the Council with little time to respond prior to the hearing, in circumstances where the Reply was filed in time and addresses a material issue, I consider it should be admitted. The primary objection to Mr McIlvaney's second statement is the same, and I reject it for the same reasons. However, I accept that §§4-8 are legal submissions rather than evidence, and so inadmissible for that reason.

20. Although I indicated during the hearing that if there were factual matters the Council wished to refute, I would give the Council the opportunity to file evidence in response, in light of exchanges with Mr Manning during the hearing I understood the Council did not intend to file any further evidence (save perhaps to exhibit the anticipated review decision in *Al-Shameri*). The evidence of Mr Messenger was filed almost three weeks after the hearing, together with supplementary submissions, unaccompanied by an application form. Although I have some sympathy with the claimants' objection to the admission of these materials in these circumstances, given the importance of the issues and the degree of clarification that Mr Messenger's evidence gives, and having regard to the very tight timescales imposed in *Al-Shameri*, I consider that it would be contrary to the overriding objective to refuse to admit the Council's evidence and supplementary submissions. The claimants were entitled to have the last word and I admit their reply of 4 April 2021. I reject the Council's attempt to file yet further submissions in response on 7 April 2021.

D. The facts of the individual cases

Mr Elkundi

21. Mr Elkundi lives with his wife, three sons (now aged 23, 13 and 6) and two daughters (now aged 16 and 12). Mr Elkundi suffers from osteoarthritis of the knees which restricts his mobility, particularly climbing stairs. He applied to the Council as a homeless person seeking housing assistance on 17 November 2014. On the same day, he was placed on

the Council's housing register under Part VI. On 16 January 2015, the Council provided the Elkundi family with temporary interim accommodation, pursuant to section 188(3) in a three-bedroom property which I shall refer to as "No.40".

22. On 17 March 2015, following a statutory review, the Council accepted it owed Mr Elkundi the main housing duty under section 193(2). The Council continued to secure temporary accommodation for the family at No.40 (but pursuant to section 193(2) rather than section 188(1)), where the Elkundi family have now lived for more than six years.

23. On 14 July 2015, the Council accepted that No.40 is overcrowded and awarded him increased points for bidding for Part VI accommodation. On 29 September 2017, the Council notified Mr Elkundi that he had been given Band 2 priority on the Council's Part VI housing register, the reason for his priority being "*Overcrowding – Homeless Priority*".

24. In 2015, the Council offered Mr Elkundi a four-bedroom property which he declined due to his mobility issues and, following a review, the Council accepted that property was unsuitable. In March 2017, Mr Elkundi told the Council over the telephone that No.40 was unsuitable (inter alia) due to the impact of his osteoarthritis on his ability to use the stairs. In November 2017, the Council offered Mr Elkundi No.40 on a permanent basis and he declined the offer due to his mobility issues. In March 2018, Mr Elkundi submitted a letter from his GP concerning his osteoarthritis, supporting his request to move. The Council advised that an occupational therapy report would be required. Occupational therapist reports dated 23 July 2018 and 8 April 2019 recommended that Mr Elkundi move to a property with level access or a maximum of one or two steps.

25. On 7 November 2019, Mr Elkundi's solicitors requested a statutory review of the suitability of No.40. On 3 January 2020, the Council made a decision on the review request. As the meaning of this decision is in issue, I have set out the substantive content in full. It is in the form of a letter from Grant Kennelly, Service Manager in the Housing Options Review Team, to Mr Elkundi (copied to his solicitor). It states:

> "**Homeless Review Request**
>
> 1. I refer to your review request received by the Council in relation to the suitability of your current temporary accommodation provided by the Council pursuant to its duties under s193(2) HA 1996.
>
> 2. I have now completed my enquiries and I consider that your current accommodation is unsuitable on mobility grounds, given the difficulties you have in accessing the accommodation and the recommendations made by the Council's Occupational Therapist. I have notified the temporary accommodation team of my decision and have requested that alternative suitable temporary accommodation is identified as soon as possible.
>
> 3. It is unfortunately the case that the Council has received a significant increase in homeless applications in recent months, which has led to a significant increase in the number of households accommodated in temporary accommodation. The

> Council always endeavours to move households to suitable accommodation as soon as possible in order to comply with the above legislation however due to the current unprecedented demand the Council is in some cases unable to do so.
>
> 4. Please rest assured that the Council is taking all reasonable steps to both secure an increased supply of accommodation and to make best use of existing stock, and you will be provided with alternative accommodation as soon as possible. Unfortunately due to the pressures I have referred to above, I am unable to provide a timescale for the provision of such alternative accommodation. You will be contacted separately by an officer from the temporary accommodation team as soon as accommodation becomes available.
>
> 5. Under s204 of HA 1996 you do have a right of appeal to the County Court on a point of law. If you wish to appeal, you must do so within **21 calendar days** of being notified of this decision."

26. Following pre-action correspondence, Mr Elkundi's claim for judicial review was issued on 24 February 2020.

27. In a witness statement dated 6 March 2020, filed on behalf of the Council, Vicki Pumphrey, Senior Service Manager in the Neighbourhood Directorate, stated:

> "As a result of the review decision the family were placed on the Planned Move List on 10 January 2020. The council is therefore searching for a suitable property for this family of seven. We have not been able to find any suitable alternative accommodation for this family whether in the private sector or within the council's own housing stock up until today because there are very few 4-5 bedroomed properties available."

On 6 March 2020, Ms Pumphrey's evidence was the Elkundi family "*are currently number 1 on the Planned Move List*".

28. Following the grant of permission by Andrews LJ on 4 November 2020, the Council made an offer of alternative temporary accommodation to Mr Elkundi. He refused the accommodation as unsuitable. On 29 January 2021, in a review decision, the Council acknowledged that the offered accommodation was unsuitable due to statutory overcrowding giving rise to a Category 1 hazard.

29. By the final day of the hearing, 12 March 2021, Mr Elkundi was placed fourth in the queue for four-bedroom accommodation on the "planned move list" ("PML"). This placement flows from his "*Planned Move Date*" being given as 17 November 2014 (i.e. the date Mr Elkundi first applied to the Council for housing assistance). I was informed that Mr Elkundi was effectively at the top of the queue because:

i) First in the four-bedroom queue was an applicant who required specialist accommodation. The Council's record shows that by 12 March 2021 this applicant's "*Days Waiting*" were 4,679 (i.e. 12 years, 10 months).

ii) Second in the four-bedroom queue was an applicant who, the Council anticipated, would shortly switch to a different bedroom queue. This applicant was recorded as having been waiting 4,406 days (i.e. 12 years, 1 month).

iii) Third in the four-bedroom queue was an applicant whose household had reduced in size and so the Council anticipated this applicant, too, would shortly move out of the four-bedroom queue. This applicant was recorded as having been waiting 2,358 days (i.e. 6 years, 5 months).

Mr Ahmed

30. Mr Ahmed is a single parent, living with seven of his eight children. His oldest son, who is now 23, moved out in September 2019. His other seven children are aged 20, 19, 16, 15, 13, 12 and 8. Mr Ahmed's 8 year old son has been diagnosed with severe autism and epilepsy. His disability is such that he receives Disability Living Allowance with both higher rate care and mobility components. Mr Ahmed's 13 year old daughter has a deformity in her right leg which causes her to walk with crutches.

31. Mr Ahmed applied to the Council as a homeless person seeking housing assistance on 29 October 2018 and the Council completed a personalised housing plan with him. On 16 January 2019 he was placed on the Council's housing register under Part VI and given Band 2 (Overcrowding – Homeless) priority. On 18 February 2019, the Council concluded its section 184 inquiries and determined that it owed Mr Ahmed the main housing duty under section 193(2).

32. On 21 March 2019, the Council offered Mr Ahmed temporary accommodation in a three-bedroom property that I shall refer to as "No.165". Mr Ahmed accepted the accommodation offered and sought a review of its suitability on 8 October 2019.

33. On 18 December 2019 the Council made a decision on the review request. This decision, too, is in the form of a letter from Mr Kennelly to Mr Ahmed (copied to his solicitor). It states:

> "**Homeless Review Request**
>
> 1. I refer to your review request received by the Council in relation to the suitability of your current temporary accommodation provided by the Council pursuant to its duties under s193(2) HA 1996.
>
> 2. I have now completed my enquiries and I consider that your current accommodation is unsuitable on the basis of overcrowding. I have notified the temporary accommodation team of my decision and have requested that they identify alternative suitable temporary accommodation as soon as possible.

> 3. Please rest assured that the Council is taking all reasonable steps to both secure an increased supply of accommodation and to make best use of existing stock, and you will be provided with alternative accommodation as soon as possible. Unfortunately, I am unable to provide a timescale for the provision of such alternative accommodation. You will be contacted separately by an officer from the temporary accommodation team as soon as accommodation becomes available.
>
> 4. Under s204 of HA 1996 you do have a right of appeal to the County Court on a point of law. If you wish to appeal, you must do so within **21 calendar days** of being notified of this decision."

34. Following pre-action correspondence, Mr Ahmed issued this claim for judicial review on 23 November 2020.

35. The Ahmed family are still living at No.165. Mr Ahmed has explained that three of his sons (the 16, 15 and 12 year olds), and his 13 year old daughter, share one bedroom which has two bunk beds. Mr Ahmed and his 8 year old son sleep in a second bedroom. Mr Ahmed's 20 year old son, who is studying engineering at university, sleeps in the third and smallest bedroom. He has a bed and a small desk, but the room is so small that the bed prevents the door being closed, which is distracting when he studies, particularly because of the behaviour of Mr Ahmed's autistic 8 year old son. At the time of the hearing, Mr Ahmed's 19 year old daughter was temporarily living with her mother, but the Council acknowledged that she normally resides with Mr Ahmed (within the meaning of section 176). Although the Council accepts No.165 is overcrowded, the Council draws attention to the fact that in addition to three bedrooms, the property has a living room, in which it is suggested some of the family could sleep if they chose.

36. Mr Ahmed has given evidence that his 13 year old daughter was due to have an operation in September 2020 to tighten her calf and to balance her feet. The operation could not go ahead because, while she recovers from the operation, she will not be able to use stairs and so will need a bedroom on the ground floor, which is not available at No.165 as there is no bedroom or living room on the ground floor.

37. By 12 March 2021, Mr Ahmed was placed thirteenth in the queue for five-bedroom accommodation on the PML. This placement flows from his "*Planned Move Date*" being given as 29 October 2018 (i.e. the date Mr Ahmed first applied to the Council for housing assistance), with his "*Days Waiting*" recorded as 864 (i.e. 2 years, 4 months). The first applicant in the five-bedroom queue has a recorded "*Planned Move Date*" of 26 August 2014, representing 2,389 "*Days Waiting*" (i.e. 6 years, 6 months).

38. I note that in a pre-action letter dated 5 October 2020 the Council stated that Mr Ahmed was "*number 36 on the Planned Move List requiring a 5/6 bedroomed property*". Mr Manning sought to rely on this as indicating significant progress in moving up the queue. However, as I made clear during the hearing, I was not prepared to accept that the reference to his placement in the pre-action correspondence was accurate, in the absence of any evidence to support it. None was adduced. According to a witness statement given on behalf of the Council by Marcia Bell, the Senior Service Manager in the Council's Temporary Accommodation Team, on 29 January 2021, there were 31 households in the

five-bedroom queue and, at that point, Mr Ahmed was fourteenth in the queue. It is very likely that the information provided in the pre-action letter was erroneous.

Mrs Ross

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

40. From 2006, Mrs Ross lived in a bungalow in respect of which she had an assured tenancy. In September 2013, in light of her deteriorating health, Mrs Ross moved out of her former home and into her mother's home. On 26 September 2013, Mrs Ross applied to the Council as a homeless person seeking housing assistance. In November 2013 she spent a month in hospital. She was discharged back to her mother's address as the hospital were concerned that she needed someone to stay with her overnight. On 9 December 2013, the Council accepted that it owed Mrs Ross the main housing duty under section 193(2).

41. In October 2015, Mrs Ross requested temporary accommodation as her mother wished her to move out. Although her mother's home could not be appropriately adapted for a wheelchair user, Mrs Ross continued to live with her mother until 19 July 2018 when she again asked the Council for temporary accommodation. She was accommodated for about seven or eight weeks in hotel/bed and breakfast accommodation. Mrs Ross's evidence is that she spent a night (on 1 September 2018) on the street in her wheelchair without any accommodation, although it appears that this was due to a misunderstanding regarding the arrangements for transporting her to the accommodation provided by the Council for that night.

42. On 6 September 2018, the Council arranged for Mrs Ross to move into a two-bedroom property ("No.45"), which it provided as temporary accommodation under section 193(2). No.45 is a semi-detached two-bedroom bungalow, with a wet room, a level path to the front door, off road parking and a garden.

43. Shortly after she moved in, Mrs Ross made enquiries about having No.45 adapted to meet her needs as an electric wheelchair user. On 11 September 2018, an occupational therapist, Nathaniel Hare, carried out an assessment for the Council and he confirmed that the property would need to be adapted. He noted:

    i) Mrs Ross "*has difficulty negotiating the threshold of the front door in her electric wheelchair*". He recommended this difficulty could be resolved by putting in an internal threshold ramp.

    ii) Mrs Ross "*stated that she has difficulty accessing the bathroom in her wheelchair due to the turning space from the corridor to the bathroom*". He recommended replacing the existing bathroom door with a sliding door to enable Mrs Ross to access the bathroom with less difficulty.

    iii) Mrs Ross "*demonstrated that she has difficulty accessing the kitchen in her wheelchair due to restricted space*". She was "*unable to manoeuvre her wheelchair once in the kitchen and the turning space into the kitchen from the corridor is*

limited". He stated that he would discuss adaptation of the property to enable Mrs Ross to access the kitchen via the reception room.

44. The Council's process for adapting a property involves, first, an occupational therapist undertaking a priority needs assessment and, second, a feasibility assessment being undertaken to determine whether or not the property can be adapted. In Mrs Ross's case, Mr Hare carried out a priority needs assessment on 22 October 2018. He made the following recommendations:

> "1) Raise or replace the current toilet basin to achieve a height of approximately 19.
>
> 2) Reposition sink basin and provide bilateral drop down rails to allow the service user to transfer independently from her wheelchair.
>
> 3) Adaptation to the properties kitchen area to create sufficient turning space for the service user's electric wheelchair.
>
> 4) Entry to the kitchen to be made via the properties reception room. Cabinets and sink to be relocated and the current doorway to be repositioned. Please ensure cabinets and cupboards are an appropriate height for a wheelchair user.
>
> 5) Bathroom door to be replaced with a sliding door."

45. Tracey Lakin, who works in the Council's Neighbourhood Directorate Asset Management and Maintenance division, has given evidence that on receipt of Mr Hare's priority needs assessment she issued it to "*Engie UK who are our partners who instruct contractors to undertake the adaptation works*", but then withdrew it because "*the property was a temporary accommodation property and aids and adaptations are not undertaken on temporary accommodation properties*".

46. The evidence of Ms Pumphrey is that the Council granted Mrs Ross a secure tenancy in respect of No.45 in early April 2019. Mr Kennelly's evidence is that "*it was intended that the property would be provided in final discharge of the duty under s.193(2), as the acceptance of accommodation under Part 6, or as a final offer*". However, Mr Kennelly states that errors were made by the Council with the result that although Mrs Ross accepted a secure tenancy, "*the Council had not formally offered the property to the claimant under Part 6 nor as a final offer and had not seemingly taken the necessary steps to bring the duty under s.193(2) to an end*".

47. In parallel to her request for housing assistance under Part VII, Mrs Ross had been on the Council's housing register under Part VI for many years. On 24 March 2016, the Council first determined that Mrs Ross was eligible to bid for two-bedroom properties, having accepted the evidence that she required a second bedroom for an overnight carer. Save for a brief period when, following a requirement to re-register, Mrs Ross was erroneously noted as eligible only to bid for one-bedroom properties, she remained on the housing register and eligible to bid for two-bedroom properties until April 2019 when, in view of her acceptance of permanent accommodation, the Council closed Mrs Ross's housing

register application. From May 2017 until April 2019 the Council put in place "assisted bidding" to seek to help Mrs Ross bid for Part VI accommodation.

48. A further priority needs assessment was carried out on 21 April 2019 (and completed on 2 May 2019) by an occupational therapist, Amelia Williams. The assessment "*provided a comprehensive list of adaptations in relation to the bathroom, kitchen, and windows*". According to Ms Pumphrey, the "*adaptations were given a high priority*". The priority needs assessment request was "*actioned, agreed and funding [was] secured*" to carry out the adaptations.

49. However, more than two and half years after Mrs Ross moved into No.45, the property has not been adapted. The reason for this is that on 1 August 2019, during a further Health and Housing Assessment conducted for the Council by an occupational therapist, Catherine Cartwright, Mrs Ross advised that she did not want to continue with adaptations to No.45 as she wanted to move. Her reasons for wishing to move were that her network of support (her mother, carer, friends and her church) are all in Handsworth, and because she said the air in the bungalow is toxic as she cannot open windows. Although the adaptations have not been carried out, Ms Pumphrey states:

> "The adaptations remain available, should Ms Ross elect to stay in her current home. Having carried out feasibility assessments, the Council remain of the view that the property can be adapted."

50. On 17 September 2019, Mrs Ross sought a review of the suitability of No.45. Mr Kennelly has explained that there was a delay in this request being forwarded, internally, to the Review Team. Once it had been, on 13 January 2020 the Council responded:

> "I have now concluded the review of the decision to discharge duty to you by offering you 45 Springthorpe Road.
>
> I am now writing to you as required by Section 203 of the Housing Act 1996 to notify you of our decision and the reasons for it.
>
> …
>
> Taking into account all the evidence available to us we have used our discretion and agreed that the duty to make you **one further and final** offer of accommodation in line with the Current Allocations Policy be reinstated."

51. After noting that disability is a protected characteristic for the purposes of the public sector equality duty, the Council accepted that Mrs Ross has a disability as defined by the Equality Act 2010. The letter continued:

> "This decision means that the Council has a duty to take reasonable steps to secure that accommodation does not cease to be available for your occupation or secure suitable accommodation for your occupation.
>
> …

> Given the high demand of social housing in Birmingham, it may take some considerable time for you to receive an offer of social housing. You should therefore try to secure your own alternative accommodation to resolve your housing need whilst participating fully through the City's Choice Based Letting Scheme.
>
> …
>
> The council also reserve the right to make you an offer of suitable temporary accommodation at any time to meet its legal duty to you. If this is offered and you refuse any offer of suitable temporary accommodation, our duty to you will be brought to an end.
>
> …
>
> Although this is a positive decision, I am required to advise that under s204 of HA 1996 you do have a right of appeal to the County Court on a point of law. If you wish to appeal, you must do so within 21 calendar days of being notified of this decision. …"

52. Although Mrs Ross had requested a review of the suitability of No.45, as the Council has acknowledged, the 13 January 2020 letter did not address the question whether the property was suitable temporary accommodation. Subsequently, in October 2020, Mr Kennelly explained:

> "In September 2019 an email was forwarded to the Housing Options Service from the local housing team, stating that your client was having difficulties in the current accommodation and that she did not consider it to be suitable for her needs on mobility grounds. This email was not forwarded to the Housing Options Review Team until January 2020, at which time it was taken as a review of the suitability of the accommodation. On investigating, it appears that the review officer noted that there was no offer letter or discharge of duty letter and that as such the offer was in her opinion not valid for the purposes of discharging the Council's homelessness duty either as a Part 6 offer or as a final offer of accommodation. It is for this reason that the letter was issued on 13 January confirming that a further offer would be made and that the Council was effectively still under the s193 duty to secure that suitable accommodation was available for your client. It would however also appear that no decision was made at this time in relation to the specific suitability on mobility or other grounds, only that it was not a legitimate offer and therefore a further offer had to be made, which is why the letter of 13 January makes no finding in relation to suitability." (emphasis added)

53. Meanwhile, on 13 December 2019, the Council accepted Mrs Ross onto the Council's housing register again. However, she was assessed as eligible to bid for one-bedroom properties only. In December 2019, Mrs Ross asked to be recognised as eligible for two-bedroom properties, reiterating her request in January and February 2020. On 5 June 2020 the Council upheld its decision that Mrs Ross was not eligible to bid for two-bedroom properties. However, following a review, on 25 August 2020, Mrs Ross was awarded Band 1 priority (with the reason given as "*under-occupancy*"), with eligibility to bid for two-bedroom properties.

54. On 25 August 2020, Mrs Ross again sought a review of the suitability of No.45. The Council initially notified Mrs Ross of its decision on 14 October 2020. Following correspondence that letter was withdrawn and replaced with a letter dated 23 October 2020. The meaning of this review decision, like those in *Elkundi* and *Ahmed* is in issue. This letter, too, is in the form of a letter from Mr Kennelly, in this case to Mrs Ross's solicitors. It is considerably longer than the letters in *Elkundi* or *Ahmed*. Mr Kennelly noted, first, that this was a response to Mrs Ross's request for a review of the suitability of No. 45 and then detailed the evidence and information he had considered. At §§3-7 he set out the history (which he described as "*somewhat confusing*") in some detail, including the paragraph that I have quoted in §52 above. The letter continued:

> "8. I have consulted with the Occupational Therapy Service regarding your client's circumstances, and it remains the case that in the opinion of the assessing officer your client's current accommodation is fully adaptable to her needs. However, given that your client has advised them that she does not want the adaptations carried out and instead wishes to pursue a move, they will not move forward on this issue. However, it is noted that your client has not placed any bids since May 2017 to date.
>
> 9. When considering the submissions made, and to the medical supporting information and the opinion of the Council's Occupational Therapy Service, I consider that at the present time it cannot be asserted that your client's current accommodation is suitable for her under the relevant legislation, and that the only conclusion is that the accommodation is unsuitable. I would however state that I consider that this situation has occurred largely as a consequence of your client accepting the accommodation as was and then a short time later refusing to allow the identified adaptations to be carried out and instead wanting to move from the property; had your client agreed to the approved adaptations in August 2019 they would have been carried out and the accommodation would have met your client's mobility needs and been suitable for her. However, given that the Council remains under the s193 duty at this time, it is apparent that the accommodation is presently unsuitable and that it is unlikely that this will change given that no adaptations are scheduled as your client has refused these to take place at this particular property.
>
> 10. I have today added your client to the "planned move|" list and requested that alternative suitable temporary

> accommodation is identified as soon as possible. I would however also state that given your client's very specific medical and mobility needs, it is unlikely that a suitably adapted property will be readily available to the Council. I further consider that given the submissions made in relation to your client's mobility needs it is unlikely that bed and breakfast or hostel type accommodation will be suitable for your client, and that she therefore requires a self-contained two bedroomed property which is already adapted to meet her needs or in which her mobility needs can be better met than at present.
>
> 11. With regards to securing alternative temporary accommodation, in determining the suitability of accommodation, the Council is entitled to take into account the global public health emergency and it is entitled to take account of practical constraints such as the shortage of housing stock: *Poshteh v Kensington and Chelsea RLBC* [2017] UKSC 36; [2017] AC 624. Further, accommodation that is not suitable in the long term may well be suitable in the short term: *Ali v Birmingham City Council* [2009] UKHL 36; [2009] 1 WLR 1506; [2009] HLR 41.
>
> 12. With that in mind, given these circumstances and the very specific accommodation needs of your client, I consider that your client's current accommodation is reasonable for her to continue to occupy for the time being, until alternative accommodation is identified or she is able to successfully bid for permanent accommodation via the Allocation Scheme. As I have stated, I have added your client to the 'planned move' list and the Council is actively looking for alternative accommodation.
>
> …
>
> 14. I would also point out that despite being first registered on the Council's housing register in May 2017, your client has never placed any bids for accommodation through the Birmingham Choice scheme. Given that the Council operates a choice based lettings scheme, if your client is failing to place any bids for accommodation she will evidently not be shortlisted for a permanent offer of accommodation. I would also confirm that in conversation with the Occupational Therapy Service, it was confirmed that adaptations can be funded in any permanent accommodation secured by your client, so she may wish to consider placing bids for properties that can be adapted to her needs via this service, in addition to placing bids for properties that are advertised as having all of the necessary adaptations already in place." (emphasis added)

55. Mr Kennelly added that the offer to adapt Mrs Ross's current accommodation remained available, subject to the conditions that Mrs Ross would have to agree to accept the accommodation under the relevant legislation (with the proviso that the necessary

adaptations would be carried out to render it suitable for her needs) and agree to the closure of her housing application. Finally, he notified Mrs Ross of her right of appeal in essentially the same terms as the final paragraphs of the review decisions in *Elkundi* and *Ahmed*, modified to take account of the fact that this letter was addressed to Mrs Ross's representatives.

56. The earlier version of the review decision, dated 14 October 2020, was in the same terms as the letter of 23 October 2020, save that it did not contain §§12-14 and §11 read:

> "Given the limited supply of suitable temporary accommodation available to the Council and the specific needs highlighted in your client's case, I am unable therefore to give an anticipated timescale for the provision of alternative temporary accommodation. Please rest assured that the Council will however attempt to offer such accommodation as soon as possible. I also however consider that whilst your client's current accommodation is not suitable for her needs, I do not consider that it is the case that it is immediately unreasonable for her to occupy and I consider that it remains suitable for her to continue to occupy for the short to medium term whilst the Council seeks to secure alternative accommodation that meets her very specific requirements." (emphasis added)

57. In a pre-action protocol letter dated 20 October 2020, Mrs Ross's solicitors stated that the review decision irrationally contradicted itself by concluding the property is unsuitable and then stating it is suitable. They stated they were taking instructions with a view to submitting an appeal under section 204 in relation to this aspect of the decision. On 23 October 2020, the Council withdrew the 14 October decision and replaced it with the 23 October review decision.

58. Ms Pumphrey's evidence is that as of 23 December 2020, Mrs Ross was number 152 in the queue for two-bedroom accommodation on the PML. Mrs Ross was omitted from the version of the PML exhibited to Ms Bell's second statement in *Al-Shameri*, dated 22 February 2021, and from the updated and expanded version provided on the final day of the hearing. I was informed that the reason for this was that Mrs Ross had made a successful bid for a two-bedroom bungalow in the B45 postal area, resulting on 13 January 2021 in the Council making her a final offer in respect of that property. When that offer was made, Mrs Ross was taken off the PML. However, it transpired that Mrs Ross had made the bid in error, as the property is not within the area into which she wishes to move. The Council accepted that explanation and has not treated its duty as discharged. Ms Cafferkey explained that Mrs Ross's omission from the PML was an error, due to an administrative difficulty, which the Council intended to correct. He informed me that, but for this error, Mrs Ross would have been placed at number 117 in the two-bedroom queue on 12 March 2021. This placement flowed from the fact that she joined the PML on 23 October 2020; Ms Pumphrey explained that, having been provided with permanent accommodation, when Mrs Ross sought to move she fell to be treated as a new applicant.

Mr Al-Shameri

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

60. Mr Al-Shameri's wife has an assured tenancy in respect of a housing association property ("No.5") which is described in the tenancy agreement as a "*2 Bedroom, 3 Person House*". When they moved into No.5 in October 2006, the couple had only one young child. No.5 comprises two living rooms and a kitchen (downstairs), and two bedrooms and a bathroom (upstairs). One of the bedrooms is a double room and the other is a small single box room. The two youngest children sleep in the double bedroom with their parents. Since their daughter was born last December, their 7 year old son has moved into the second bedroom where he and his three sisters sleep on mattresses which are laid wall to wall across the floor. There used to be a bunk bed in the room, but Mr Al-Shameri and his wife removed it because their daughters were scared of heights and so never used to sleep on the top bunk. The room is too small for a double bed. In response to the Council's suggestion that the living rooms could be used as bedrooms, Alyena Rahman explains in her second statement that this does not appear appropriate in view of the size, configuration and functions of the living rooms. In particular, the front door opens straight into the front living room and access to the rest of the house is through this room, which is used for the children to study. The back living room is a thoroughfare for the kitchen and the stairs leading upstairs, and it is the room where the family eat.

61. Mr Al-Shameri applied to the Council as a homeless person seeking housing assistance on 30 January 2018. At that stage, he and his wife had four children and his wife was pregnant with their fifth child.

62. On 27 April 2018, the Council accepted it owed Mr Al-Shameri the main housing duty under section 193(2). The decision on Mr Al-Shameri's homelessness application was contained in a five-page letter sent to him by a Senior Housing Needs Officer, Gail Fenton. The meaning of this letter is in issue. It has to be read in full, but given its length I will only set out the key passages:

> "I am writing to notify you that a decision has been made in respect of your recent homelessness application and that your application for assistance has been successful. We owe you a duty to make sure you have suitable accommodation. This is called a section 193(2) duty under Part 7 of the Housing Act 1996 and this letter formally notifies you that we owe you this duty."

The letter contained pro forma language addressing the position "*If we have already provided you with temporary accommodation*" which did not apply in Mr Al-Shameri's case, and then continued:

> "If we are yet to offer you temporary accommodation we will be in contact with you the same day to make arrangements to do so

> unless you have agreed with us that you will remain with relatives or friends for a short period.
>
> Our duty to you will continue until we can make you an offer of an introductory tenancy."

The letter explained the circumstances in which the duty would come to an end and that, if it did, the Council would tell him and he would have a right to review that decision. The letter then informed Mr Al-Shameri in a bold, italicised passage that acceptance of this duty "*does not mean you will receive an offer of a social housing home*". He was told he would need to join the housing register to be considered for social housing and details were given of how to do so. The letter continued:

> "**So what will happen next?**
>
> We will look to meet or end our duty to you by securing a suitable offer of accommodation for you in the private rented sector or in social housing; subject to qualifying to joining [sic] the housing register. Any offer of accommodation will only be made after we have made a full assessment of your housing needs and circumstances to make sure the offer we make you is suitable under the homeless legislation.
>
> You will receive only **one** suitable offer of social housing accommodation only to meet or end our duty to you. If you refuse the offer we will have no duty to make you any further offer and you will then have to make your own housing arrangements. Please do not refuse the offer we make you thinking that the Council will change its mind and give you something else. We will make you one suitable offer only and if you refuse it no more offers will be made.
>
> If you have any queries regarding this letter or what our duty owed to you to secure suitable accommodation means do not hesitate to email your case officer who will be happy to explain it further.
>
> …
>
> This decision means that the Council has a duty to take reasonable steps to secure that accommodation does not cease to be available for your occupation or secure suitable accommodation for your occupation.
>
> Our duty to you will continue until one of the following actions or events brings this duty an end:
>
> …
>
> Birmingham City Council reserves the right to place bids on your behalf at any time from the date of this letter. This is called

> assisted bidding. Assisted bidding does not prevent you from placing your own bids, however, if you are shortlisted as being the highest placed applicant as a result of an assisted bid, we will still consider this to be your one and final offer and you should consider accepting it. Regardless of whether you refuse or accept the assisted bid offer the council will consider that it has discharged it [sic] homelessness duty to you. [This is the only paragraph in the letter that appears in red.]
>
> …
>
> You have agreed with the council to remain "homeless at home" rather than be placed in temporary accommodation. I must stress that the Council does have a duty to provide you with suitable temporary accommodation. If your circumstances changes [sic], or if you are asked to leave your current accommodation, you must contact us immediately so that we can make arrangement to provide you with temporary accommodation. Regrettably, it is not possible for us to predict at this stage where or what temporary accommodation you will be offered.
>
> The council also reserves the right to make you an offer of suitable temporary accommodation at any time to meet its legal duty to you. If this is offered and you refuse any offer of suitable temporary accommodation, our duty to you will be brought to an end.
>
> While this decision is a positive one for you, under Section 202 of the Housing Act 1996, you have a right to request a review of this decision. …" (Original bold; underlining added)

63. On 1 September 2020, Mr Al-Shameri's solicitors sent a pre-action protocol letter to the Council, alleging breach of the main housing duty, and requesting the immediate provision of suitable accommodation. At that time, Mr Al-Shameri's wife was pregnant with their sixth child. Ms Rahman acknowledges in her second statement that Mr Al-Shameri's first request for temporary accommodation was made in the pre-action protocol letter of 1 September 2020. However, the reason for this, it is said, is that he was not aware of the option of seeking temporary accommodation before he was advised of this by his solicitors.

64. In a statement dated 2 March 2021, Mr Al-Shameri refuted the Council's assertion that he had agreed to remain "*homeless at home*" rather than take up temporary accommodation. He acknowledges that it is said in the letter of 27 April 2018 that he agreed to remain homeless at home, but he states:

> "I would like to confirm that I did not agree to remain homeless at home. I was not aware of the option of temporary accommodation. The first time I became aware that this might be an option was when I approached my solicitors in August 2020.

> The Council accepted the main housing duty following my homeless application. I thought this would give me greater priority for a property from the main housing register (i.e. a higher band). I did not know that I could also request temporary accommodation; this was never discussed at my homeless interview."

65. Ms Fenton, who completed the homeless application form with Mr Al-Shameri on 30 January 2018, has given a statement dated 5 March 2021. She states:

> "I do not personally remember the case in detail, but I can see from the case records, which coincide with my general practice and that of all housing needs officers in the council, that the issue of temporary accommodation was discussed with the Claimant.
>
> In general terms when I interview an applicant I will fill in the homelessness application form with them. … As part of that process I will discuss with them whether they want temporary accommodation and will inform them that, if they do, that accommodation may be bed and breakfast accommodation for a time and could be located anywhere in the city – it is dependent on what is available on any given day.
>
> …
>
> When completing the homelessness application form, each question is asked to the customer. One of the questions is "Do you require temporary accommodation". I can see from the Claimant's application form that the question was answered "no".
>
> The Claimant must therefore have stated that he did not want temporary accommodation. In any event, … it is my practice to discuss temporary accommodation with applicants at their interview." (emphasis added)

66. I note that the application form only enables the answer '*yes*' or '*no*' to the question "*[d]o you need temporary accommodation*?" and immediately underneath this question it asks for the "*[d]ate you must leave your current accommodation*".

67. The Council responded to the pre-action protocol letter on 22 September 2020:

> "…The temporary accommodation provided to your client is suitable. …
>
> If you contend that the statutory accommodation is no longer suitable, then there is a statutory mechanism to request the Council to reconsider that issue…"

As the Council acknowledges, this letter appears to be premised on the basis that the Council had provided temporary accommodation to Mr Al-Shameri, which was incorrect: the family had remained in housing association accommodation.

68. In a letter dated 24 September 2020, Mr Al-Shameri's solicitors responded:

> "The Council accepted a full housing duty towards our client and his family on 27/04/2018 on the basis that their accommodation … was unreasonable for them to continue to occupy and to date that duty has not been discharged.
>
> Our client did not request temporary accommodation at the time he was notified of his homeless application decision, however since that time his wife gave birth to a severely disabled child who is now two years old and their eldest child is now undertaking her GCSEs. Their home has become more unreasonable to continue to occupy and hence their request for alternative accommodation. …
>
> Under the circumstances it is wholly inappropriate to request a review of the suitability of accommodation."

69. In a letter dated 28 September 2020, the Council stated:

> "the Council is in the process of seeking suitable alternative temporary accommodation for your clients, but has concluded that, while it does so, their current accommodation is suitable for the time being". (emphasis added)

The Council did not make an assessment of the needs of the Al-Shameri household and appears not to have considered whether No.5 is statutorily overcrowded, before deciding that it is suitable.

70. This claim for judicial review, together with an application for urgent consideration and interim relief, was issued on 8 October 2020. Section 3 of the claim form (N461) identifies the decisions in respect of which Mr Al-Shameri sought judicial review as (1) a continuing failure to secure suitable accommodation for the claimant and (2) the Council's decision of 28 September 2020 that the claimant's current accommodation is suitable for the time being.

71. Ms Pumphrey states in her witness statement dated 17 February 2021 (filed in *Al-Shameri*) that "*[t]he claimant was placed on the planned moved list*". Although no date is given in the Council's evidence, it is apparent that he was first placed on the PML at some point after the pre-action protocol letter of 1 September 2020; the Council did not put him on the PML in April 2018. Mr Elkundi (with a total of 7 family members) and Mr Ahmed (with a total of 8 family members) were placed, respectively, in the four-bedroom and five-bedroom queues on the PML (matching the size of properties for which they were eligible to bid). The Council's evidence does not address which bedroom queue Mr Al-Shameri was placed in or where he was placed in the queue by reference to the date on which he had applied for assistance (or, perhaps, the date he had joined the PML). If his case had been treated in the same way as theirs, Mr Al-Shameri would have been

placed in the four-bedroom queue and at least 20 applicants would have been ahead of him. As the facts outlined below demonstrate, it is apparent that his case was treated differently. No explanation has been given for this.

72. On 16 November 2020, the Council offered Mr Al-Shameri temporary accommodation in a three-bedroom property I shall refer to as "Flat 6". Flat 6 is a flat on the second floor of a block (i.e. two floors above ground level). There is no lift access. The three bedrooms and one living room are on the same level. No assessment of need was carried out before this offer was made. Mr Al-Shameri viewed the property on 23 November 2020 and refused the offer. A letter from his solicitors dated 24 November 2020 notified the Council of his reasons for doing so. In a statement dated 4 January 2021 Mr Al-Shameri stated:

> "…I could not accept the offer and the main reasons for this were that the accommodation was on the third floor [sic] where access is by several flights of stairs only and no lift access. At present, my disabled son … is two years old and is taken outdoors in a buggy, however he will be moved on to a wheelchair soon. Furthermore, my wife was due to give birth and the use of a buggy would also be required for the new baby. I did not see how it would be reasonably practical for us to manage two buggies and in due course a wheelchair, up and down several flights of stairs on a daily basis.
>
> In addition, my eldest daughter … is undertaking her GSCEs in a local school in Balsall Heath and there is no direct bus to Balsall Heath from the area of the proposed property. My daughter would have to catch two buses for a single journey to school which would involve getting a bus into the city centre and a bus out to Balsall Heath. A single journey to school would take between 1 hour and 25 minutes to 1 hour and 45 minutes, without traffic. There is no bus stop near to the accommodation or outside my daughter's school so the journey time would also include walking to the bus stops.
>
> I also have extensive family support networks in the Balsall Heath/Sparkbrook area and a move to the proposed area would leave us without this much needed support. For example, we need to take our disabled son to medical appointments on a regular basis and can ask one of our relatives to baby-sit our other children as they live close by. Our relatives do not drive so we would lose this support if we were moved far from our current area."

73. Mr Al-Shameri's application for interim relief was refused on the papers by HHJ David Cooke on 13 October 2020 and the application was renewed at an oral hearing before HHJ Worster on 7 January 2021. HHJ Worster refused the application for interim relief but, as I have said, he granted permission to move for judicial review and permission to file and serve amended grounds.

74. In its summary grounds of defence, dated 29 December 2020, the Council asserted that Mr Al-Shameri's current accommodation (i.e. No.5) "*is suitable accommodation for the time being, until alternative temporary accommodation is available, or they are able to successfully bid for long-term accommodation under the allocation scheme*". The Council made no reference to the offer of Flat 6 in its summary grounds. However, at the oral hearing of the renewed application for interim relief, the Council sought to rely on the offer of temporary accommodation. A few days after the hearing, on 11 January 2021, Ms Fenton notified Mr Al-Shameri that as a result of his refusal of the offer of temporary accommodation at Flat 6, the Council had discharged its duty to accommodate him. In addition, he was told he had lost his Band 2 award and his name would be removed from the housing register. The Council subsequently acknowledged that this letter was deficient in that insufficient consideration was given to the matters raised by Mr Al-Shameri's solicitors in their letter of 24 November 2020 or to relevant statutory matters.

75. On 14 January 2021, the Claimant's solicitors responded that as they had received no response to their letter of 24 November 2020, and no reliance had been placed on the offer in the Council's summary grounds of defence, they had assumed the offer had been mistakenly made. They stated the Council ought to have treated their letter of 24 November 2020 as a request for a review of the suitability of Flat 6 and, in any event, they now sought such a review.

76. In accordance with the statutory timeframe, a response to the request for a review was required by no later than 11 March 2021, a date which fell on the third day of the hearing. On 11 March 2021, Mr Kennelly sent a lengthy letter to Mr Al-Shameri to inform him that he was "*minded to*" find against him on his review of the suitability of the offer of Flat 6 and on the request to overturn the Council's decision to discharge its duty. Mr Al-Shameri was given an opportunity to make representations to the Council in response by 1 April 2021. His solicitors made further representations on 19 March 2021.

77. On 26 March 2021, Mr Kennelly notified Mr Al-Shameri of his decision that the offer of accommodation at Flat 6 was suitable. Accordingly, the Council upheld "*the decision to discharge the main housing duty under section 193 Housing Act 1996 following your refusal of a suitable offer of accommodation*".

78. Mr Al-Shameri had been on the housing register since 30 November 2012. When the Council accepted in 2018 that he was homeless, he was awarded Band 2 priority on the basis of overcrowding/homelessness. It is apparent from his bidding history that he was eligible to bid for three-bedroom properties until November 2018 when, due to the increased size of his family, this was changed to four-bedroom properties. On 2 December 2020, following a review, the Council decided that the threshold for a Band 2 medical award was met. This indicated the following test was met in respect of No.5:

> "An applicant's housing is unsuitable for severe medical reasons or due to their disability, but who are not housebound or whose life is not at risk due to their current housing. However, their housing conditions directly contribute to causing serious ill health and the condition of the property cannot be resolved within a reasonable period of time."

79. Mr Al-Shameri's evidence is that he regularly checked the housing website for suitable properties and made bids, but four-bedroom properties (whether a house, maisonette or

flat) are rarely available and, as he is in a "*very low position*" he has never been offered a property from the main housing register. His bidding history shows that he placed 18 unsuccessful bids for three bedroom properties in about a year from late 2017 to late 2018, and 38 unsuccessful bids for four bedroom properties over the course of a little over two years thereafter. As I have said, on 11 January 2021, the Council removed Mr Al-Shameri from the housing register.

E. Practice/Policy, the Planned Move List and the Birmingham context

80. The evidence on behalf of the Council addressing the PML and how the Council performs its section 193(2) duty is given primarily in statements made by Ms Pumphrey and Ms Bell, who are Senior Service Managers in, respectively, the Neighbourhoods Directorate and the Temporary Accommodation Team. On these issues, five statements given by Ms Pumphrey and five given by Ms Bell are material, namely (in date order): (i) Pumphrey 1st/Elkundi 06/03/20; (ii) Bell 1st/Elkundi 27/11/20; (iii) Bell 1st/Al-Shameri 06/01/21; (iv) Pumphrey 2nd/Ross 28/01/21; (v) Bell 1st/Ahmed 29/01/21; (vi) Pumphrey 1st/Ahmed 01/02/21; (vii) Pumphrey 3rd/Ross 10/02/21; (viii) Pumphrey 1st/Al-Shameri 17/02/21; (ix) Bell 2nd/Al-Shameri 22/02/21; and (x) Bell 3rd/Al-Shameri 12/03/21. In addition, on 1 April 2021, the Council filed a statement made by Gary Messenger, the Council's Head of Service, responsible for the "*whole service, including the Council's allocation scheme, statutory reviews under Part 6 and 7 of the Housing Act 1996, void properties management and its homelessness audits and policies*".

81. On these general issues, the claimants rely on three statements made by Michael McIlvaney, a partner and director of the solicitors firm, Community Law Partnership Solicitors, representing all four claimants: namely, (i) McIlvaney 1st/Ahmed 20/11/20; (ii) McIlvaney 1st/Al-Shameri 06/01/21 and (iii) McIlvaney 2nd/Al-Shameri 02/03/21.

The evidence regarding a policy in respect of securing temporary accommodation

82. Ms Bell, who describes her role as being "*to ensure that there is enough temporary accommodation to meet demand*", states that:

> "When a person presents as homeless and needs temporary accommodation my team is notified. If there is a self-contained property that matches that applicant's needs and it is immediately available, they will be placed in that property. If not, the Council will rely on emergency accommodation which is usually bed and breakfast. When a family is placed into bed and breakfast accommodation, my team will immediately start to look for self-contained accommodation that matches the household's needs. <u>This is by placing them on a document called the planned move list</u> …" (emphasis added)

83. Ms Pumphrey gave the following evidence on 6 March 2020 in Elkundi:

> "<u>The Planned Move List is a list of applicants to whom a full duty is owed by the Council under s.193(2)</u>. The list comprises of those applicants for whom a specific type of accommodation is required, for example an applicant who requires an adapted property, or an applicant that has a large household. In

> circumstances where it is more difficult to find suitable accommodation a move has to be "planned", enabling the authority to have regard to the applicant's circumstances. Whilst the list is called "The Planned Move List" it comprises those that have not yet been provided with TA, and those who have but for whom other accommodation is being sourced. The list is operated in conjunction with our Temporary Accommodation Policy (November 2018). A copy of this policy is exhibited to this statement, marked "**VP5**".
>
> That policy indicates many of the factors that are taken into account when determining whether the applicant may be offered any particular property. The list is prioritised in date order, but this order is subject to any circumstances which may justify taking a case out of order (such as those listed in the policy). There is discretion to allow for complex needs, or exceptional circumstances, or medical issues, for example if a four bedroomed property that also had level access became available it might not go to the next applicant on the list if he/she did not require level access." (emphasis added)

84. On 27 November 2020, Ms Bell gave evidence in Elkundi:

> "As Ms Pumphrey notes in her statement, there is a general, informal policy which governs the approach the Council takes to the provision of temporary accommodation and the Planned Move List is an internal operational mechanism which serves to implement the objectives of that policy."

I note that whereas Ms Pumphrey had said the PML was operated in conjunction with a formal written policy, which she had exhibited, at this stage Ms Bell said there was a general, informal policy, the objectives of which the PML served to implement.

85. However, in statements dated 29 January 2021 (in *Ahmed*) and 22 February 2021 (in *Al-Shameri*) Ms Bell has corrected the evidence. In the latter statement she said:

> "I am aware that, in statements in other cases, Vicki Pumphrey has suggested that we are operating a temporary accommodation policy in relation to the provision of temporary accommodation. This is not correct. There is currently no such policy in place. I did prepare a draft of a possible policy which I think was circulated to senior colleagues, but it was never approved or implemented and is therefore not in use. I believe that this draft is the document that my colleague was mistakenly referring to, as she would have been one of the colleagues to whom is was circulated. She is not involved in the allocation of temporary accommodation, and may therefore have mistakenly assumed that the draft was approved."

86. Ms Pumphrey, too, has corrected her evidence in statements dated 1 February 2021 (in *Ahmed*) and 17 February 2021 (in *Al-Shameri*). In the latter statement she said:

> "In my witness statement of 6 March 2020 in the case of Elkundi I say at paragraph 26 that the planned move list is just for s193(2) accommodation [and] I reference a temporary accommodation policy. I repeat these in my witness statement on the Roberta Ross case dated 21 December 2020 at paragraph 4. I have subsequently made enquiries from my colleague Marcia Bell who has confirmed that:
>
> a. The planned move list relates to those who require temporary accommodation under both s188(1) and s193(2) of the Housing Act 1996.
>
> b. The policy I refer to is only a draft policy that Ms Bell had prepared but which had never been approved and is not in operation.
>
> I apologise to the Court for any confusion caused which was completely unintentional." (emphasis added)

87. I accept the Council's evidence that the references to a temporary accommodation policy was mistaken. The Council does not operate any such policy in conjunction with the PML.

The Planned Move List (PML)

88. Ms Bell stated that as of 22 February 2021 there were 3,575 households owed the duty under either section 188(1) or 193(2) and in temporary accommodation in Birmingham. Of these 3,575 households, 701 were on the planned move list on the basis that they required to move on from one set of interim or temporary accommodation to alternative interim or temporary accommodation. The precise number of applicants in temporary accommodation changes constantly, but she states the number is always large. The PML is "*updated daily and is very fluid*".

89. Ms Bell stated in her 29 January 2021 statement:

> "The only way to keep track of how many people need to move is to keep a list. This is done by way of daily spreadsheet and it is simply a way of holding data. It is the only way the Council can keep track of the households waiting for accommodation.
>
> People are added to this list if the accommodation they have requested is not available at the time of their request for accommodation. With regard to those to whom a main duty is owed, data is recorded as to their needs. We then wait for a suitable property then to become available. Once moved the applicant will be taken off the list.
>
> The list sets out what size of property each applicant needs, for example the area and the number of bedrooms. When a property becomes available the Council are then able to consult the spreadsheet to locate the applicant who has been waiting the

> longest for that type [of] property which is then offered to the applicant.
>
> There is discretion to allow for complex needs, or exceptional circumstances, or medical issues, for example if a four bedroomed property that also had level access became available it might not go to the next applicant on the list if there is another that specifically requires level access." (emphasis added)

90. Ms Bell exhibited a copy of the PML as it stood on 19 January 2021. In her statement dated 22 February 2021 (in *Al-Shameri*) Ms Bell has explained the meaning of the headings for each column of the PML. A further copy of the PML as it stood on 12 March 2021 was provided to the court on the last day of the hearing, showing two additional columns. Although Ms Bell has stated that "*data is recorded as to their needs*", the 12 March 2021 version of the PML in which the entries for Mr Elkundi and Mr Ahmed are shown unredacted does not include any statement regarding the disabilities that members of those households have or of their resulting needs.

91. It is apparent that the PML is divided into separate queues depending on the number of bedrooms that the Council has specified are required for the applicant. According to Ms Bell's evidence, the queue is ordered by reference to "*the date the case was added*", so as to "*ensure that people are rehoused in order*". Similarly, Ms Pumphrey's evidence is that the "*list is prioritised in date order*". The PML includes a number of dates: "*TA status update*" (the date the temporary accommodation status was last updated); "*TA Admissions Date*" (the date that the households are first accommodated in temporary accommodation); "*Tenancy start date*" (the date the current temporary accommodation tenancy commenced); "*TA tcy end date*" (the date occupation of the temporary accommodation ended); and "*stage status date*" (the date, for example, when the main housing duty was accepted). I therefore sought clarification during the hearing as to which was the operative date for the purposes of placement in the queue (i.e. what was meant by "*the date the case was added*"?).

92. Mr Manning initially informed me that the key date was the date the applicant was put onto the PML, which date was said to be shown in the column headed "*TA status update*". On considering the PML, I identified two of the (redacted) claimants (by reference to their data) and pointed out that the "*TA status update*" was not the date they had been put onto the PML. This led to Ms Bell giving a further statement on the final day of the hearing in which she explained that in the version exhibited to her earlier statement she had accidentally removed a column headed "*Planned Move Date*" (and another column that was immaterial). Ms Bell's evidence is that the "*Planned Move Date*"

> "is the date on which the applicant was placed on the Planned Move List. It is in fact this date that is used by my team to determine the order on the List (i.e. by reference to who has been in the queue for accommodation for the longest period), not the TA status update date."

93. Looking at the PML, while it is correct that the "*Planned Move Date*" determines the order of each bedroom queue, contrary to Ms Bell's evidence that does not appear to represent the date on which the applicant was placed on the PML. The "*Planned Move Date*" entry for Mr Elkundi is given as 17 November 2014. That is the date on which he

first made his application for housing assistance under Part VII. It is not the date on which he was placed on the PML. Ms Pumphrey's evidence is that he was placed on the PML on 10 January 2020. There are some other references which indicate the precise date Mr Elkundi was placed on the PML may, perhaps, have been a few days earlier, but that minor discrepancy is of no consequence. What is clear is that the date on which Mr Elkundi was placed on the PML does not appear as an entry in any of the columns on the PML and has no bearing on where he appears in the queue. Similarly, the "*Planned Move Date*" for Mr Ahmed is given as 29 October 2018. Again, that is the date on which he first made his application for housing assistance under Part VII. It is not the date on which he was placed on the PML. The evidence of Ms Pumphrey is that Mr Ahmed was placed on the PML following the review decision made on 18 December 2019.

94. On receipt of Ms Bell's 12 March 2021 statement, on the morning of the final day of the hearing, I put these points to Mr Manning and asked the Council for clarification in light of the manifest conflict between the Council's witness evidence and what is apparent on the face of the PML in respect of the two claimants whose data is before the court. I reiterated my request for clarification at the end of the hearing. In supplementary submissions dated 1 April 2021, the Council states:

> "**"Days Waiting" on the Planned Move List**
>
> The authority has taken instructions on the start point of the "Days Waiting" field in the Planned Move List, which is the day that the applicant is added to the list."

95. Unfortunately, this answer does not address the inconsistency. The "*Days Waiting*" are evidently calculated by reference to the "*Planned Move Date*". For Mr Elkundi, on 12 March 2021, his "*Days Waiting*" were 2306 i.e. 6 years and 115 days, that being the period since 17 November 2014 when he first made his application. On the same day, Mr Ahmed's "*Days Waiting*" were 864 i.e. 2 years and 134 days, that being the period since 29 October 2018 when he made his application.

96. It is possible that the entries in the "*Planned Move Date*" column (and "*Days Waiting*" column) for Mr Elkundi and Mr Ahmed were erroneous and ought, in accordance with Ms Bell's evidence, to have given the dates on which they were placed on the PML (and days waiting since then). I have no information regarding the other applicants on the PML by which to assess whether their entries, like those for the claimants, show the date on which they first made their application for assistance, or whether as Ms Bell states they give the date the applicant was put on the PML. If Ms Bell's evidence as to what the "*Planned Move Date*" shows were right, it would mean that the entries for the only two applicants on the PML for whom the court has data just happen to be wrong in precisely the same way. It would also mean that on 12 March 2021, there were applicants who had been waiting more than 12 years, not just since they had first applied for Part VII housing assistance, but since the Council had decided they needed to move to alternative temporary accommodation. It seems more probable that the "*Planned Move Date*", which undoubtedly determines an applicant's place in the bedroom queue, reflects the date on which assistance was first sought. But given the uncertainty, when considering Ground 2 I have addressed the operation of the PML on the alternative bases that the queues are ordered (a) by reference to the date on which the applicant was admitted to the PML or (b) by reference to the date on which the applicant made a homeless application.

97. The applicants on the PML are recorded as requiring accommodation ranging from one-bedroom up to seven-bedroom properties. As of 19 January 2021, the number of applicants in each queue was:

    i) seven-bedroom queue: 2 applicants (highest waiting days: 3247 days);

    ii) six-bedroom queue: 9 applicants (highest waiting days: 1763 days);

    iii) five-bedroom queue: 32 applicants (highest waiting days: 1894 days);

    iv) four-bedroom queue: 86 applicants (highest waiting days: 4628 days);

    v) three-bedroom queue: 179 applicants (highest waiting days: 3388 days);

    vi) two-bedroom queue: 292 applicants (highest waiting days: 3973 days); and

    vii) one-bedroom queue: 106 applicants (highest waiting days: 2650 days).

98. Although there is no policy complementing the PML, Ms Bell's evidence is that there are exceptions to re-housing applicants in date order, "*such as if there is a high-level risk such as a police instruction to move on or an adapted property which is specific in its requirement or pursuant to mandatory court orders*".

99. Ms Bell states:

> "I would also like to explain that putting an applicant on the planned move list does not mean that the accommodation that they are currently occupying is considered by the council to be unsuitable immediately or even in the short to medium term. It means only that we have decided that we need to seek more suitable accommodation for the applicant's household because the current accommodation will not be suitable for their occupation in the longer term, i.e. for as long as they will probably continue to be in temporary accommodation, so more suitable temporary accommodation is needed."

100. This evidence has to be considered in light of my finding (below) that in *Elkundi, Ahmed* and *Ross* the Council decided their accommodation was unsuitable and then put them on the PML. Nevertheless, I accept that some applicants on the PML may be in accommodation that is suitable in the short-term or the medium-term. Others on the PML are in accommodation that is unsuitable, albeit, if it were accommodation in which they could not remain another night, the Council would source emergency accommodation (usually bed and breakfast accommodation).

101. In his statements dated 20 November 2020 and 6 January 2021, Mr McIlvaney suggests that over the last two years or so it has become standard practice, when the Council has conceded that accommodation is unsuitable, to "*state that the applicant can remain in the accommodation for an unspecified period of time until other accommodation might become available and … refer to an extra-statutory/non-statutory 'Move On List'* [i.e. the PML] *which the Defendant claims to operate but in respect of the operation of which little clarity is provided*". Mr McIlvaney suggests this practice has the effect that "*many applicants are left in unsuitable accommodation, sometimes in appalling conditions, for*

considerable periods of time", despite an acknowledgment they are owed the main housing duty.

102. In his statement dated 2 March 2021, Mr McIlvaney states that it is only during the course of these proceedings that some answers to the questions he and his colleagues have been asking the Council over recent years about the PML have emerged. But he says:

> "Notwithstanding this recent disclosure there are still numerous issues in relation to the legality of the PML and in relation to its transparency. It appears to operate as a non-statutory waiting list though it is not known who is included on the list other than 'households waiting for accommodation'. It is not clear who makes the decision that an applicant should go on the list. It is not made clear to an applicant whether they have been placed on the list, and if so what their position is, and whether there are any rights in relation to review. It is not clear how applicants are prioritised or by whom. It is unclear as to whether this 'system' makes any or any sufficient allowance for disability." (emphasis added)

The Birmingham context

103. Ms Bell has given evidence regarding the nature and magnitude of the difficulties the Council faces in fulfilling its housing obligations. She states:

> "In 2019 it was estimated that there were 1,141,816 people living in the Birmingham local authority area. The second largest local authority was Leeds, with an estimated population of 793,139. …There are 23.3 million households in the UK, of which approximately 451,664 are in Birmingham … This is about 1.9%.
>
> The [Ministry of Housing, Communities and Local Government] indices of deprivation from 2019 states that Birmingham is the 7th most deprived local authority in England and has 27.6% of children living in income deprived households. … I can say, from my experience, that this means that there are likely to be a larger number of homeless households than in areas with fewer income deprived households. Income deprived households tend to live in more precarious accommodation than people with more income, and also are likely to find it harder to meet their outgoings such as rent.
>
> ***Homelessness in Birmingham***
>
> This experience is reflected in the homelessness figures for Birmingham. The council entertains a very substantial number of homelessness applications each year. I have reviewed the MHCLG statistics which show that for the financial year 2019 to 2020 there were a total of 304,290 initial assessments carried out across England. Of these, Birmingham carried [out] 6,569,

> more than any other local authority in England, with Leeds carrying out 6,482 and Manchester 5,315. In the same year, the relief duty was accepted in 139,800 cases across England. Birmingham accepted the relief duty in 4,450 cases, which is 1,500 more cases than the second placed council – Manchester City Council who had 2,906 acceptances.
>
> …
>
> In England, the main housing duty … was accepted in 40,030 cases. Again, Birmingham accepted this duty in more cases than any other council – in 2,340 cases (or about 5.85% of the national acceptance figure). Manchester had the second largest number of acceptances, at 1,444 (or about 3.6% of the national figure).
>
> Another way of looking at the statistics is that, in England, of the homeless applications made, the relief duty is accepted on 46% of cases. In Birmingham it is closer to 68%. Likewise, in England as a whole, the main housing duty was accepted in 13% of cases but in Birmingham it was closer to 36% of cases.
>
> These statistics are not an accident, but reflect the Council's active wish (and that of my colleagues and myself) to perform our homelessness duties fully, and not to avoid or minimise them. However, one unfortunate consequence of adopting this approach is that finding enough housing stock is a difficult challenge for the Council and for me and my team."

104. Ms Bell states that on 3 December 2020:

> "Birmingham had 60,673 units of housing stock that it owns of which 58,738 were let at a social rent (as opposed to an affordable rent or on a shared ownership basis).
>
> There were … 14,209 applicants on the council's housing waiting list, of whom 2,662 are waiting for properties with more than 3 bedrooms. Those statistics also showed that there were 4,369 applicants with one or more of the statutory reasonable preference categories for an allocation of housing by the council; of those 3,082 were owed a homelessness duty by the local authority, 1,240 were living in unsanitary or overcrowded conditions and 1,156 needed to move on medical grounds including relating to disability."

105. Ms Bell acknowledges that these waiting list figures, in respect of the Part VI housing register, do not directly relate to the provision of temporary accommodation pursuant to Part VII. But if long-term accommodation is not readily available, homeless households who are occupying temporary accommodation will stay in that accommodation longer, making it more difficult to find temporary accommodation for others. In addition, other councils are suffering from similar housing shortages and those from London and the South East are able to offer private landlords in the West

Midlands higher rents (while saving money) than the Council is able to offer. The increased competition inflates rents and makes it harder to procure accommodation that is affordable and therefore suitable for applicants.

Securing temporary accommodation

106. Ms Bell's evidence (in a statement dated 27 November 2020) is that:

> "The provision of temporary accommodation under Part 7 is separate and distinct from the Council's housing list. There are essentially three sources of accommodation used as temporary accommodation for the homeless; the council's own limited stock which has been earmarked specifically as Part 7 accommodation; private sector leasing ("PSL") which is private sector accommodation procured by the Council on short leases for the purpose of letting to homeless applicants on non-secure tenancies; and private rented sector accommodation ("PRS") where applicants enter into licences or tenancies with landlords directly.

107. Ms Bell explains (in a statement dated 22 February 2021):

> "Every morning the team receives a list of void properties. This is known as the fit for let summary. The properties are from the Council's Part VII stock (this includes private sector leased stock). As I mentioned above, the Council's Part VII stock is separate from its Part VI stock. The empty properties that have been checked as being fit to be let (so any repair work that needs to be done is carried out) are flagged and then the officers in my team manually match those properties to those on the list.
>
> The officers do this by identifying the number of bedrooms that property has, the area it is in and whether it has any adaptations. They will then start with the person who has been waiting on the list for the longest time and see whether the property is a match. If a property has adaptations, then they will match it to the person who has been on the list the longest and whose needs match that property.
>
> Once a match has been made the person is contacted and offered the property.
>
> Whilst my team tries to work with the people in date order, there are some exceptions. These can include circumstances where the Police require us to make an immediate move, or the Court makes a mandatory order.
>
> The planned move list has nothing to do with the allocation process for long term accommodation and is only used as an internal document for temporary accommodation." (emphasis added)

108. Although Ms Bell has referred to the Council's (limited) stock of accommodation earmarked as temporary accommodation, in her evidence in *Elkundi* and *Ahmed* she has stated that the Council has no four-bedroom or five-bedroom properties and so these have to be sourced from the private rented sector. In a statement filed after the hearing, Mr Messenger has clarified that while the Council does not own any five-bedroom or six-bedroom properties (whether categorised as Part VI or Part VII accommodation), it does own four-bedroom properties. The Council tries to "*avoid using the authority's own stock for temporary accommodation, so that they can be used under Part 6*". So it is now clear that the statement that the Council has no four-bedroom properties means only that it has none it has earmarked as Part VII stock.

109. As regards sourcing properties from the private rented sector for use as temporary accommodation, Ms Bell's evidence is that in the 12 months to 6 January 2021 the Council had let only 11 four-bedroom properties. Over the last 3 years, the Council has sourced, on average, only 6 five-bedroom properties per year.

110. Mr Messenger's evidence is that, although the Council seeks to avoid using its own stock as temporary accommodation, in light of the pressures on the service, since March 2020, 15 four-bedroom properties have been made available for use as temporary accommodation. In addition a "*further 48 properties of council-owned stock, traditionally considered as … 3-bedroom properties but having a second living room, and so used as 4 bedroom properties have been secured*", for use as temporary accommodation. Mr Messenger states: "*We have asked for further 4-bedroom properties but if these are allocated, it will … have an adverse impact on people bidding under Part 6 who will be unable to obtain a long-term home*".

111. Mr Messenger explains the Council's reluctance to use its own stock as temporary accommodation for those owed duties under Part VII in these terms:

> "Every large 4 bedroom property used for Part 7 temporary accommodation, however, denies the opportunity for someone bidding for it under Part 6, including a homeless applicant in temporary accommodation. This is therefore somewhat counterproductive for two reasons:
>
> (i) it prevents people from moving out of temporary accommodation and therefore prevents the authority from being able to use its temporary accommodation for other families; and
>
> (ii) if people in housing need (e.g. because their current housing is unsatisfactory) are unable to obtain accommodation from the waiting list within a reasonable time, they are likely to apply to the authority as homeless, causing even more pressure on the supply of temporary accommodation.
>
> This is true of properties of all sizes and is why we try to avoid using the authority's own stock for temporary accommodation, so that they can be used under Part 6.

> …
>
> It can therefore be seen that it is a difficult balance to strike whether to make more council properties available for Part 7 use. There is a very limited supply for everyone. Every property used for Part 6 or Part 7 purposes has an impact on every other Part 6 and Part 7 applicant and therefore on the ability of the authority to satisfy homelessness demand. The decision on how to make best use of its stock whether council-owned or private sector leased, is complex and a matter of fine judgments looking at the whole of the waiting list and all the Part 7 applicants awaiting accommodation, all of whom – whether Part 6 or Part 7 – have a housing need for accommodation of the right size."

112. In 2018 the Council attempted to source 1,500 units of accommodation from the private rented sector for use as temporary accommodation. By January 2021 the Council had managed to obtain 970 units. The Council is in the process of entering a new tendering phase, seeking to procure 2,000 additional properties for temporary accommodation. Ms Bell explains that if there is enough interest, the result would be that "*the Council will be less reliant on B&B and families would be given self-contained accommodation more quickly*".

The impact of the pandemic

113. In several statements, Ms Bell has addressed the impact of the Covid-19 pandemic on the Council's ability to secure temporary accommodation for those owed accommodation duties under Part VII. She says "*the pandemic has had a devastating effect on Birmingham's housing capability*".

> "Before the first national lockdown which began around 23.3.20, we had been working to reduce the number of households in bed and breakfast accommodation ("B&B"). As at 23.3.20, we had 308 cases in B&B in comparison from 23.3.20 to 31.7.20, 739 households moved into B&B. This was in part, due to the "all-in" directive from the Government which meant that even households that would not normally be eligible for a service were accommodated. During this period, we moved 283 households out of B&B, into self-contained accommodation.
>
> Pre-COVID, between 20-40 temporary self contained properties were available each week but, during lockdown, this dropped to below 10 in some weeks and even lower than that in other weeks. This was due to our property and repairs contractors not being about to provide a full service which limited the number of properties available and increased the turnaround times."

114. Ms Bell further states that as a result of the measures introduced since the pandemic began, namely, stays on evictions and requirements for longer notices before eviction proceedings can be commenced,

> "the Council has experienced a significantly lower turnover of housing stock than usual, for both temporary accommodation and Part 6 allocations of long term housing. The result is that the Council has even fewer properties becoming available.
>
> Having made enquiries within the Council, the impact of the eviction ban has meant there were 30% fewer departures from temporary accommodation between 31 March 2020-31 December 2020 compared to 31 March 2019-31 December 2019. … Likewise the void availability for long term general needs housing has reduced by 420 properties (21%) during the same period."

115. Mr McIlvaney accepts that the pandemic has presented challenges to everyone, including the Council, but he suggests its impact upon housing supply is perhaps overstated for these reasons:

> "Whilst the stay on evictions has to some extent led to a 'freezing' in the turnover of available housing stock, it has most likely also led to a reduction in the number of persons seeking homeless assistance following eviction. The demand for housing from rough sleepers, such as there has been, is for a different type of property to that required by homeless families."

116. I note that while the Coronavirus Act 2020 eased some duties on authorities (e.g. in respect of the Care Act 2014) it introduced no easement of the duty on local housing authorities under section 193(2).

F. The legislative framework

PART VI: ALLOCATION OF PERMANENT ACCOMMODATION

117. Part VI is concerned with the process for distributing (or to use words of the statute, "*allocating*") tenancies of social housing. Section 166A provides:

> "(1) Every local housing authority in England must have a scheme (their "allocation scheme") for determining priorities, and as to the procedure to be followed, in allocating housing accommodation. For this purpose *"procedure"* includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken.
>
> (2) The scheme must include a statement of the authority's policy on offering people who are to be allocated housing accommodation—
>
> (a) a choice of housing accommodation; or
>
> (b) the opportunity to express preferences about the housing accommodation to be allocated to them.

(3) As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to—

(a) people who are homeless (within the meaning of Part 7);

(b) people who are owed a duty by any local housing authority under section 190(2), 193(2) or 195(2) (or under section 65(2) or 68(2) of the Housing Act 1985) or who are occupying accommodation secured by any such authority under section 192(3);

(c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions;

(d) people who need to move on medical or welfare grounds (including any grounds relating to a disability); …

(5) The scheme may contain provision for determining priorities in allocating housing accommodation to people within subsection (3); and the factors which the scheme may allow to be taken into account include—

(a) the financial resources available to a person to meet his housing costs;

(b) any behaviour of a person (or of a member of his household) which affects his suitability to be a tenant;

(c) any local connection (within the meaning of section 199) which exists between a person and the authority's district.

…

(9) The scheme must be framed so as to secure that an applicant for an allocation of housing accommodation—

(a) has the right to request such general information as will enable him to assess—

(i) how his application is likely to be treated under the scheme (including in particular whether he is likely to be regarded as a member of a group of people who are to be given preference by virtue of subsection (3)); and

(ii) <u>whether housing accommodation appropriate to his needs is likely to be made available to him and, if so, how long it is likely to be before such accommodation becomes available for allocation to him</u>;

…

> (14) A local housing authority in England shall not allocate housing accommodation except in accordance with their allocation scheme." (emphasis added)

118. Each of the claimants is on the Council's housing register and able to bid for Part VI accommodation. However, Part VI is concerned with ensuring the available housing stock (however limited it may be) is allocated fairly in accordance with the statutory scheme. In view of the severe shortage of social housing, it is possible for an applicant to remain on the housing register for life without ever succeeding in a bid for accommodation. Part VI does not impose obligations on local housing authorities to secure accommodation for applicants: it focuses on the procedure for allocating the available stock. No complaint is made in these claims about the Council's compliance with the provisions of Part VI.

PART VII: THE STATUTORY HOMELESSNESS SCHEME

119. The duties of a local housing authority in England towards those who face the immediate problem of homelessness are found in Part VII (as amended), which Part contains sections 175 to 218. The duties on a local housing authority under Part VI and Part VII are distinct and it is important not to confuse them: see *Birmingham City Council v Ali* [2009] UKHL 36, [2009] 1 WLR 1506 at [14]. Where a duty to secure accommodation for an applicant arises under Part VII, the duty may be performed by securing temporary (i.e. non-permanent) accommodation. However, the cases demonstrate that applicants may spend many years in "*temporary*" accommodation provided under Part VII.

Homelessness and threatened homelessness

120. The concept of homelessness is defined in section 175(1)-(3) which provides:

> "(1) A person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere, which he—
>
> (a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court,
>
> (b) has an express or implied licence to occupy, or
>
> (c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession.
>
> (2) A person is also homeless if he has accommodation but—
>
> (a) he cannot secure entry to it, or
>
> (b) it consists of a moveable structure, vehicle or vessel designed or adapted for human habitation and there is no place where he is entitled or permitted both to place it and to reside in it.

> (3) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy." (emphasis added)

121. Section 176 specifies that accommodation shall be regarded as "*available for a person's occupation*" only if it is available for occupation by the applicant together with any other person who normally resides with him as a member of his family or who might reasonably be expected to reside with him.

122. In determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation, regard may be had to the general circumstances prevailing in relation to housing in the district of the local housing authority to whom he has applied for accommodation or for assistance in obtaining accommodation (section 177(2)). Section 177(1) and (1A) address the circumstances in which it is deemed not to be reasonable to continue to occupy accommodation by reason of domestic (or other) violence.

123. The concept of *threatened* homelessness is defined in section 175(4)-(5) which provides:

> "(4) A person is threatened with homelessness if it is likely that he will become homeless within 56 days.
>
> (5) A person is also threatened with homelessness if—
>
> (a) a valid notice has been given to the person under section 21 of the Housing Act 1988 (orders for possession on expiry or termination of assured shorthold tenancy) in respect of the only accommodation the person has that is available for the person's occupation, and
>
> (b) that notice will expire within 56 days." (emphasis added)

The duty of inquiry

124. When a person applies to a local housing authority for accommodation, or for assistance in obtaining accommodation, if the authority has reason to believe that an applicant *may be* homeless *or* threatened with homelessness then, pursuant to section 184(1), the authority must make such inquiries as are necessary to satisfy itself whether the applicant (a) is eligible for assistance and (b) if so, whether any duty, and if so what duty, is owed to him under the provisions of Part VII that follow section 184.

125. A local housing authority is required first to determine whether an applicant is "*eligible*" for housing assistance under Part VII. Eligibility normally depends on the immigration status of the applicant: sections 185 and 186. A person who is subject to immigration control is ineligible, unless he is of a class prescribed by regulations made by the Secretary of State (and those who are excluded from entitlement to universal credit or housing benefit may not be included in a prescribed class).

126. If the applicant is eligible, the local housing authority will determine what duty (if any) is owed to him by reference to three statutory criteria, namely:

i) Is the applicant "*homeless*" or "*threatened with homelessness*"? (See section 175 and §§120 to 123 above.)

ii) Does the applicant have a "*priority need for accommodation*"? Section 189(1) provides:

> "The following have a priority need for accommodation
>
> (a) a pregnant woman or a person with whom she resides or might reasonably be expected to reside;
>
> (b) a person with whom dependent children reside or might reasonably be expected to reside;
>
> (c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside;
>
> (d) a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster." (emphasis added)

Additional categories have been prescribed by regulations made under section 189(2): Homelessness (Priority Need for Accommodation) (England) Order 2002 (2002/2051).

iii) Has the applicant become "*homeless intentionally*"? Section 191(1) provides:

> "A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy".

127. The local housing authority may also consider, although it is not obliged to do so, the applicant's "*local connection*" to the area and whether the case is one to be referred to another local housing authority pursuant to section 198.

128. The authority is required, on completing its inquiries, to notify the applicant of its decision and, so far as any issue is decided against his interests, give reasons for its decision (section 184(3)), and notify the applicant of his right to request a review of the decision pursuant to section 202 and of the time limit for doing so (section 184(5)).

The duty to assess and make a personalised housing plan

129. Section 189A provides that if the local housing authority is "*satisfied*" that an applicant is *eligible* and *homeless or threatened with homelessness*, the authority must make, and put into writing, an assessment of the applicant's case (section 189A(1) and (3)). Amongst other matters, the assessment must address "*what support would be necessary for the applicant and any other relevant persons to be able to have and retain suitable accommodation*" (189A(2)). The authority should then seek to agree with the applicant,

and record in writing, a plan of the steps the applicant is to be required to take and the steps the authority is to take (section 189A(4) and (5)). In default of agreement, the authority must record the plan in accordance with section 189A(6).

The relief and prevention duties

130. If the local housing authority is satisfied that an applicant is *eligible* and *homeless* the relief duty in section 189B applies; whereas if it is satisfied the applicant is *eligible* and *threatened with homelessness* the prevention duty in section 195 applies.

131. Section 189B provides, so far as material:

> "(1) This section applies where the local housing authority are satisfied that an applicant is –
>
> (a) homeless; and
>
> (b) eligible for assistance.
>
> (2) Unless the authority refer the applicant to another local housing authority in England (see section 198(A1)), the authority must take reasonable steps to help the applicant to secure that suitable accommodation becomes available for the applicant's occupation for at least –
>
> (a) 6 months, or
>
> (b) such longer period not exceeding 12 months as may be prescribed.
>
> (3) In deciding what steps they are to take, the authority must have regard to their assessment of the applicant's case under section 189A.
>
> (4) Where the authority –
>
> (a) are satisfied that the applicant has a priority need, and
>
> (b) are not satisfied that the applicant became homeless intentionally,
>
> the duty subsection (2) comes to an end at the end of the period of 56 days beginning with the day the authority are first satisfied as mentioned in subsection (1)." (emphasis added)

132. Section 195 provides, so far as material:

> "(1) This section applies where the local housing authority are satisfied that an applicant is –
>
> (a) threatened with homelessness; and

> (b) eligible for assistance.
>
> (2) The authority must take reasonable steps to help the applicant to secure that accommodation does not cease to be available for the applicant's occupation.
>
> (3) In deciding what steps they are to take, the authority must have regard to their assessment of the applicant's case under section 189A." (emphasis added)

The duties to secure accommodation

133. Part VII contains a graduated series of provisions which, in differing circumstances, impose obligations on a local housing authority to secure temporary accommodation for an applicant.

134. **First**, an initial duty to "*secure that accommodation is available for the applicant's occupation*" is triggered if the local housing authority has reason to believe that an applicant may be homeless, may be eligible and may have a priority need. This *interim accommodation duty*, imposed by section 188(1), is owed to those who may be homeless, not those who may be *threatened* with homelessness; and it is limited to those who may have a priority need. However, it is owed irrespective of any (lack of) local connection.

135. Paragraph 15.5 of the Code of Guidance issued by the Secretary of State pursuant to section 182(1) provides:

> "The threshold for triggering the section 188(1) duty is low as the housing authority only has to have a **reason to believe** (rather than being satisfied) that the applicant **may** be homeless, eligible for assistance and have a priority need". (Original emphasis).

136. The interim accommodation duty comes to an end once the local housing authority has undertaken its inquiries and determined what further duty (if any) the applicant is owed.

137. **Secondly**, if the local housing authority is *satisfied* that the applicant is *eligible*, *homeless*, and has a *priority need*, but it concludes the applicant became *homeless intentionally*, then once the relief duty has come to an end the *short-term duty* under section 190(2) applies. The short-term duty requires the local housing authority to secure that accommodation is available for the applicant's occupation "*for such period as they consider will give him a reasonable opportunity of securing accommodation for his occupation*".

138. Paragraph 15.14 of the Code of Guidance provides:

> "In determining the period of time for which accommodation will be secured under section 190(2) housing authorities must consider each case on its merits. A few weeks may provide the applicant with a reasonable opportunity to secure accommodation for themselves. However, some applicants might require longer and others, particularly where the housing

> authority provides pro-active and effective assistance, might require less time."

139. This duty is time limited. It was common ground that in practice accommodation tends to be provided under section 190(2) for about 4-6 weeks.

140. **Thirdly**, section 199A(2) and 200(1) impose *holding duties* in circumstances where a local housing authority ("the notifying authority") is referring an applicant's case to another local housing authority. Both duties are to secure that accommodation is available for occupation by the applicant pending the outcome of the referral. The duty under section 199A(2) applies where, but for the referral, the notifying authority would be subject to the relief duty *and* the notifying authority "*have reason to believe that the applicant may have a priority need*". The duty under section 200(1) applies where, but for the referral, the notifying authority would be subject to the main housing duty under section 193(2).

141. The holding duties come to an end when the applicant is notified of the decision as to whether the conditions for referral of the applicant's case are met (i.e. once it is determined which of the two local housing authorities owe the applicant the relief duty or the main housing duty (as applicable)).

142. **Fourthly**, the *main housing duty* under section 193(2) is "*the highest duty which is owed under Part VII*": *Birmingham v Ali*, Baroness Hale at [19]. In its current form, section 193(1)-(3) provides, so far as material:

> "(1) This section applies where –
>
> (a) the local housing authority –
>
> (i) are satisfied that an applicant is homeless and eligible for assistance, and
>
> (ii) are not satisfied that the applicant became homeless intentionally,
>
> (b) the authority are also satisfied that the applicant has a priority need, and
>
> (c) the authority's duty to the applicant under section 189B(2) has come to an end.
>
> …
>
> (2) Unless the authority refer the application to another local housing authority (see section 198), <u>they shall secure that accommodation is available for occupation by the applicant</u>.
>
> (3) The authority are subject to the duty under this section until it ceases by virtue of any of the following provisions of this section." (emphasis added)

143. It can be seen that the main housing duty is owed (once the section 189B(2) relief duty has come to an end) only if the local housing authority is satisfied that the applicant is (i) eligible, (ii) homeless, (iii) and has a priority need, (iv) the local housing authority is not satisfied the applicant has become homeless intentionally, and (v) the applicant has a local connection (or, at least, no referral to another local housing authority is made on the grounds of the applicant's lack of local connection). The main housing duty will continue until one of the events specified in section 193(5)-(7AA) occurs.

144. **Fifthly**, a duty similar to the main housing duty is owed under section 193C(4) to an applicant who meets each of the criteria referred to in §142 above, but who has deliberately and unreasonably refused to cooperate. The duty will continue until one of the events specified in section 193C(5)-(6) occurs.

Powers to accommodate

145. A local housing authority also has the power (but not a duty) to secure accommodation for a homeless applicant (i) pending a decision on review (section 188(3)), (ii) pending the determination of an appeal (section 204(4)) and (iii) in performance of the relief duty or the prevention duty (section 205(3)).

Suitability

146. The accommodation that a local housing authority is required to secure for an applicant (directly or indirectly), in performance of any of its accommodation duties under Part VII must be "*suitable*" accommodation. This is made clear by section 206(1) which provides:

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

147. In determining whether accommodation is suitable for an applicant, the local housing authority must have regard to Parts 9 and 10 of the Housing Act 1985 (slum clearance and overcrowding) and Parts 1 to 4 of the Housing Act 2004: section 210.

148. The Code of Guidance provides:

> "17.2 Section 206 provides that where a housing authority discharges its functions to secure that accommodation is available for an applicant the accommodation must be suitable. This applies in respect of all powers and duties to secure accommodation under Part 7, including interim duties. The accommodation must be suitable in relation to the applicant and to all members of their household who normally reside with them, or who might reasonably be expected to reside with them.

…

17.7 Accommodation that is suitable for a short period, for example accommodation used to discharge an interim duty pending inquiries under section 188, may not necessarily be suitable for a longer period, for example to discharge a duty under section 193(2).

17.8 Housing authorities have a continuing obligation to keep the suitability of accommodation under review, and to respond to any relevant change in circumstances which may affect suitability, until such time as the accommodation duty is brought to an end.

17.9 Housing authorities are required to assess whether accommodation is suitable for each household individually, and case records should demonstrate that they have taken the statutory requirements into account in securing the accommodation."

Statutory review and appeal

149. Section 202 gives an applicant a right to request a review of various decisions. It provides, so far as material:

"(1) An applicant has the right to request a review of –

(a) any decision of a local housing authority as to his eligibility for assistance,

(b) any decision of a local housing authority as to what duty (if any) is owed to him under sections 189B to 193C and 195 (duties to persons found to be homeless or threatened with homelessness),

(ba) any decision of a local housing authority –

(i) as to the steps they are to take under subsection (2) of section 189B, …

(bc) any decision of a local housing authority –

(i) as to the steps they are to take under subsection (2) of section 195, …

(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),

> (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), or
>
> (h) any decision of a local housing authority as to the suitability of accommodation offered to the applicant by way of a final accommodation offer or a final Part VI offer (within the meaning of section 193A or 193C).
>
> (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.
>
> …
>
> (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." (emphasis added)

150. Section 203(3) provides:

> "The authority, or as the case may be either of the authorities, concerned shall notify the applicant of the decision on the review."

151. If the final decision on review is to confirm the original decision on any issue against the interests of the applicant, the local housing authority "*shall also notify him of the reasons for the decision*" (section 203(4)). Section 203(5) provides:

> "In any case they shall inform the applicant of his right to appeal to the county court on a point of law, and of the period within which such an appeal must be made (see section 204)."

152. An applicant who has requested a review under section 202 and is dissatisfied with the decision on review (or is not notified of the review decision within the prescribed time) may appeal to the county court on any point of law arising from the review decision (or, as the case may be, the original decision): section 204(1). Such an appeal must be brought within 21 days of being notified of the review decision (or, as the case may be, of the date on which he should have been so notified): section 204(2). The county court has the

power to give permission to bring an appeal out of time only if satisfied there is good reason for the delay: section 204(2A).

EQUALITY ACT 2010

153. Section 149 of the Equality Act 2010 contains the public sector equality duty. It provides, so far as material:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to –
>
> …
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of person who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> …
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
>
> …
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

154. The relevant protected characteristics include "disability" and "pregnancy and maternity".

CHILDREN ACT 2004

155. Section 11(2) of the Children Act 2004 provides:

> "Each person and body to whom this section applies must make arrangements for ensuring that –
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and
>
> (b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need."

The section applies to the Council as a local authority in England: section 11(1)(a) of the Children Act 2004.

G. The nature of the main housing duty under section 193(2)

156. The claimants contend that section 193(2) imposes an immediate, unqualified and non-deferrable duty to secure the availability of suitable accommodation to those to whom the duty is owed. They acknowledge that the concept of suitability is a flexible one. On their analysis, if a local housing authority has not secured suitable accommodation for a person to whom it owes the main housing duty, it is in breach of section 193(2). Any explanation that the authority may have is relevant only to relief.

157. The Council acknowledges that the duty is non-deferrable and that it is a duty of result, not a duty to take (reasonable) steps. However, the Council takes issue with the submission that it is an immediate and unqualified duty. The Council submits it is a duty to secure suitable accommodation *within a reasonable period of time* (having regard to all the circumstances, including the availability of accommodation). On the Council's analysis, any explanation a local housing authority may have for not having secured suitable accommodation for a person to whom it owes the main housing duty is relevant, first, to the question whether that omission is a breach of section 193(2).

Willers v Joyce (No.2)

158. In *M v Newham* Linden J addressed this issue in detail, by reference to the key authorities on which I have been addressed, and rejected the contention that the duty in section 193(2) is to secure accommodation within a reasonable time. The Council submits that *M v Newham* is wrong and I should not follow it.

159. In *Willers v Joyce (No.2)*, Lord Neuberger addressed the application of the doctrine of precedent, noting the nuanced position when it comes to courts of co-ordinate jurisdiction. He observed at [9]:

> "So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary".

160. In this instance, it may be said that "*cogent*" rather than "*powerful*" reasons would be required not to follow *M v Newham* because there are inconsistent decisions of the High Court on the nature of the duty. In *M v Newham* Linden J followed *R v Newham LBC ex p Begum* (1999) 32 HLR 808 ("*Begum*") in which Collins J held that the analysis of the duty in *R v Southwark LBC ex p Anderson* (1999) 32 HLR 96 ("*Anderson*") and *R v Merton ex p Sembi* (1999) 32 HLR 439 *("Sembi*") was wrong. However, *M v Newham* analyses the nature of the duty in the light of the judgments of the Court of Appeal in *Codona v Mid-Bedfordshire DC* [2005] EWCA Civ 925, [2005] HLR 1 ("*Codona*") and *R (Aweys & ors) v Birmingham City Council* [2008] EWCA Civ 48, [2008] 1 WLR 2305 *("Aweys")* and of the House of Lords in *Birmingham v Ali* (on appeal from *Aweys*). In these circumstances, I consider that a powerful reason not to follow *M v Newham* would be required.

161. In any event, for the reasons that I explain below, I agree with Linden J's conclusion as to the nature of the duty and his excellent analysis. I am not persuaded there is any reason, still less a cogent or powerful one, not to follow *M v Newham.* Nevertheless, in deference to the extensive argument that I have heard, I will explain my reasons for reaching the same conclusion.

The statutory provisions

162. The starting point for consideration of the nature of the duty is, of course, the words of section 193(2) considered in their statutory context (see §§117 to 152 above, especially §142).

163. The claimants contend that, on its face, the section 193(2) duty to secure that accommodation is available for the applicant is triggered as soon as the duty is found to be owed and it is unqualified. The provision does not contain the qualifying words "*within a reasonable period*" or words to similar effect.

164. Nor is it a duty to take "*reasonable steps*". The claimants contrast the terms of section 193(2) with the relief and prevention duties (see §§130 to 132 above) in which Parliament has imposed express duties to take "*reasonable steps*", with concomitant obligations on the local housing authority to record those steps in writing, and give the applicant a right to request a review of any decision as to the steps the local housing authority is to take. While the claimants acknowledge that these provisions, unlike section 193(2), were not in the original Act but have been added later, nonetheless the claimants contend that they show that if Parliament had intended to qualify the nature of the main housing duty it could and would have done so expressly.

165. The claimants submit there is no justification for glossing the words in the way the Council proposes. In Part VII, Parliament was addressing the immediate and urgent problem of homelessness. The main housing duty is the highest duty that can be owed to any applicant under Part VII. It is only owed to those who are not only currently and unintentionally homeless, and eligible for assistance, but who have also been classified by Parliament as having a "*priority need*" for housing assistance because, for example, the household includes children or a person who is vulnerable by reason of disability. While the unqualified duty is onerous, it is moderated by the elasticity of the concept of suitable accommodation. So, for example, bed and breakfast accommodation may be suitable for a family with children for a few weeks, if accommodation is urgently required to ensure they have a roof over their heads, even though such accommodation would not

be suitable for them for an extended period. Or the local housing authority may determine that self-contained accommodation that is significantly smaller than the family would need in the long-term, given the size and make-up of the family, is suitable accommodation for, say, a period of months.

166. The Council accepts that the duty under section 193(2) cannot be deferred: the duty is owed immediately that the statutory criteria are satisfied. The Council also accepts that it is a duty to achieve an outcome (i.e. securing suitable accommodation), not a duty to take (reasonable) steps towards a goal.

167. However, the Council submits that section 193(2) contains no time limit within which a local housing authority is obliged to achieve the outcome of securing suitable accommodation for an applicant. The Council contends that the legislation should be not be interpreted in a way that puts a local housing authority automatically in breach, and reliant on the court refraining in its discretion from granting the applicant relief, if it has acted reasonably, and with reasonable expedition, in seeking to secure suitable accommodation, albeit it has not yet achieved the desired outcome. The Council submits that in the absence of an express time limit, the Parliamentary intention must have been to give local housing authorities a reasonable period (having regard to all the circumstances, including the availability – or lack of availability – of the type of accommodation sought) to secure suitable accommodation for those owed the main housing duty.

168. The Council seeks to derive support for this interpretation from section 206(1)(c) (see §146 above). Ms Cafferkey emphasises that a local housing authority may discharge its housing functions under Part VII by giving advice and assistance that "*will secure*" (i.e. in the future) suitable accommodation for the applicant. She submits that this shows that the outcome does not have to be secured immediately.

169. Subject to consideration of the relevant authorities, to which I turn next, for my part I agree with the claimants' submissions as summarised in §§163 to 165 above. In my judgment, section 206(1)(c) is not inconsistent with this conclusion. The ability to perform the duty by providing advice and assistance which will secure suitable accommodation for an applicant would only be inconsistent with the duty being immediate if it were anticipated that the duty would be performed by a single act of securing suitable accommodation. But that is not the case. The nature of the accommodation duties under Part VII is such that a local housing authority will often be looking for suitable accommodation in which to place an applicant in the future (or giving advice and assistance to enable him to secure such accommodation in the future) at the same time as it is performing the duty by (currently) securing accommodation that is suitable at that point in time. For example, the authority may be performing their duty by securing bed and breakfast accommodation for an applicant and, at the same time, recognising that such accommodation will only be suitable for the applicant for a brief period, it may provide advice and assistance to enable the applicant to secure alternative suitable accommodation. Or the local housing authority may give advice and assistance to a homeless applicant who is in a women's refuge which enables her to secure suitable accommodation at the point when she is ready to move into it.

170. Interpreting the duty as unqualified does not mean that the circumstances in which the local housing authority is seeking to perform its duty are relegated to be considered *only* at the relief stage. First, they are taken into account in determining whether a person is

homeless under section 175(3) (see §122 above). Second, the flexible concept of suitability imports considerations such as the length of time an applicant has been in a particular type of accommodation and the dearth of availability of the type of accommodation the applicant requires in the longer term. However, if the local housing authority has determined that the accommodation it has secured is unsuitable (that being a question for it, subject to appeal) then it follows from the unqualified nature of the duty that so long as the applicant remains in that unsuitable accommodation the authority will be in breach of the main housing duty.

Anderson, Sembi and Begum

171. In *Anderson*, the local housing authority had accepted that it owed the applicants the main housing duty under section 193(2). The two applicants were living, with the three daughters of the second applicant, in one bedroom accommodation which it was accepted was unsuitable. Over a period of 1 year and 9 months since it had accepted the main housing duty, the authority had made four offers of three bedroom accommodation each of which had been refused (although the applicants had expressed their willingness in principle to consider a three bedroom house). The authority had accepted that the first three offers had been unsuitable and the fourth offer was subject to an ongoing review. It is apparent that the authority was seeking to discharge its duty under section 193(2) by making a Part VI offer of permanent accommodation to the applicants: see pp.98-99.

172. Moses J said at p.97:

> "The real question in this case is whether it is correct to say that they have failed in their duty merely because such accommodation has, as yet, not been provided."

173. Section 193(2) has never been amended, but section 193(3) and (4) have been. At the time of *Anderson*, those provisions read:

> "(3) The authority are subject to the duty under this section for a period of two years ("the minimum period"), subject to the following provisions of this section. After the end of that period the authority may continue to secure that accommodation is available for occupation by the applicant, but are not obliged to do so (see section 194).
>
> (4) The minimum period begins with –
>
> (a) if the applicant was occupying accommodation made available under section 188 (interim duty to accommodate), the day on which he was notified of the authority's decision that the duty under this section was owed to him;
>
> (b) if the applicant was occupying accommodation made available to him under section 200(3) (interim duty where case considered for referral but not referred), the date on which he was notified under subsection (2) of the decision that the conditions for referral were not met;

> (c) in any other case, the day on which accommodation was first made available to him in pursuance of the duty under this section."

174. Moses J held at p.98:

> "The statutory scheme under the Housing Act shows that there is no time limit within which a housing authority is obliged under the statute to comply with a duty to secure available accommodation for those who fall within section 193. That is shown by reference to section 193(3) and (4) which identify a minimum period during which the authority is subject to the obligations to secure available accommodation under section 193(2) and identifies, in subsection (4), the starting date; the period is two years. Where that period has elapsed, there is a statutory obligation under section 194 to review the entitlement under section 193 after that period of two years."

175. In a significant passage, he continued at p.98:

> "The provisions within the Housing Act, which require housing authorities to put in place an allocations policy and to comply with that policy, are contained within Part VI of the Housing Act. They demonstrate that there will be those to whom a duty is owed under section 193 of the Act who will not be housed immediately or within any particular time limit. There may be those in respect of whom, the housing authority will be under an obligation, in accordance with their allocation policy, to give a greater priority.
>
> The very existence of an allocation scheme means that some will, unfortunately, have to wait longer than others. In this case, the applicants have been told, in correspondence, where they are on the housing list in relation to four bedroom properties." (emphasis added)

176. On the facts, Moses J rejected the contention that the authority was in breach of its duty under section 193(2).

177. In *Sembi* the applicant, who was aged 52 and physically disabled, applied for housing assistance at a time when she was not homeless, but was threatened with homelessness due to the imminent sale of her late brother's property, in which she lived but had no interest. The authority accepted that it owed her a duty under section 193(2) but did not immediately take active steps to secure alternative accommodation for her. About a month before the property was due to be sold, the applicant's solicitors wrote to the authority that she needed accommodation urgently. Having said that she did not want temporary accommodation, about two weeks before the house was due to be sold, she said she was prepared to accept interim accommodation. Two weeks later the authority secured temporary accommodation for the applicant in a home with 24 hour nursing care, which was occupied mainly by the old and terminally ill. The authority's position was

that this accommodation was suitable by way of interim provision but would not be suitable long-term accommodation.

178. Jowitt J said at p.443:

> "There is a single issue in this case before me, and that is whether or not the respondent has delayed in providing suitable longer term accommodation, to the point at which it becomes right to say it has simply failed to discharge the duty which it owes to Miss Sembi."

179. Counsel for Miss Sembi accepted that the authority was "*entitled to a reasonable time in which to make its investigations and seek to find suitable accommodation*". Jowitt J found help in dealing with the question in Moses J's judgment in *Anderson*. While acknowledging that the authority "*let some time slip by after accepting its duty*", Jowitt J held:

> "Bearing in mind the difficulties which a housing authority can face, and does in this case face, in finding accommodation which is suitable on a long or longer term basis for Miss Sembi, I find myself quite unable to say, even taking into account the earlier delay before sufficiently vigorous steps were taken, that the respondent has by now simply failed to discharge its duty to Miss Sembi which it owes to her under section 193 of the Act."

180. In *Begum* the applicants' household consisted of a married couple, their six children, the husband's 14 year old half-brother and the husband's mother. The authority accepted that they were owed the main housing duty. The family were initially housed in bed and breakfast accommodation and then in a four-bedroom house. Their circumstances changed as a result of an accident which left the husband's mother disabled and needing to use a wheelchair. The authority acknowledged that the four-bedroom property was unsuitable as it was overcrowded and not suitable for a wheelchair user. Five months after that acknowledgement, when the case was heard by Collins J, suitable accommodation for the family had yet to be secured.

181. Collins J rejected a submission made by the authority, relying on the (now superseded) terms of section 193(4)(c) (see §173 above) that "*Parliament must have intended that the duty under section 193 did not arise immediately*" (see p.813). Collins J observed at p.814:

> "It is important to remember at all times that the duty under Part VII of the 1996 Act is to house the homeless. It is to deal with those who are suddenly and through no fault of their own rendered homeless. It is not to provide them with permanent accommodation, but only with temporary. The two year period was chosen because it was anticipated that councils should be able within that time to provide permanent accommodation in their own stock after the applicant had been placed on the register which is required to be kept by section 162 of the Act (in Part VI) and which provides the only means whereby council accommodation can be provided. The discretion to extend the

> full housing duty beyond two years in section 194 was to cater for cases where two years was insufficient to obtain permanent accommodation."

(Section 193(3) no longer contains the two year "minimum period".)

182. Collins J continued:

> "It is essential to bear in mind that the duties under Part VI and Part VII are separate. That under Part VI relates to permanent accommodation and involves joining a queue. The Council must have an allocation scheme which gives reasonable preference to those who suffer various disadvantages: section 167(2). One such disadvantage, which has been added to the list by regulations made pursuant to section 167(3), is that of having been homeless. Many councils have a points scheme so that the more disadvantaged families can reach the top of the queue more quickly. But Part VII contains no such recognition that there may be a delay in complying with the duty."

183. Collins J accepted that the terms of sections 207 to 209 (as they then read) made plain that "*the housing duties under sections 188, 190, 200 and 193 cannot be deferred*": pp.814-816.

184. At p.816, Collins J said:

> "Newham, like most if not all the Inner London Boroughs, has appalling difficulties in finding accommodation for the homeless, particularly if there are problems such as a large family. It contends that it is doing its best and Parliament cannot have intended that it should be required to provide accommodation when it has none available. Accordingly, submits Mr Woolf, the duty must be construed as being one to make suitable accommodation available within a reasonable time and what is reasonable will depend upon the circumstances of each case and in particular upon whether the council has the necessary accommodation available.
>
> While I have considerable sympathy with the Council, I do not think that the qualifications which Mr Woolf submits are necessary can be read in to the words of the statute. Parliament has not qualified the duty in any way: it could have done. However, the situation for the council is not quite as desperate as might be thought. While the duty exists, no court will enforce it unreasonably. Mr Luba accepts that it would be unreasonable for an applicant to seek mandamus within a few days of the duty arising if it were clear that the Council was doing all that it could, nor, in its discretion, would a court make such an order. Indeed, permission would probably be refused. Furthermore, whether or not accommodation is suitable may depend upon how long it is to be occupied and what is available. It may be reasonable to

> expect a family to put up with conditions for a few days which would be clearly unsuitable if they had to be tolerated for a number of weeks. But there is a line to be drawn below which the standard of accommodation cannot fall. …
>
> However, the court must bear in mind that Parliament has not qualified the duty and must not be too ready to accept that the Council is taking all appropriate steps…" (emphasis added)

185. Collins J held that the authority could not show that it had done all that it could because it had adopted a policy which disabled it from having all possible accommodation available. The authority had taken the view, wrongly, that accommodation for those owed the main housing duty could not come from its housing stock because (the authority had thought) such stock was restricted to persons being allocated permanent housing under Part VI. Collins J observed at p.817:

> "I recognise that this approach may justifiably be said to be likely to prejudice those seeking permanent accommodation from a council and to favour the homeless. But that is what Parliament has in my judgment intended. The duty to house the homeless, albeit temporarily, is unqualified: that to provide permanent accommodation depends on joining a queue and the availability of such accommodation." (emphasis added)

186. In *Begum*, the authority relied on *Anderson* and *Sembi* in support of the submission that, notwithstanding it had not provided suitable accommodation, nevertheless it was not in breach of section 193(2). In respect of *Anderson*, having cited the passage which I have quoted in §175 above, Collins J held at p.818:

> "With the greatest respect to Moses J. that is to confuse two duties, the one under Part VI and the other under Part VII. It may be that the confusion arose because of the way counsel argued the case, but it is clear from the scheme of the Act that the Part VII duty is quite distinct from the authority's functions under Part VI. It may be that the conclusion in favour of Southwark was justified on the facts of the case because, having regard to what the council had done, no relief was appropriate in the exercise of the court's discretion. But the council was not complying with its duty under section 193 because no suitable accommodation had been provided since the duty arose in May 1997. Mr Luba has submitted that *Anderson's* case is no authority on the extent of the duty arising under section 193 since Moses J was apparently being pressed with a claim based on Part VI. That may be so, in which case anything said on the section 193 duty is *obiter*. But I am satisfied that, if Moses J. was intending to deal with the duty under section 193, he was wrong in what he said about it and so I need not follow his reasoning: see *R. v. Greater Manchester Council, ex p. Tal* [1985] Q.B. 67."

187. Collins J noted that in *Sembi* it was conceded that the authority was entitled to a reasonable time in which to make its investigations, and that Jowitt J had followed *Anderson*, then said at p.818:

> "It seems that the council had provided accommodation which it asserted was suitable. It is not entirely clear whether Jowitt J. accepted that it was suitable, but he certainly took the view that the applicant ought to have appealed to the County Court. This has enabled Mr Luba to submit that Jowitt J.'s observations were obiter. In any event, they rely on what in my view is an erroneous approach adopted by Moses J.
>
> It may be that the result in both *ex p. Anderson and ex p. Sembi* would have been the same whichever approach was adopted. The flexibility of the concept of suitability and the recognition by the court that it cannot order a council to do the impossible may mean that delay in providing accommodation which an applicant feels to be suitable will be tolerated. But the court must always bear in mind that Parliament has decided that the duty is unqualified and so should not be persuaded by alleged impossibility in finding suitable accommodation unless satisfied that all reasonable steps have been taken."

188. In *M v Newham*, Linden J said of *Anderson* and *Sembi* at [44]:

> "It is worth noting that both Moses J and Jowitt J appear to have been proceeding on the basis that the duty under s.193(2) is to find the applicant permanent suitable accommodation under Part VI. This may well have made them more sympathetic to arguments that the housing authority was to be given time to find such accommodation. They do not appear to have attached a great deal of weight to [the] possibility that the duty under Part VII may be discharged by the provision of accommodation which is suitable on a temporary basis. Had they done so, they might have been less receptive to arguments based on the difficulty of finding suitable alternative accommodation. In any event, I consider that *Ex p Anderson* and *Ex p Sembi* have been overtaken by the authorities discussed below, with which they are fundamentally inconsistent."

(The "*authorities discussed below*" to which Linden J referred were *Begum, Codona, Aweys* and *Birmingham v Ali*.)

189. Linden J observed at [52] that:

> "Collins J's analysis of the law did not preclude the possibility that a period of time would elapse between the authority's acceptance of the section 193(2) duty and the making available of alternative accommodation. But this was on the basis that the concept of suitability would, in appropriate cases, allow that the existing accommodation was "suitable" for a short period of time

> and that the authority therefore was not in breach. Even if the existing accommodation was not suitable, the court's discretion in relation to relief was sufficient to ensure that unreasonable orders were not made."

And see *M v Newham* at [74].

The parties' submissions regarding Anderson, Sembi and Begum

190. The claimants contend that it has long been recognised that *Anderson* and *Sembi* misstated the nature of the duty, and this was corrected in *Begum*. They submit that this court should follow *Begum* and *M v Newham.*

191. The Council contends that *Anderson* and *Sembi* were correctly decided. Ms Cafferkey relies on Moses J's analysis of the duty to secure accommodation as being subject to no time limit (see §174 above), which she submits is correct and has the effect that the duty is only breached if the authority fails to secure accommodation within a reasonable period. Ms Cafferkey submits that Collins J and Linden J were wrong to infer Moses J confused the duties under Part VI and Part VII or that he overlooked the fact that the section 193(2) duty could be performed by providing temporary accommodation.

192. Ms Cafferkey makes essentially the same submission as to the nature of the duty as was made by Mr Woolf on behalf of the authority in *Begum* and rejected by Collins J (see §184 above). In *Begum*, as the duty was owed for a "*minimum period*", the authority submitted that the duty – and the point at which the minimum period began – could be deferred, whereas Ms Cafferkey accepts the duty cannot be deferred, but she submits (as Mr Woolf did) that it is a duty to secure suitable accommodation for the applicant within a reasonable time.

My conclusions regarding Anderson, Sembi and Begum

193. Prior to the House of Lords decision in *R v Brent LBC ex p Awua* [1996] AC 55, the perception was that accommodation secured under section 65(2) Housing Act 1985 (the predecessor of section 193(2)) had to be permanent. Lord Hoffmann observed in *Awua* at 70B-D:

> "So p. 34, para. 11.2 of the Department of the Environment's Code of Guidance (Homelessness: Code of Guidance for Local Authorities, 3rd ed. (1991), Department of the Environment; Department of Health; Welsh Office) says: 'The legislation makes it clear that the accommodation secured must be long-term settled accommodation, commonly referred to as 'permanent." In *Reg. v. Brent London Borough Council, Ex parte Macwan* (1994) 26 H.L.R. 528, 534 Leggatt L.J. pointed out, in my view quite rightly, that this statement was wrong. The Act says nothing of the kind. But he felt constrained by the authorities to say that accommodation under section 65(2) 'does have to be secured without limit of time, and so . . . be indefinite.' Dillon L.J. said, at p. 536, that 'the accommodation to satisfy the council's duty must . . . be 'permanent' in the sense in which that term is used in the cases.'"

194. This understanding was fundamentally changed by the House of Lords in *Awua*. Lord Hoffmann (with whom the other members of the Judicial Committee agreed) said at 72B-F:

> "I would therefore hold that the duty of the local housing authority to an unintentionally homeless person in priority need under section 65(2) is simply to secure that accommodation becomes available for his occupation. Under the substituted section 69(1), the accommodation must be 'suitable,' but this does not import any requirement of permanence. In determining whether accommodation is 'suitable' the council is instructed to 'have regard to Part IX (slum clearance), X (overcrowding) and XI (houses in multiple occupation) of this Act.' This points to suitability being primarily a matter of space and arrangement, though no doubt other matters (such as whether the occupant can afford the rent) may also be material. But there is no reason why temporary accommodation should ipso facto be unsuitable. If the tenure is so precarious that the person is likely to have to leave within 28 days without any alternative accommodation being available, then he remains threatened with homelessness and the council has not discharged its duty. Otherwise it seems to me that the term for which the accommodation is provided is a matter for the council to decide. In some cases, such as a person in priority need because he is old, mentally ill or handicapped (section 59(1)(c)), the council may decide to provide permanent accommodation as soon as reasonably possible. In other cases, such as the pregnant woman in my earlier example, it may prefer to use temporary accommodation and wait and see. But provided that the decision is not *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd. v. Wednesday Corporation* [1948] 1 K.B. 233), I do not think that the courts should lay down requirements as to security of tenure." (emphasis added)

195. In my judgment, Collins J was right in *Begum* to find that in *Anderson*, Moses J had confused the duties under Part VI and Part VII, perhaps because the authority was seeking to discharge its Part VII duty solely by making offers of permanent accommodation under Part VI. Moses J did not refer to the possibility that the section 193(2) duty could be performed by securing temporary accommodation and there is no indication in his judgment that he was referred to *Awua* or made aware of this possibility.

196. In *Sembi*, at the point when the applicant became homeless (rather than threatened with homelessness) the authority provided her with temporary accommodation. By the time of the hearing before Jowitt J, she had been in that accommodation for just over two months. It was accommodation which the authority considered was currently suitable (albeit they acknowledged the need to look for alternative accommodation that would be suitable on a long-term basis), and the applicant had not requested a statutory review of its suitability. In my judgment, Jowitt J was right to find that the appropriate course was for the applicant to pursue her right to review of the suitability of the accommodation. However, insofar as he took the view that the authority was entitled to a reasonable time to find suitable accommodation this was based on the combination of a concession by

counsel, a misperception that the duty could only be performed by finding permanent or long-term accommodation and the erroneous analysis in *Anderson*.

197. I agree with the observations of Linden J in *M v Newham* regarding *Anderson, Sembi* and *Begum,* in particular at [44], [52] and [74] (see §§188 to 189 above).

Codona

198. In *Codona*, the applicant had appealed unsuccessfully to the county court against the authority's determination in a review decision that the bed and breakfast temporary accommodation she had been offered was suitable. The Court of Appeal considered her further appeal. The central issue in the appeal was (see [27]):

> "whether a local housing authority discharges its duty under the 1996 Act to secure suitable accommodation for a homeless gypsy caravan dweller, with an aversion to conventional "bricks and mortar accommodation", by offering her such accommodation in the form of temporary bed and breakfast accommodation."

199. Auld LJ (with whom Thomas LJ and Holman J agreed), addressed the authorities on the meaning of "suitability" at [33] *et seq*, in these terms:

> "33. The authorities suggest a number of basic propositions for the criteria of suitability of accommodation for offer to statutorily homeless persons. First, … "suitability" means … suitable as accommodation for the person or persons to whom the duty is owed.
>
> 34. Second, and contrary to Mr Harper's submissions on this point, the word, if it is to do its job adequately in this context, must have a broad meaning. It must, as a matter of common-sense encompass considerations of the range, nature and location of accommodation as well as of its standard of condition and the likely duration of the applicant's occupancy of it. …
>
> 35. But so also, individual cases, must the nature of the property, for example, whether it is [a] flat in a high rise block of flats or a house with stairs, or whether it is too small or too big for the applicant and his or her family. Similarly, it is obvious that location could be of great relevance to the suitability of accommodation offered to [a] particular applicant, for example, whether it is readily accessible to public transport or shops or schools or a local doctor, or whether it is in an area of high crime or racial harassment in respect of which the applicants, by reason of their race or religion might be particularly vulnerable.
>
> 36. Third, the duty to provide suitable accommodation is absolute in the sense that there is no statutory entitlement of, or duty on, a local housing authority, when determining suitability,

to have regard to its resources or general practicability of offering accommodation to homeless persons. …

37. Nevertheless, as Dyson J observed in *Ex p. Sacupima*, at [23] and [24] of his judgment, suitability is not itself an absolute concept. It may have various levels, though there is a *Wednesbury* minimum depending on the circumstances of each case, below which it cannot fall. In the following passage in para.24 (seemingly accepted by this Court on appeal ((2001) 33 HLR 18, per Latham LJ at [21], with whom Sir Murray Stuart-Smith and Henry L.J. agreed), he explained what he meant, citing in part from a judgment of Collins J in *R v Newham LBC Ex p. Ojuri (No.3)* (1998) HLR 452, at 461:

> "Although financial constraints and limited housing stock are matters that can be taken into account in determining suitability, '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."

38. And, fourth, where it is shown that a local housing authority has been doing all that it could, the court would not make an order to force it to do the impossible. Its duty was to secure the availability of suitable accommodation within a reasonable period of time, the reasonableness of that period depending on the circumstances of each case and on what accommodation was available. In *Ex p. Begum*, Collins J said, at 816:

> "… Parliament has not qualified the duty in any way: it could have done. However, the situation for the council is not quite so desperate as might be thought. While the duty exists, no court will enforce it unreasonably. Mr Luba [counsel for the applicant] accepts that it would be unreasonable for an applicant to seek mandamus within a few days of the duty arising if it were clear that the council was doing all that it could, nor, in its discretion, would a court make such an order. Indeed, permission would probably be refused."

39. It is plain from the reasoning of Collins and Dyson JJ in those cases that suitability in this context should be regarded as an elastic concept in that the line below which no reasonable authority could consider accommodation to be suitable in an individual case is the *Wednesbury* line."

200. In respect of *Codona*, the key dispute between the parties turns on the second sentence of [38]. The claimants contend that Auld LJ was here addressing the circumstances in which the court will make a mandatory order, rather than the nature of the duty. Although if they are wrong, they contend the point no longer stands in light of *Aweys* and *Birmingham v Ali*. The Council submits that Auld LJ meant what he said: the duty is to secure the availability of accommodation within a reasonable time. And this is reinforced, not undermined, the Council submits, by *Birmingham v Ali*.

201. Although I readily acknowledge that the paragraph could be read in the way the Council contends, I am of the view that Auld LJ was addressing the threshold for the grant of relief in circumstances where a local housing authority has not secured suitable accommodation for an applicant who is owed the main housing duty. Auld LJ began the section at [33] by indicating that he was drawing a number of propositions from the authorities to which he proceeded to refer. The fourth of these propositions is stated in the first sentence of [38] which concerns relief: the court will not order a local housing authority to do the impossible. The implication is that Auld LJ is approving the passage drawn from *Begum* that is quoted in [38] and drawing his fourth proposition from it. That passage includes Collins J's statement that the duty is unqualified and then addresses relief. Auld LJ could not have drawn from *Begum* the proposition that the duty is to secure accommodation within a reasonable time as that is precisely the submission that Collins J rejected in the clearest of terms. Moreover, as this was an appeal in circumstances where the authority had determined that the accommodation it had offered was suitable, no question as to the time within which suitable accommodation must be secured arose. As I read the passage, Auld LJ was expanding his statement that the court will not force an authority "*to do the impossible*" by saying that, in considering what (if any) relief to grant where an applicant who is owed an accommodation duty is in unsuitable accommodation, the court will not require an authority to do more than secure the availability of suitable accommodation within a reasonable time.

Aweys/Birmingham v Ali

202. In *Aweys* the Court of Appeal considered six cases in which the applicant had applied to Birmingham City Council for housing assistance under Part VII. The claims had been heard at first instance by Collins J: [2007] HLR 27. On appeal to the House of Lords, the case became known as *Ali v Birmingham.* In each case, the Council accepted it owed the applicants the main housing duty.

203. When the appeal was heard by the Court of Appeal in October 2008, three of the applicants remained in unsuitable accommodation:

    i) Mr Ali lived with his wife and four children. He was registered disabled and one of his children was severely disabled. The Council accepted it owed him the main housing duty in June 2002. Six months later he was provided with a three bedroom property which he accepted, whilst challenging its suitability given his and his child's disabilities. In July 2003, the Council conceded their accommodation was unsuitable. More than five years later, Mr Ali remained in the same accommodation that the Council had accepted was unsuitable.

    ii) Mrs Abdulle and her husband lived with their six children. The Council accepted it owed her the main housing duty in March 2003. The family stayed with friends in grossly overcrowded conditions until October 2003 when, following threats of

an application for injunctive relief, the Council provided her with temporary accommodation. In June 2004, the Council offered her a three-bedroom property which she accepted, while seeking a statutory review of its suitability. The Council accepted that the duty remained undischarged. Her seventh child was born in August 2005. By October 2008, 4½ years later, Mrs Abdulle was still waiting for an offer of suitable accommodation.

iii) Mr Adam lived with his wife and five children in a two bedroom flat on the fourteenth floor of a block. In November 2005 the Council acknowledged that he was owed the main housing duty. His sixth child was born in February 2007. After the proceedings at first instance, in April 2007, he was offered accommodation which he accepted while seeking a review of its suitability. The review decision accepted the premises were unsuitable but he was still waiting, by October 2008, for an offer of suitable accommodation.

By the time the appeal reached the House of Lords, each of these applicants' cases had been resolved with the offer of suitable accommodation.

204. The other three applicants' cases had already been resolved by the time the appeal reached the Court of Appeal:

iv) Mr Aweys, his wife and six children remained living in a two-bedroom flat on the eighth floor of a block for about 16 months from when the main duty was accepted and 28 months from when he first sought to apply for assistance.

v) In Miss Sharif's case, 11 people were living in a three-bedroom flat. She was offered suitable permanent accommodation within 10 months of the main duty being accepted.

vi) Ms Omar lived with her seven children. She made a homelessness application in July 2004 based upon overcrowding, rat infestation and damp. The main housing duty was finally accepted in May 2006 and after a delay of 15 months she was suitably housed.

205. The Council

> "applied a fixed policy to all those found homeless by operation of section 175(3) that they should wait until they were made an offer at some indeterminate future date of an alternative and long-term home usually under Part VI of the 1996 Act in order to discharge its duty under section 193" (Aweys, [26]).

206. At first instance, Collins J equated the question whether accommodation is reasonable to continue to occupy (section 175(3)) with the question whether it is suitable accommodation (section 206(1)). He held (see *Aweys*, [27]):

> "For the homeless at home, their existing accommodation can never be regarded as suitable, even for a short time, since they are only homeless if it is not reasonable to expect them to continue to live there."

He made mandatory orders that within a week the Council make offers of suitable accommodation to the families who did not yet have it.

207. The Court of Appeal dismissed the Council's appeal. The argument "*ranged widely*" (*Aweys*, [35]) but Ward LJ took the view that he should confine his judgment to the "*narrow question*"

> "is it a lawful discharge of the council's duty under section 193(2) to leave a homeless family in the accommodation they were occupying in circumstances where they were found to be homeless because it would not be reasonable for them to continue to occupy those very premises?" (*Aweys*, [36]).

Ward LJ held that "*the answer to that question is, 'No'*". He reasoned that the duty under section 193(2) is to secure that "*accommodation*" is available for occupation by the family. The words "*accommodation available for occupation*" in section 175(1) and 193(2) must bear the same meaning in both sections.

> "Thus if it is not accommodation for section 175(1) purposes in determining whether or not they are homeless it cannot be accommodation for section 193(2) purposes for discharging the obligation there imposed." (*Aweys*, [37])

208. Arden LJ agreed with Ward LJ, save to the extent that she considered it necessary to address the further question as to the time within which the duty under section 193(2) may be performed (*Aweys*, [61]); and Smith LJ agreed with both judgments (*Aweys*, [72]). Arden LJ held:

> "62. <u>The core duty in section 193(2) is not qualified by any expression defining the time within which the duty is to be performed. Moreover, the duty is not qualified by some such word as "forthwith". Equally, it is not watered down by some such words as "as soon as possible". Nor is the duty expressed in terms of best endeavours or taking reasonable steps: cf section 195(2) set out in para 10 above</u>.
>
> 63. We were referred to *Codona v Mid-Bedfordshire District Council* [2005] LGR 241. In that case, this court held, applying the earlier decision of Collins J in *R v Newham London Borough Council, Ex p Mashuda Begum* [2000] 2 All ER 72 that the court would not make an order to force a local authority to do the impossible: see para 38, per Auld LJ, with whom Thomas LJ and Holman J agreed. This court added that the duty of the authority "was to secure the availability of suitable accommodation within a reasonable period of time, the reasonableness of that period depending on the circumstances of each case and on what accommodation was available".
>
> 64. This would mean that the local authority only had to provide accommodation under section 193(2) within a reasonable time. However, <u>the point did not arise for decision and is therefore not</u>

> binding on this court. Moreover, this court was stating propositions suggested by the decided authorities and did not expressly state that they were going no further than Collins J had done in *Ex p Begum*, the only authority cited on the point now under scrutiny. In all the circumstances, I consider that the passage I have cited neither prevents nor should persuade this court from coming to a different conclusion.
>
> 65. In my judgment, the key point is that section 193(2) is expressed in terms of producing a result, namely securing accommodation to be made available. Because the duty is expressed in terms of securing a result, and the context is homelessness, which of its nature requires some urgent action, I do not consider that there can properly be an implication into the statute that it is sufficient to comply with the duty imposed by section 193(2) within a reasonable time. However, I would not (at least without further argument) rule out the possibility that the court may decline to make a mandatory order against a local authority to perform its duty to secure accommodation for an applicant in a case where the local authority is placed in what is in effect an impossible situation: see *Ex p Begum*." (emphasis added)

209. In *Birmingham v Ali*, the House of Lords considered the six Birmingham cases together with *Moran v Manchester City Council* in which the applicant had moved, with her two children, into a women's refuge, as a result of domestic violence, and subsequently sought accommodation under Part VII when she was evicted from the refuge for her behaviour. Baroness Hale gave the leading opinion, to which Lord Neuberger contributed, and with which all members of the Judicial Committee agreed. The first issue for the House was

> "whether accommodation which it is not reasonable to expect the applicant to continue to occupy can nevertheless be suitable accommodation for the purposes of the duty under section 193(2)" (Birmingham v Ali, [27]).

210. The House of Lords interpreted section 175(3) broadly and so broke the (perceived) correlation between reasonableness to continue to occupy and suitability of accommodation. Baroness Hale addressed the meaning of section 175(3) in these terms:

> "34. … Does section 175(3) mean that a person is only homeless if she has accommodation which it is not reasonable for her to occupy another night? Or does it mean that she can be homeless if she has accommodation which it is not reasonable for her to continue to occupy for as long as she would occupy it if the local authority did not intervene?
>
> 35. The Court of Appeal in the Manchester case, the courts below in the Birmingham case, and perhaps other courts before them, have assumed that the former is the case: that section 175(3) is concerned with the reasonableness of present occupation.

> Obviously, once it is unreasonable for the person to stay there one more night, section 175(3) is met; the person is homeless and cannot be intentionally homeless if she leaves.
>
> 36. However, the language suggests that both sections 175(3) and 191(1) are looking to the future as well as to the present. They do not say "which it *is* reasonable for him to occupy" or "which it *was* reasonable for him to occupy". They both use the words "continue to". This suggests that they are looking at occupation over time. This suggestion is reinforced by the words "would be" and "would have been". These again suggest an element of looking to the future as well as to the present. They contrast with section 177(1) which provides that "it is not reasonable" to continue to occupy accommodation where there is a risk of violence.
>
> 37. These linguistic reasons are reinforced by the policy of the Act. The words defined in section 175 are "homeless" and "threatened with homelessness". The aim is to provide help to people who have lost the homes to which they were entitled and where they could be expected to stay. Section 175(3) was introduced for a case like the Puhlhofers (*R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484), who could no doubt have been expected to stay a little while longer in their cramped accommodation, but not for the length of time that they would have to stay there if the local authority did not intervene.
>
> 38. In the Birmingham case, this interpretation has the advantage that the council can accept that a family is homeless even though they can actually get by where they are for a little while longer. The council can begin the hunt for more suitable accommodation for them. Otherwise the council would have to reject the application until the family could not stay there any longer. …
>
> 40. … the combination of section 188(1) and section 206(1) means that the council's interim duty under section 188 is to provide "suitable" accommodation. If an applicant is occupying accommodation which it is unreasonable for him to continue occupying for even one night, it is hard to see how such accommodation could ever satisfy section 188(1). Section 175(3) obviously includes such cases but does not have to be limited to them." (emphasis added)

211. Baroness Hale observed (at [43]) that, in the Manchester case, "*this interpretation has the advantage that a woman who has lost her home because of domestic violence remains homeless even though she has a roof over her head in the refuge*". Having noted that when *R v Ealing LBC ex p Sidhu* 80 LGR 534 was decided section 175(3) had not yet been enacted and so the only tool available to enable the judge to decide that Mrs Sidhu (who had found temporary shelter in a women's refuge) remained homeless was to determine that the refuge was not "*accommodation*", Baroness Hale continued:

> "46. However, another tool is now available and in our view it is proper for a local authority to decide that it would not be reasonable for a person to continue to occupy the accommodation which is available to him or her, even if it is reasonable for that person to occupy it for a little while longer, if it would not be reasonable for the person to continue to occupy the accommodation for as long as he or she will have to do so unless the authority take action."

212. Baroness Hale addressed the impact of this analysis on the duty under section 193(2) and the question of suitability in these terms:

> "41. This then feeds into the duty under section 193. As Lord Hoffmann said in *R v Brent London Borough Council, Ex p Awua* [1996] AC 55, 68:
>
> > "there is nothing in the Act to say that a local authority cannot take the view that a person can reasonably be expected to continue to occupy accommodation which is temporary … the extent to which the accommodation is physically suitable, so that it would be reasonable for a person to continue to occupy it, must be related to the time for which he has been there and is expected to stay."
>
> Those observations were directed to the question of when it ceases to be reasonable for a person to continue to occupy accommodation in the context of the meaning of "accommodation", but they apply equally to the point at issue here.
>
> 42. Given that an authority can satisfy their "full" housing duty under section 193(2) by providing temporary accommodation (which must of course be followed by the provision of further accommodation, so long as the section 193(2) duty survives), these observations clearly do not only apply to section 188. They emphasise that accommodation which may be unreasonable for a person to occupy for a long period may be reasonable for him to occupy for a short period. Accordingly, there will be cases where an applicant occupies accommodation which (a) it would not be reasonable for him to continue to occupy on a relatively long-term basis, which he would have to do if the authority did not accept him as homeless, but (b) it would not be unreasonable to expect him to continue to occupy for a short period while the authority investigate his application and rights, and even thereafter while they look for accommodation to satisfy their continuing section 193 duty.
>
> …
>
> 47. This does not mean that Birmingham were entitled to leave these families where they were indefinitely. Obviously, there

would come a point where they could not continue to occupy for another night and the council would have to act immediately. But there is more to it than that. It does not follow that, because that point has not yet been reached, the accommodation is "suitable" for the family within the meaning of section 206(1). There are degrees of suitability. What is suitable for occupation in the short term may not be suitable for occupation in the medium term, and what is suitable for occupation in the medium term may not be suitable for occupation in the longer term. The council seem to have thought that they could discharge their duty under section 193(2) by putting these families on the waiting list for permanent council accommodation under their Part VI allocation scheme. But the duty to secure that suitable accommodation is available for a homeless family under section 193(2) is quite separate from the allocation of council housing under Part VI. There are many different ways of discharging it, and if a council house is provided, this does not create a secure tenancy unless the council decides that it should. As we have already pointed out, the suitability of a place can be linked to the time that a person is expected to live there. Suitability for the purpose of section 193(2) does not imply permanence or security of tenure. Accommodation under section 193(2) is another kind of staging post, along the way to permanent accommodation in either the public or the private sector.

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

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

213. Addressing the approach to be adopted by the court, Baroness Hale said:

> "50. It is right to face up to the practical implications of this conclusion. First, there is the approach to be adopted by a court, when considering the question whether a local housing authority have left an applicant who occupies "accommodation which it would [not] be reasonable for him to continue to occupy" in that accommodation for too long a period. The question is of course primarily one for the authority, and a court should normally be slow to accept that the authority have left an applicant in his unsatisfactory accommodation too long. In a place such as Birmingham, there are many families in unsatisfactory accommodation, severe constraints on budgets and personnel, and a very limited number of satisfactory properties for large families and those with disabilities. It would be wrong to ignore those pressures when deciding whether, in a particular case, an authority had left an applicant in her present accommodation for an unacceptably long period.
>
> 51. None the less, there will be cases where the court ought to step in and require an authority to offer alternative accommodation, or at least to declare that they are in breach of their duty so long as they fail to do so. While one must take into account the practical realities of the situation in which authorities find themselves, one cannot overlook the fact that Parliament has imposed on them clear duties to the homeless, including those occupying unsuitable accommodation. In some cases, the situation of a particular applicant in her present accommodation may be so bad, or her occupation may have continued for so long, that the court will conclude that enough is enough."

214. Lord Hope gave a short opinion in which he agreed with the opinion of Baroness Hale, to which Lord Neuberger had contributed, and added this:

> "3. I wish also to associate myself particularly with Baroness Hale's observation, in para 36, that both sections 175(3) and 191 look to the future as well as the present. I would make the same point about the duty in section 193(2), which requires the housing authority to secure that accommodation "is available for occupation by the applicant". The equivalent provision in section 31(2) of the Housing (Scotland) Act 1987 uses the phrase "becomes available". In my opinion the effect of these two provisions is the same. In *Codona v Mid-Bedfordshire District Council* [2005] LGR 241, para 38 Auld LJ said that the duty of the authority was to secure the availability of suitable accommodation within a reasonable period of time, the reasonableness of the period depending on the circumstances of each case and on what accommodation was available. Collins J took a different approach in the Birmingham case: *R (Aweys) v Birmingham City Council* [2007] HLR 394. He said that it was a breach of the authority's duty for it to require families to remain

> in unsuitable accommodation even for a short time. I prefer the approach which Auld LJ adopted. But Collins J recommended discussion leading to agreement, not compulsion.
>
> 4. In the Court of Appeal Arden LJ disagreed with the way the duty was expressed in Codona: *R (Aweys) v Birmingham City Council* [2008] 1 WLR 2305, paras 62–65. She said that the duty in section 193(2) was expressed in terms of producing a result in the context of homelessness, which of its nature requires some urgent action. But the words of the subsection need to be seen in their overall context. The urgency of the action that is needed will vary from case to case, including the way the authority fulfils its interim duty under section 188(1). Each of these two duties needs to be seen in the light of what can be done in the performance of the other. There may be cases where it would not be unreasonable for a homeless person to be expected to continue to occupy for a short period accommodation which it would not be reasonable for him to occupy for a long time while the authority looks for accommodation which will release it from its duty under section 193(2). I agree with Baroness Hale that the court must have regard to the practicalities of the situation. As Auld LJ said in *Codona*, at para 38, the court will not make an order to force a local authority to do the impossible. On the other hand it may well feel that it is proper for it to step in where the time that is allowed to elapse becomes intolerable. The point which I wish to stress is that the description of the duty in *Codona* is, with respect, the one that should be adopted in preference to that recommended by Arden LJ." (emphasis added)

215. Only Lord Scott expressed agreement with Lord Hope's opinion (at [5]). Baroness Hale, Lord Neuberger and Lord Walker did not do so.

216. In *M v Newham*, Linden J observed at [74] that Baroness Hale's approach "*was essentially the approach of Collins J in Ex p Begum [2000] 2 All ER 72 which recognised that the flexibility of the concept of suitability could allow for alternative accommodation not to be offered immediately*". While acknowledging "*what are arguably areas of uncertainty*" arising from the authorities ([84]), Linden J concluded:

> "92. *Second*, I respectfully prefer the approach of Collins J in *Ex p Begum* [2000] 2 All ER 72 and of the Court of Appeal in the *Birmingham City Council* case [2008] 1 WLR 2305 at least in so far as they held or implied that, once it is accepted or established that the accommodation currently occupied by the applicant is not suitable, the housing authority which owes the applicant a section 193(2) duty will be in breach of that duty. As Arden LJ (as she then was) pointed out, the statutory duty is not to make suitable accommodation available "within a reasonable time" although the considerations which go to the question whether the housing authority has acted within a reasonable time may be relevant to relief. I appreciate that this *may* be contrary to what

> Auld LJ said at para 38 of his judgment in *Codona* [2005] LGR 241 but, as I have pointed out, he made his remarks in the context of a discussion of the concept of "suitability", which was the issue in that case, rather than the issue being as to the reasonableness of a delay in facilitating a move out of unsuitable accommodation. And, given that he agreed with what Collins J said about the concept of suitability in *Ex p Begum*, it is not absolutely clear whether he was describing the circumstances in which breach of statutory duty will be established or the approach which would be taken to the question of relief once it has been.
>
> 93. Similarly, I appreciate that Lord Hope expressly endorsed Auld LJ's "description of the duty" and Lord Scott agreed with Lord Hope. But they also agreed with Baroness Hale's opinion. In my judgment it was implicit in Baroness Hale's approach that reasonable delay in finding alternative accommodation would only be permissible if the accommodation was regarded as suitable for the time being, and that the housing authority would otherwise be in breach of its duty under section 193(2). Had the House of Lords considered that the duty is merely to make suitable accommodation within a reasonable time, Baroness Hale would surely have said so. Instead, as I have pointed out, the analysis in relation to the issue of principle was based on the question whether or not the existing accommodation could be regarded as "suitable", so that the authority was in fact discharging its statutory duty, and the premise for the discussion was that, if it could not be so regarded, the housing authority would be in breach." (emphasis added)

217. Linden J recognised that a housing authority may decide that an applicant's current accommodation is such that they are homeless whilst, at the same time, deciding that the accommodation is suitable on a short-term basis. However, he concluded that where, as the authority had done in that case, they decided, in accordance with the relevant statutory review procedure, that the accommodation is *not* suitable, the authority could not maintain that it was discharging its obligation to make suitable accommodation available to the applicant while leaving them in that very accommodation (*M v Newham*, [88]).

218. Linden J continued:

> "89 I appreciate that this is not the only possible reading of the decision of the House of Lords. As pointed out above, three of the *Birmingham City Council* cases were ones in which the housing authority had accepted, in the context of a statutory review procedure, that the claimant's current accommodation was not "suitable". Baroness Hale might therefore have said that, on any view, the council's appeal in those cases succeeded [*sic. Linden J must, it seems to me, have meant "failed"*]. She did not. Indeed, as noted above, she specifically commented on one of those three cases, *Ali*, and indicated that he may well have established that his present accommodation was unsuitable, not

> on the basis that the council accepted that it was, but on the basis that he had been in the accommodation for too long.
>
> 90. In my judgment, however, the House of Lords made clear that it was confining itself to deciding the key issues of principle given the way in which the *Birmingham City Council* case had been argued below and that it would not decide the appeals on the basis of the particular facts of each case or any arguments which were not run below. The claimants had apparently *not* argued, in the alternative, that they should win on the facts in the event that the council was not automatically in breach by virtue of having failed to secure suitable alternative accommodation whilst accepting that the claimants were homeless. Nor does it appear that the claimants had argued that the council was bound by its admission of unsuitability in the three relevant cases. This may well be because, at the time of the council's decisions in these cases, the difference between the concepts of "homelessness" and "suitability" which the House of Lords identified had not been sufficiently clearly established in law, so that the council's admissions could not fairly be regarded as binding. In any event, whatever the reasons for the claimants' approach, as noted above Baroness Hale made clear that it was not open to them to succeed on any basis other than winning the issue of principle."

The parties' submissions regarding Aweys/Birmingham v Ali

219. The claimants contend that Arden LJ was correct in her analysis of the section 193(2) duty and that this formed part of the *ratio decidendi* of the Court of Appeal's judgment in *Aweys.* Further, the claimants submit that Linden J was right, in *M v Newham*, to find that Baroness Hale implicitly adopted the same approach. Lord Hope's rejection of Arden LJ's analysis of the nature of the duty reflects the view only of the minority and so does not bind this court.

220. The Council submits that Lord Hope's conclusion regarding the nature of the duty represents the view of the Judicial Committee. Ms Cafferkey relies, in particular, on paragraph 49 of Baroness Hale's opinion in which she suggested that the question of breach would depend on a "*critical examination of the facts*". She submits that as the Council had *conceded* that the accommodation was unsuitable in several of the joined cases, it must follow that the fact that the Council had not secured suitable accommodation for those applicants did not *automatically* put the Council in breach of its duty. Ms Cafferkey contends that the reason for this must be that the Council was entitled to a reasonable time to secure suitable accommodation.

221. In response to this point, the claimants rely on Linden J's analysis which I have cited in §218 above).

My conclusions regarding Aweys/Ali v Birmingham

222. It is correct that in the case of Mr Ali, the Council had conceded in July 2003 that the accommodation was unsuitable. Indeed, it is apparent from the judgment of Collins J that

that concession had been made in a consent order: see [2007] HLR 27 at p.414. However, no such concession was made at first instance in any of the other cases. In Mrs Abdulle's case, the Council acknowledged that it had not discharged its duty, but it did not acknowledge or decide that (for the time being) the accommodation was unsuitable: see [2007] HLR 27 at p.410. Indeed, the Council argued the contrary. In Mr Adam's case, a formal concession of unsuitability was made in the context of review proceedings, but it was only made after the hearing before Collins J (and, indeed, in respect of accommodation that was only offered after the first instance hearing).

223. The cases were argued at every level on the basis that accommodation that it was not reasonable to continue to occupy could not, in principle, be suitable accommodation, whether because it was incapable of being regarded as "*suitable*", even for a short time, or because it could not be regarded as "*accommodation*". The only applicant who could have made an alternative argument at first instance, on the facts, that the Council had *determined* his accommodation was unsuitable and was bound by that conclusion, was Mr Ali. There is no indication in Collins J's judgment that any such argument was made before him and, in any event, it is clear that before the Court of Appeal and the House of Lords the issue was argued as a pure question of law.

224. It is unsurprising, in these circumstances, that Baroness Hale held that once the applicants failed on the point of principle, there was no alternative basis on which the House of Lords could find in favour of any of them. Subject to what I have said about the number of cases in which the Council had made a concession of unsuitability, I agree with the view expressed by Linden J at [89]-[90] (see §218 above). Given that the way the cases were argued "*meant that it was unnecessary* [for the House of Lords] *to consider the detailed facts of their respective cases*" (*Birmingham v Ali*, [49]), in my view, the fact that a finding of breach was not made in Mr Ali's case, despite the concession that he was in unsuitable accommodation, does not show that Baroness Hale considered the duty is to secure suitable accommodation within a reasonable time.

225. On the contrary, if Baroness Hale (and Lords Neuberger and Walker) had agreed with Lord Hope's description of the nature of the duty, they would surely have said so. They did not. I agree with Linden J that it is implicit in Baroness Hale's approach that reasonable delay in finding *alternative* accommodation would only be permissible if the *current* accommodation is regarded as suitable for the time being (see, especially, *Birmingham v Ali*, [47]). The practical considerations to which Baroness Hale referred are reflected in the flexibility of the concept of suitability, and in particular the recognition that there is a temporal element to the assessment of suitability. However, as Baroness Hale made clear at [47], accommodation may be unsuitable even if it cannot be said that the applicant cannot continue to occupy it for another night.

226. Even if I am wrong to interpret Baroness Hale's opinion as *positively* supporting the conclusion that section 193(2) duty is immediate and unqualified, in my view, it is clear that a majority of the Judicial Committee did not disapprove of the analysis of section 193(2) as an immediate, unqualified duty. If the majority did not determine the nature of the duty, then I am bound by Arden LJ's analysis. As she considered it a necessary part of her decision, and Smith LJ agreed with her, I reject the Council's contention that it was *obiter*.

227. Although, on my analysis, there is something of an inconsistency between Lord Hope's agreement with Baroness Hale's opinion and his own description of the nature of the

duty, nonetheless, I accept Ms Cafferkey's submission that Lord Hope plainly analysed the duty as being to secure suitable accommodation within a reasonable period of time. For the reasons I have given, I consider that I am bound by the contrary conclusion reached by the majority in the House of Lords, or if they did not determine the point, by the conclusion of the majority of the Court of Appeal. In any event, in the absence of binding authority, I respectfully prefer Arden LJ's analysis of the duty. Lord Hope's reasoning – that "*there may be cases where it would not be unreasonable for a homeless person to be expected to continue to occupy for a short period accommodation which it would not be reasonable for him to occupy for a long time while the authority looks for accommodation which will release it from its duty under section 193(2)*" ([4]) – supports a flexible approach to the concept of suitability, as elucidated by Baroness Hale. It does not lead to the conclusion that, allowing for such a flexible approach, the duty should also be interpreted as qualified in the way described by Lord Hope.

Conclusion on issues (1) and (2)

228. In conclusion, I accept the claimants' submission that the duty under section 193(2) to secure suitable accommodation is immediate, unqualified and non-deferrable. It follows that if the duty is owed to an applicant, and the local housing authority fails to secure suitable accommodation for him, the authority will be in breach of its duty. I reject the Council's submissions that *M v Newham* is wrong and that the duty is to secure suitable accommodation within a reasonable time

H. ***Elkundi*, *Ahmed* and *Ross*: Did the Council decide their accommodation was unsuitable?**

229. The Council submits that in considering each of the decision letters in this case I should apply the guidance given by Lord Neuberger in *Holmes-Moorhouse v Richmond Upon Thames LBC* [2009] UKHL 7, [2009] 1 WLR 413 at [46] to [51]. In particular, the Council emphasises the following passages:

> "47. However, a judge should not adopt an unfair or unrealistic approach when considering or interpreting such review decisions. Although they may often be checked by people with legal experience or qualifications before they are sent out, review decisions are prepared by housing officers, who occupy a post of considerable responsibility and who have substantial experience in the housing field, but they are not lawyers. It is not therefore appropriate to subject their decisions to the same sort of analysis as may be applied to a contract drafted by solicitors, to an Act of Parliament or to a court's judgment.
>
> …
>
> 49. In my view, it is therefore very important that, while circuit judges should be vigilant in ensuring that no applicant is wrongly deprived of benefits under Part VII of the 1996 Act because of any error on the part of the reviewing officer, it is equally important that an error which does not, on a fair analysis, undermine the basis of the decision, is not to be accepted as a reason for overturning the decision.

> 50. Accordingly, a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision. That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions." (emphasis added)

230. The claimants do not demur, and I accept that in considering the Council's decisions in each case I should follow this guidance.

Elkundi: the parties' submissions

231. Mr Nabi submits that it is impossible to read the review decision in *Elkundi* as anything other than a decision that since 3 January 2020 the Council has accepted that the temporary accommodation it has been providing to Mr Elkundi and his family, pursuant to section 193(2), is unsuitable. He submits that this case is similar to *M v Newham* in which Linden J rejected a similar contention as to the meaning of the review decision to that made by the Council in this case: see *M v Newham* at [15] and [86]-[87].

232. The Council submits that read as a whole and benevolently, and having regard to the evidence to which I refer in §§233 to 236 below, the decision meant that the accommodation was currently, and in the short-term, suitable, but it was unsuitable in the long term. Suitability is not a binary concept, as the judgment of Baroness Hale in *Birmingham v Ali* demonstrates. Mr Kennelly was saying that Mr Elkundi was to remain where he was while alternative accommodation was secured for him, whereas if Mr Kennelly had considered the accommodation was immediately unsuitable he would have arranged for the family to be accommodated in bed and breakfast accommodation. Ms Lovegrove relies on the fact that the letter made express reference to the right of appeal in support of his submission that a (partially) adverse decision was made on this review.

233. In a witness statement dated 6 March 2020 (filed in *Elkundi*), Ms Pumphrey gave evidence at (§35) that the reason the family were left at No.40 was because the Council

> "believed that it would be better for this family to remain where they are rather than to go into bed and breakfast accommodation which could have been anywhere in the city. It is noted that the Claimant wants accommodation as near as possible to Tyseley as his children attend schools in that area. However, we do not have any housing stock available in that area. The only option would be Travelodge and this would depend upon availability on the day. Further, the Claimant and his family would not be able to take all of their belongings to Travelodge but would have to place these into storage."

234. Ms Pumphrey continued:

> "40. The Council has not delayed in finding accommodation for this family. We have searched our own stock, as well as asked

> private landlords. There is simply nothing suitable for this family of seven. The family could be placed in bed and breakfast accommodation however, we would rather keep the family in a self-contained home rather than place them into such accommodation.
>
> 41. I have spoken to Grant Kennelly the review decision maker and it is apparent from those discussions that his determination that the property was unsuitable due to medical conditions was not intended to be a finding that the property was immediately unsuitable such that the authority was in breach of its duty. The decision was made in order to start the process of finding alternative accommodation but it is not considered that the property is unsuitable for the applicant to remain in for the short-term whilst those searches are carried out. The review decision therefore answers one of two issues: the first being whether the property is unsuitable in the long term such that searches should be carried out for alternative accommodation; the second being whether the family should stay there pending the securing of that accommodation. Mr Kennelly was addressing the first issue. It is the authority's position that Mr Elkundi can stay at the current property in the interim period whilst that accommodation is found." (emphasis added)

235. In a witness statement dated 27 November 2020 (filed in *Elkundi*), Ms Bell gave evidence:

> "On 3.1.20, the Council concluded that the property was unsuitable on medical grounds only, because its OT and medical advisor recommended that Mr Elkundi could not manage more than 1-2 steps access." (emphasis added)

236. In a witness statement dated 11 December 2020 (filed in *Elkundi*), Mr Kennelly gave evidence as follows:

> "2. I want to clarify firstly that my decision that Mr Elkundi's temporary accommodation was unsuitable for his household, dated 3 January 2020, was on the sole basis that the accommodation did not meet Mr Elkundi's mobility needs as confirmed by the Council's Occupational Therapist.
>
> 3. Furthermore, in the letter where I stated that Mr Elkundi's accommodation was unsuitable, I did not mean that the accommodation was immediately unsuitable. I considered that he could remain at the accommodation in the short term until alternative accommodation had been identified. I set out in my letter that I had notified the temporary accommodation team of my conclusion and had requested that alternative temporary accommodation be identified as soon as possible. In making this recommendation, I was aware of the large family size and the number of bedrooms required and of the fact that alternative

> accommodation would most likely not be available when my decision was made.
>
> 4. If I had felt that the accommodation was immediately unsuitable for Mr Elkundi to occupy even for the short term until alternative accommodation could be identified, rather than adding his household to the "planned move" list for alternative temporary accommodation to be identified in due course, I would have emailed the manager of the temporary accommodation team and requested that the household be moved immediately, irrespective of whether the only accommodation available at this time was bed and breakfast or similar.
>
> …
>
> 6. In my letter of 3 January 2020, I also attempted to manage Mr Elkundi's expectations by setting out the pressures on the Council's temporary accommodation availability which would likely result in him having to wait for alternative accommodation to be identified." (emphasis added)

237. Mr Nabi relies on *R v Westminster City Council, ex p Ermakov* (1996) 28 HLR 819 in support of his submission that the court should not permit the Council to rely on Mr Kennelly's statement or §41 of Ms Pumphrey's statement in *Elkundi*. This is post-decision evidence, prepared after judicial review proceedings were issued (and not even foreshadowed in the response to the letter before claim), which seeks to change the statutory review decision. Mr Nabi submits that it is critical that the Council should not be permitted to alter its decision by reference to post-decision evidence because, if the decision had been that the accommodation was suitable, Mr Elkundi would have exercised his right, within the 21 day time limit, to appeal to the county court.

238. Mr Nabi submits that the Council's reliance on the inclusion in the decision of information about the right of appeal is misplaced. The terms of section 203(5) (quoted in §151 above), in particular the requirement in "*any case*" to inform the applicant of the right of appeal, are such that – whether or not this is what section 203(5) strictly requires – authorities routinely include reference to the right of appeal in all review decisions, even if the decision is wholly in the applicant's favour. I note that the letter of 13 January 2020 to Mrs Ross, in which the Council expressly stated that "*[a]lthough this is a positive decision, I am required to advise that under s204 of HA 1996 you do have a right of appeal*" (§51 above), is an explicit example of this practice.

239. I am also asked by the claimants to consider the approach taken by the Council in the case of *Shaib v Birmingham City Council*. The review decision in Shaib, dated 18 March 2020, was a letter from Mr Kennelly in the following terms:

> "**Homeless Review Request**
>
> 1. [*§1 was in identical terms to §1 of the Elkundi and Ahmed review decisions: see §§25 and 33 above.*]

2. I have considered all the evidence and information provided for consideration of the review, including but not limited to:

- Your review request;
- Your homeless application;
- The Homelessness Code of Guidance for Local Authorities ("the statutory guidance");
- The Homelessness (Suitability of Accommodation) (England) Order 2012;
- The Housing Act 1985 ("HA1985");
- The Housing Act 1996 ("HA1996");
- The Housing Act 2004 ("HA2004");
- The Equality Act 2010 ("EA2010");
- The Children Act 2004 ("CA2004");
- Information from our records;
- Relevant case law;

3. Having given consideration to the submissions made and having completed my enquiries, I have concluded that your current temporary accommodation is unsuitable for your household on the basis of disrepair. I have notified the temporary accommodation team of my decision and have requested that you are provided with alternative suitable temporary accommodation as soon as possible.

4. I would however clarify that having considered the submissions made by your representatives, I consider that the accommodation provided is unsuitable only on the basis of the identified disrepair; this is not an acceptance that the accommodation is unsuitable for your household on all stated grounds. I consider that the accommodation is of a suitable size for your household; I consider that the accommodation is not unsuitable on the basis that the bathroom is accessed via the kitchen, or the size of the bathroom.

5. I would also state that whilst I acknowledge that the accommodation is at the present time unsuitable for your household within the meaning of the legislation this is not to state that the accommodation is immediately unfit for your household to occupy or that it would not be reasonable for you to continue to occupy the accommodation for the short to medium term until such time as a more suitable property is identified.

6. [*§6 was in identical terms to §3 of the Elkundi review decision.*]

7. [*§7 was in identical terms to §4 of the Elkundi review decision and § 3 of the Ahmed review decision.*]

> 8. [*§8 was in identical terms to §5 of the Elkundi review decision and §4 of the Ahmed review decisions*.]" (emphasis added)

240. In view of the terms of the review decision, particularly §5, Ms Shaib appealed to the county court against the review decision (while also bringing a judicial review claim in parallel). Before the county court, the Council submitted that it was impossible to understand the purpose of Ms Shaib's appeal because Mr Kennelly decided that the property was not suitable. The "*additional comments in the decision letter were simply the Reviewing Officer explaining the likely way forward following the decision he had made as to the suitability of the property*". In dismissing the appeal, HHJ Williams accepted the Council's submission that the words in §5 of the review decision did not form part of the decision but were "*mere commentary*".

241. Mr Nabi submits that it is verging on abusive for the Council to contend that the meaning of the decision in Mr Elkundi's case is that his accommodation is suitable (albeit not for the long-term) while contending in *Shaib* that it was impossible to understand the purpose of the appeal as the meaning of the decision was that her accommodation had been found to be unsuitable.

242. The Council submits that in *Shaib* there was a Category 1 hazard due to damp and the Council "*did not assert that the reference to "unsuitable" in that case meant anything other than unsuitable*". In oral submissions on behalf of the Council, Ms Lovegrove said she could not speak for the approach taken in *Shaib* but it may have depended on what evidence or instructions Mr Kennelly gave in that case regarding his decision, as these are fact-sensitive issues. She contends that the evidence in this case from Mr Kennelly reinforces the interpretation for which the Council contends. The Council contends that, unlike in *Ermakov* where the authority performed a *volte face*, here Mr Kennelly's evidence (and §41 of Ms Pumphrey's evidence) clarifies that the decision was that the accommodation is suitable in the short-term.

Elkundi: decision on the meaning of the review decision

243. In seeking a review of the suitability of the accommodation (at No.40) which the Council was providing to him and his family in performance of the main housing duty, Mr Elkundi was exercising his right under section 202(1)(g) (see §149 above). The Council was, therefore, under a statutory duty to notify him of the decision on the issue Mr Elkundi raised, pursuant to section 203(3) (see §150 above). In addition, if the Council decided any issue against his interests, it had a statutory duty to give reasons for the decision (see section 203(4)). It is well established that reasons must be intelligible and deal with the substantial points. An obligation "*to give reasons for a decision is imposed so that the persons affected by the decision may know why they have won or lost and, in particular, may be able to judge whether the decision is valid and therefore unchallengeable or invalid and therefore open to challenge*": *Ermakov* at p.826 (Hutchison LJ).

244. In *Ermakov* the claimant had applied to the City of Westminster for housing assistance. The authority decided that he had become homeless intentionally. The reason given was that the authority was not satisfied that he and his family experienced harassment, therefore it was reasonable for them to remain in their accommodation. When the claimant brought judicial review proceedings, the authority adduced evidence from the reviewing officer that he had not disbelieved the claimant's story but nevertheless

considered it would have been reasonable for them to have continued occupying their accommodation. Hutchison LJ, giving a judgment with which Nourse and Thorpe LJJ agreed, concluded at p.833:

> "The court can and, in appropriate cases, should admit evidence to elucidate or exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in *ex p. Graham*, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence – as in this case – which indicates that the real reasons were wholly different from the stated reasons."

245. I have set out the terms of the Council's review decision in *Elkundi* in §25 above. The outcome was notified in clear terms: "*I consider that your current accommodation is unsuitable*". That was the clear answer to the question raised by Mr Elkundi's review request, finding that No.40 "*is unsuitable*" accommodation for this family, given Mr Elkundi's mobility difficulties. I acknowledge that the same premises may be suitable for a household for, say, three months, but unsuitable for them for the following nine months and, in that sense, the suitability of accommodation is not binary. But there were only two possible answers to the question 'is the accommodation currently unsuitable?', and the answer given was, in effect, 'yes'.

246. On its face, the review decision was in Mr Elkundi's favour. His submission was that No.40 was unsuitable temporary accommodation for him and his family, and the Council agreed. Nothing in the review decision gave Mr Elkundi any reason to doubt that he had succeeded at the review stage. Nowhere in the decision did the reviewing officer indicate that his decision was that the accommodation is suitable: he said the opposite. The letter did not say the accommodation would become unsuitable in the long-term (or at any other point in the future). Nor did the Council give any *reasons* for finding the accommodation was suitable, as it would have been required to do by section 203(4), if it had so decided.

247. Paragraphs 3 and 4 of the review decision were clearly designed, as Mr Kennelly put it in his evidence, "*to manage Mr Elkundi's expectations*" about how quickly he would be offered suitable accommodation by the Council. I agree with Mr Nabi that the notification in §5 of the right of appeal flows from the practice of referring to that right in every review decision, in order to ensure compliance with section 203(5). It does not indicate that the decision was in any way adverse to Mr Elkundi's interests.

248. It is of some concern that the Council seeks to rely on §§3, 4 and 5 of the Elkundi review decision (each of which appeared in identical terms in the Shaib review decision, which was longer and created more room for argument as to its meaning than the Elkundi review decision) to alter the substance of the decision in §2, given that in seeking the dismissal of the appeal in *Shaib* the Council made submissions to the opposite effect. I do not accept that the difference is case-specific. The meaning of a decision depends on its terms

as notified to the applicant. The Council cannot properly contend that identical words in decisions addressing the same issue, have different meanings depending on unexpressed thoughts of the (same) reviewing officer.

249. In *Ermakov* the post-decision evidence changed the *reasons* for the decision. In this case, the primary focus of the post-decision evidence is not on the reasons for the decision but on the *outcome*. In my judgment, the need to be very cautious before admitting post-decision evidence addressing the meaning of the decision, or what the decision-maker had in mind and intended to say, applies with even greater force where the evidence seeks to change the result. Just as reasons must enable a person affected by a decision to know *why* he won or lost, *a fortiori* the notification of the decision must enable him to know *whether* he won or lost.

250. In determining whether to exercise his right of appeal, Mr Elkundi could only judge whether the Council had found for or against him by the terms of the review decision. Unsurprisingly, he did not appeal because the result, on its face, was in his favour. The 21 day time limit had expired before any of the evidence on which the Council seeks to rely had been filed. In the circumstances, it would be unjust to allow the Council to rely on Mr Kennelly's statement or §41 of Ms Pumphrey's statement and I rule that evidence is inadmissible.

251. In my judgment, the terms of Mr Elkundi's review decision are not ambiguous. The Council found that No.40 was unsuitable temporary accommodation for Mr Elkundi and his family.

Ahmed: the parties' submissions

252. The parties relied on the same submissions in respect of the meaning of the review decision in *Ahmed* as in *Elkundi* and it is unnecessary to repeat them.

253. In Mr Ahmed's case, in response to a pre-action protocol letter, the Council responded on 5 October 2020:

> "Whether a property is suitable has a temporal element. What is not suitable in the long term may be suitable for occupation in the short term. Taking this into account, the Council's decision of December 2019 was that the Claimant would be moved as soon as possible. Unfortunately, the Covid pandemic has rendered it not possible to offer alternative temporary accommodation over the last few months.
>
> The limited extent of the overcrowding together with the unprecedented demand for temporary accommodation during the pandemic means that the Council currently considers the Claimant's present temporary accommodation to be reasonable for his continued occupation for a further period of time." (emphasis added)

254. In a further letter of 21 October 2020, the Council stated:

> "**The council does not currently have any 5 bedroomed properties available in its housing stock but is attempting to source such accommodation**. In all the circumstances, particularly the impact of the current Covid pandemic on:
>
> (a) the supply of temporary accommodation (which has had to be used for rough sleepers not normally owed a homelessness duty) and
>
> (b) the ability of the council to obtain possession of stock due to the stay on possession proceedings and the statutory lengthening of notices of seeking possession to 6 months your client's current accommodation is reasonable to continue to occupy "for the time being".
>
> With regard to securing alternative temporary accommodation, in determining the suitability of accommodation, the Council is entitled to take into account the global public health emergency and it is entitled to take account of practical constraints such as the shortage of housing stock: *Poshteh v Kensington and Chelsea RLBC* [2017] UKSC 36; [2017] AC 624. Further, accommodation that is not suitable in the long term may well be suitable in the short term: *Ali v Birmingham City Council* [2009] UKHL 36; [2009] 1 WLR 1506; 2009] HLR 41. With that in mind, in these most unusual circumstances the Council's view is that the current accommodation is reasonable to continue to occupy for the time being, until alternative accommodation is available or your client is able to successfully bid for long-term accommodation under the allocations scheme." (Original bold emphasis; underlining added)

255. In a witness statement dated 1 February 2021, Ms Pumphrey drew attention to both these letters and added:

> "It was not until the statement of facts and grounds that the Claimant informed the Council that his eldest daughter is not residing at the Property, she is living with her mother … This clearly impacts on the suitability of the accommodation as it may no longer be overcrowded."

256. As I have said, at the hearing the Council accepted that Mr Ahmed's eldest daughter is a person who normally resides with him as a member of his family, within the meaning of section 176, and so for the purposes of assessing the suitability of temporary accommodation provided to him under section 193(2) her presence as a member of his household cannot be ignored.

257. Ms Bell gave a witness statement in Mr Ahmed's case on 29 January 2021 in which she said:

> "I would also like to explain that putting an applicant on the planned move list does not mean that the accommodation that

> they are currently occupying is considered by the council to be unsuitable immediately or even in the short to medium term. It means only that we have decided that we need to seek more suitable accommodation for the applicant's household because the current accommodation will not be suitable for their occupation in the longer term, i.e. for as long as they will probably continue to be in temporary accommodation, so more suitable accommodation is needed."

258. Although, unlike in *Elkundi*, the Council has not adduced evidence from the reviewing officer as to the meaning of the review decision, the Council maintains, as in *Elkundi*, that applying the *Holmes-Moorhouse* guidance, the review decision "*can only be sensibly read … as concluding that, in the circumstances of this case, Mr Ahmed's temporary accommodation was considered to be suitable in the short-to-medium term while another property was found*".

Ahmed: decision on the meaning of the review decision

259. Unlike in *Elkundi*, the Council has not sought to adduce evidence as to the meaning of the review decision, and so no question as to the admissibility of post-decision evidence arises. In pre-action correspondence the Council asserted that it is reasonable for the Ahmed family to continue to occupy No.165. However, the statutory concept of accommodation being reasonable for an applicant to continue to occupy is found in section 175(3). It is part of the definition of when a person is "*homeless*" not of "*suitability*" of accommodation. As is plain from the Council's acceptance that it owes Mr Ahmed the main housing duty, it is not disputed that he met the homeless test.

260. I have set out the terms of the Council's review decision in *Ahmed* in §33 above. The decision consists of only four paragraphs. Paragraphs 1, 3 and 4 are in identical terms to §§1, 4 and 5 of the Elkundi review decision. The key paragraph, §2, gives the reason for finding "*your current accommodation is unsuitable*" as overcrowding in Mr Ahmed's case, whereas it was mobility issues in Mr Elkundi's case. The only other difference is that the commentary contained in §3 of the Elkundi review decision of 3 January 2020 regarding the "*significant increase in homeless applications in recent months*" did not appear in the Ahmed review decision written two weeks earlier.

261. Save to the extent that the Council has not sought to rely on post-decision evidence as to the meaning of the review decision in *Ahmed*, the reasons that I have given in §§243 to 251 above for concluding that the review decision in Mr Elkundi's case found his temporary accommodation was unsuitable apply equally to Mr Ahmed's case.

262. In short, Mr Ahmed sought a statutory review of the suitability of his accommodation. The Council notified him of its decision, as it was required to do. The clear and unambiguous conclusion of which he was notified was that the Council found in his favour: "*your accommodation <u>is unsuitable</u> for your household*". The decision did not say that his accommodation was suitable: it said the opposite. Nor were any reasons given for making an adverse finding that his accommodation was suitable (even if only in the short-term or the medium-term) as would have been required if that had been the reviewing officer's conclusion.

Ross: the parties' submissions

263. The parties relied on the same submissions in respect of the meaning of the review decision in *Ross* as in *Elkundi* and *Ahmed*, save to the extent that they addressed the specific terms of the review decision in *Ross* (which is markedly different, at least in some respects, to the brief review decisions in *Elkundi* and *Ahmed*) and also the case-specific evidence adduced by the Council regarding the meaning of the review decision.

264. Mr Kennelly has given evidence, in a statement dated 28 January 2021 (filed in *Ross*), about his review decision in Mrs Ross's case:

> "6. In undertaking the review, I sent a letter dated 14 October 2020 setting out my decision ("the first letter"). …
>
> 7. At paragraph 9 of this first letter, and my review decision (23 October 2020), I said that, having had regard to the information from the Occupational Therapy Service and the claimant's refusal to have adaptations carried out, at the present time it could not be asserted that the accommodation was suitable. This reflects the fact that, if … the property had been subsequently adapted, it would have been suitable to the claimant's needs for the long term. What I meant here, was that, at date of my letter, the property could not be considered suitable for the long term because of the claimant's refusal to have the adaptations carried out.
>
> 8. In paragraph 10 of my first letter (and in my review decision) I advised that the claimant had been moved to the Planned Move List, and that I had requested that suitable alternative accommodation be identified as soon as possible. I also advised that, given the claimant's very specific medical and mobility needs, it was unlikely that a suitably adapted property would be readily available. I noted also that B&B would be unsuitable as temporary accommodation.
>
> 9. Given that I had advised that it was unlikely that a property that suited the claimant's very specific requirements and that B&B would be unsuitable, I was plainly explaining that, in the circumstances, the most suitable option then available for the claimant to remain where in her current home. [*sic*]
>
> 10. In the first letter, at paragraph 11, I went on to say that whilst I did not consider the accommodation suitable to the claimant's needs in the long term, I did not consider that it was *immediately* unreasonable for her to occupy and that it remained suitable for the claimant to occupy for the short to medium term. It is my understanding that I was entitled to come to such a conclusion, following the decision in *Ali v Birmingham City Council* [2009] UKHL 36.
>
> 11. The claimant's solicitors replied by letter dated 19 October 2020, … in which they said that they were puzzled by my letter. They asserted that I had, in effect, concluded that the

accommodation was temporary accommodation "is unsuitable and suitable" [*sic*]. The claimant's solicitors asked me to "withdraw … the final sentence of paragraph 11".

12. They went on to say, however, that they were encouraged by the fact that Ms Ross had been placed on the Planned Move list, asked that suitable alternative accommodation be identified *as soon as possible* and asked that any suitable accommodation offered be in the Handsworth or Handsworth Wood area. They said that they would liaise with their client to see what offers are made to her. They advised that if not "suitable offers" were made, they reserved the right to serve a pre-action protocol letter. [*sic*]

13. Before I was able to respond to their letter, the claimant's solicitors sent a pre-action protocol letter the next day, on 20 October 2020, in which they said that they had spoken to their client on 19 October 2020 who confirmed that she had not been contacted by the Council with an offer. The claimant's solicitors also said that they considered my decision that the property was suitable in the short term to be irrational. …

14. I sent a revised review decision on 23 October 2020, in response to the claimant's letter of 19 October, in which I repeated paragraphs 1-10 of my first letter. I replaced of paragraph 11 of that letter with two paragraphs:

> "11. With regard to securing alternative accommodation, in determining the suitability of accommodation, the Council is entitled to take into account the global health emergency and … practical constraints … Further, accommodation that is not suitable in the long term may well be suitable in the short term: *Ali v Birmingham City Council* [2009] UKHL 36; [2009] 1 WLR 1506; [2009] HLR 41."

15. In saying this, I was explaining that in relation to the provision of suitable temporary accommodation the Council is entitled to take into account practical constraints and that accommodation that is not be suitable for the long term, can be suitable in the short term. Clearly, I was applying these considerations to Mrs Ross' case, and that she would be occupying the property in the short term to medium term.

16. In responding to the claimant's solicitors' apparent confusion, I referred to the case of *Ali* because it provides that which is unsuitable in the long term, can be suitable in the short term. In other words, a property can be suitable and unsuitable. I then went on to say, paragraph 12, "with that in mind …" This is a reference back to the immediately previous paragraph of my letter, where I had expressly said that which is not suitable in the long term, may be suitable in the short term. With these factors

> in mind, applying them to Ms Ross' accommodation, I considered that this property (unlike B&B accommodation) was suitable in the short to medium term – I went on to conclude that, given the very pressing constraints, it was reasonable for the applicant to continue to occupy the property for the time being.
>
> 17. I appreciate that I could have stated this more clearly, and that my letter [sic] was clearer on this point, but it is clear that I was considering the claimant's occupation of the property in the shorter term and that I noted that such accommodation could be suitable in the shorter term. I had only ruled out B&B as being unsuitable. I believe the letter conveyed my decision that the property was suitable in the shorter term, whilst steps were taken to find alternative more suitable accommodation as soon as possible." (Italics in the original, underlining added)

Ross: decision on the meaning of the review decision

265. As I have said, I accept that I should apply the guidance given by Lord Neuberger in *Holmes-Moorhouse* in considering the meaning of the Council's review decisions. The review decision in Mrs Ross's case is longer and more complex than those in *Elkundi* and *Ahmed*, and I consider that there is rather more scope for sensible argument about the meaning of the decision than in either of those cases. That being so, it is all the more important to apply a realistic, practical and benevolent approach in determining the meaning of the decision in this case.

266. Nevertheless, I have reached the clear conclusion that the outcome of the review decision, as notified to Mrs Ross, was that the Council found that the accommodation it had secured for her is unsuitable for her.

267. *First*, the review decision is contained in, and only in, the letter of 23 October 2020. When Mrs Ross's solicitors indicated that she was considering appealing the suitability decision, the Council chose to *withdraw* the decision of 14 October 2020, and removed from the revised decision the passage in which Mr Kennelly had said "*I consider that it remains suitable for her to continue to occupy for the short to medium term*". The Council cannot rely on the terms of the withdrawn letter as informing the meaning of the review decision.

268. *Second*, the review decision states, unequivocally, in §9, "*at the present time it cannot be asserted that your client's current accommodation is suitable for her under the relevant legislation*"; "*the only conclusion is that the accommodation is unsuitable*"; "*it is apparent that the accommodation is presently unsuitable and that it is unlikely this will change*". Each of these statements addressed the question raised by the review request, '*is the accommodation suitable?*' Given the context, the reviewing officer must be taken to have used his words advisedly in giving the answer, repeatedly, '*the accommodation is unsuitable*'. None of these statements can sensibly be read as saying the accommodation is suitable for now, or in the short to medium-term, but it is anticipated that it will become unsuitable in the longer term.

269. *Third*, while the review decision states in §11 that accommodation that is not suitable in the long term may well be suitable in the short term, this is said in the context of a

paragraph about "*securing alternative temporary accommodation*". The implication is that it is a principle the Council may apply when considering the suitability of any alternative accommodation that may be made available for Mrs Ross to occupy.

270. *Fourth*, while the decision states in §12 "*with that in mind*" it is "*reasonable for her to continue to occupy for the time being*", he did not use the language of suitability. Given that the purpose of the review was to determine the suitability of No.45, it is clear that the outcome was notified in §9 where the reviewing officer expressly and repeatedly addressed whether the accommodation "*is suitable for her under the relevant legislation*". Nothing said in §§11-12, or in the decision read as a whole, is capable of leading to the conclusion that the outcome of the review was an adverse finding that the accommodation is suitable (even if in the medium rather than long term). In my judgment, the statement that it is reasonable for Mrs Ross to continue, for the time being, to occupy her current accommodation forms part of the commentary in which the Council explains the reasonableness of the approach it has taken and, in effect, urges a degree of patience and understanding while it seeks to solve the difficult problem of securing suitable accommodation for Mrs Ross.

271. *Fifth*, the view I have expressed in §249 above applies with equal force in this case. The ambiguity in the 14 October letter created by, on the one hand, statements that the accommodation is, at present, unsuitable, and on the other hand the statement that it is suitable to occupy in the short to medium term (which necessarily covers the present), was resolved by the Council deliberately withdrawing the latter statement. I note that, as Ms Shaib had done, Mrs Ross issued a statutory appeal, which was stayed by consent while this claim was pursued. Nevertheless, in all the circumstances, it would be unjust to admit Mr Kennelly's statement and I rule that it is inadmissible.

I. ***Elkundi*, *Ahmed* and *Ross*: Is the Council in breach of the main housing duty?**

272. The Council acknowledges that each of these three claimants is owed the duty under section 193(2). I have held that the duty under section 193(2) is unqualified, immediate and non-deferrable. And I have found that in *Elkundi*, *Ahmed* and *Ross* the Council made a decision that each of the claimants' current accommodation is unsuitable. Each of these three claimants remains in the accommodation that the Council decided is unsuitable, no alternative suitable accommodation having been secured for them. The Council accepted that it would follow, if I were to reach these conclusions, that in each of these three cases the Council is in breach of s.193(2).

The parties' submissions on the applicability of a one way functus officio rule

273. Nevertheless, both parties addressed me on the question whether the Council was prohibited by what was described in argument as a 'one way *functus officio* rule', from revisiting a review decision in which it had concluded that an applicant's accommodation was *unsuitable* and reaching the opposite conclusion (save that it could do so by making an (appealable) offer of that same accommodation). The answer to this question would be relevant, as I understood the argument, if the review decisions have been overtaken by the Council deciding (or purporting to decide), more recently that the claimants' current accommodation is (currently) suitable for them.

274. The answer to the question whether accommodation is suitable for an applicant can change over time. One common reason for this is the changing size of applicants'

households. The size of the household may increase, for example with the birth a child, or when an elderly parent joins the household to be cared for by their adult child, potentially resulting accommodation that was suitable becoming overcrowded and unsuitable. Or the needs of the household may change, rendering the accommodation unsuitable, for example, if a child or adult has or develops a disability. There is no question of a local housing authority that has decided that accommodation is *suitable* being precluded by the doctrine of *functus officio* from later determining that it is *unsuitable*. On the contrary, it is common ground that if a local housing authority has a duty to secure suitable accommodation for an applicant, it must keep under review whether accommodation which it considered suitable remains so in light of any change in circumstances (including the passage of time).

275. However, Mr Nabi submits that the local housing authority is precluded from reversing a decision that accommodation is *unsuitable* for an applicant, unless it does so by means of a formal offer of the accommodation that the applicant would have a right to appeal. He acknowledges that changes in circumstances may, of course, go both ways in terms of their impact on the suitability of accommodation. For example, an applicant's household may reduce in size when young adults leave home resulting in accommodation that was once overcrowded ceasing to be so. Or both the size and needs of the household may change when an elderly relative moves into a care home.

276. However, Mr Nabi submits a difficulty potentially arises if a local authority, having decided, on an applicant's request for a review, that accommodation is unsuitable, later decides that the accommodation is suitable. The applicant would (he submits) be precluded by section 202(2) (see §149 above) from requesting a review of that decision; and the statutory right of appeal arises only where an applicant has requested a review under section 202 and is dissatisfied with the review decision (or has not been notified of it within the prescribed time). It cannot be right that having made a favourable decision on the question of suitability, the local housing authority is then able to reverse that conclusion in a way that is unappealable. Mr Nabi submits that where a local housing authority has made a favourable decision on a review of the suitability of accommodation (i.e. that the applicant's accommodation is unsuitable), it is *functus officio*. But he accepts the local housing authority could make a formal offer of that same accommodation, if it considered that a change of circumstances had the effect of rendering the accommodation suitable for the applicant.

277. In support of his argument that a one way *functus officio* rule applies, Mr Nabi relies on *R (Sambotin) v Brent London Borough Council* [2018] EWCA Civ 1826, [2019] PTSR 371. The issue in *Sambotin* was whether a local housing authority could reconsider its determination that an applicant was eligible for housing assistance. Having determined that Mr Sambotin was eligible, homeless, had not become homeless intentionally and was in priority need, the authority referred his case to another authority, and then when the referral was rejected purported to determine he was ineligible for housing assistance. Peter Jackson LJ (with whom Henderson and Longmore LJJ agreed) held at [3]:

> "Once a public authority exercising a statutory power has decided how the power is to be exercised, it will lack further authority and be functus officio. Any later attempt to remake the decision will be outside the authority's powers (ultra vires). Aside from these limits on powers, there is a strong and obvious public policy interest in finality, which allows individuals to rely

> on statutory decisions without having to worry that they may later be changed. Nevertheless, in the interests of justice and of good administration there are certain limited circumstances in which public authorities can reconsider final decisions: where there has been fraud (*R (Southwark London Borough Council, Ex p Dagou* (1995) 28 HLR 72)); or fundamental mistake of fact (*Porteous v West Dorset District Council* [2004] LGR 577). Moreover, an authority is not to be taken to have made a final decision where its inquiries are incomplete: *Crawley Borough Council v B* (2000) 32 HLR 636."

278. Having held that once the local housing authority has satisfied itself about the four qualifying conditions under section 193(1), "*the main housing duty crystallises under section 193(2)*", Peter Jackson LJ continued at [29]:

> "The Act does not allow for the withdrawal or review of a favourable decision, only an unfavourable one via review and appeal under sections 202 and 204."

279. Mr Manning submits *Sambotin* is inapplicable because that case was concerned with a "one-off" decision as to whether the main housing duty was owed whereas a local housing authority is under a continuous duty to keep the suitability of accommodation under review. This is reflected in the statutory guidance which provides at §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."

280. Mr Manning contends that there is a continuing obligation on the authority to assess suitability of accommodation, therefore it may revisit the question of suitability and make a fresh decision at any time. He submits that the reason the claimants contend that an authority may only make a decision that accommodation is suitable, having previously determined it is unsuitable, by making an offer of that accommodation is to ensure the new decision is appealable. This mechanism is unnecessary. If it is accepted that the Council is able to make a fresh decision as to the suitability of accommodation at any time, it follows that the later decision would not be a "*decision reached on an earlier review*" under section 202(2); it would be a decision as to the suitability of accommodation attracting rights of review and appeal under sections 202(1) and 204(1).

Conclusions on the applicability of a one way functus officio rule

281. Interesting as the arguments raised by the parties under this head are, it does not seem to me that they arise for determination and so any views I express on them are necessarily *obiter*. The issue does not arise because the Council has not made fresh decisions, subsequent to the review decisions, that the accommodation secured for Mr Elkundi, Mr Ahmed or Mrs Ross is suitable. The argument centred on the meaning of the review decisions. I did not understand the Council to submit that it has made a fresh decision as to the suitability of their accommodation in any of these cases and, in any event, there is no evidence before me capable of supporting such a proposition.

282. If I am wrong, and the Council's evidence demonstrates that it has purported to make new decisions in *Elkundi*, *Ahmed* or *Ross* that the claimants' current accommodation is suitable, I would in any event find that the Council is bound by the review decisions. In my judgment, the ruling in *Sambotin* that the Housing Act 1996 does not allow for the withdrawal or review of a favourable decision applies to a favourable decision made on a request for a review of the suitability of the accommodation secured for an applicant. *First*, the continuing obligation is to ensure that accommodation secured for an applicant is suitable. If a local housing authority has determined that accommodation is unsuitable, the obligation is to secure suitable alternative accommodation. There is no continuing obligation to assess whether accommodation which the local housing authority has decided is *unsuitable* remains so. *Second*, the strong and obvious public interest in finality, to which Peter Jackson LJ referred in *Sambotin*, is applicable where an applicant has received a favourable statutory review decision accepting their submission that their accommodation is unsuitable. Subject to the exceptions identified in *Sambotin*, an applicant ought to be able to rely on such a decision without having to worry that the local housing authority may change its mind.

283. However, I am inclined to accept Mr Nabi's submissions that if, before a local housing authority has found alternative accommodation for an applicant, the needs of the applicant's household change in such a way that the local authority considers that accommodation it had decided was unsuitable is now suitable, the authority may not be precluded by its earlier review decision from offering that same accommodation to the applicant. But this is not a scenario that applies in any of these cases.

Conclusions on Ground (1) in Elkundi, Ross and Ahmed

284. The Council is in on-going breach of the duty under section 193(2) to secure suitable accommodation for Mr Elkundi, Mr Ahmed and Mrs Ross. In Mr Elkundi's case, the Council's determination that the accommodation secured for their occupation is unsuitable was made on 3 January 2020. The Council has been in breach of the duty owed to Mr Elkundi under section 193(2) throughout the 15 months that he and his family have remained in unsuitable accommodation since the review decision. In Mr Ahmed's case, the review decision was made on 18 December 2019. He and his family have remained in unsuitable accommodation throughout the 16 months since then, and the Council has been in breach of the duty owed to Mr Ahmed throughout that period. Mrs Ross has remained in her accommodation for about 7 months since the Council first determined that it is unsuitable, and the Council has been in breach of the duty owed to her throughout that period. While a decision as to the suitability of her accommodation ought to have been made in response to her request for a review in September 2019, her remedy for the failure to make such a decision lay in the county court. Given that there is a temporal element to the assessment of suitability, I reject the claimant's contention that because the accommodation was found to be unsuitable in October 2020, it follows that it must have been unsuitable on 13 January 2020 when the review decision omitted to determine the issue.

285. Financial constraints and limited housing stock are matters that a local housing authority can take into account in determining whether accommodation is suitable for an applicant, although such a decision is subject to review on *Wednesbury* grounds and there is a line below which the standard of accommodation cannot fall: see *Codona* at [37] (§199 above). But once it has been determined, as it has in these three cases, that accommodation secured for an applicant who is owed the main housing duty is

unsuitable, lack of housing stock and lack of resources provide no defence. It was not lawful for the Council to leave the Elkundi family, the Ahmed family or Mrs Ross in unsuitable accommodation.

J. *Al-Shameri*: Grounds 1 and 3

Alleged past breach of section 193(2): 27 April 2018 to 23 November 2020

286. Unlike the letters relied on in *Elkundi*, *Ahmed* and *Ross*, the 27 April 2018 letter is not a review decision addressing the suitability of the claimant's accommodation; it is a decision on the question whether the main housing duty was owed. The conclusion that Mr Al-Shameri was homeless shows that the Council decided it would not be reasonable for him and his family to continue to occupy No.5. Logically, it must follow that as *long-term* accommodation, No.5 was unsuitable for this family. But *Birmingham v Ali* shows that, in principle, a local housing authority may find that accommodation is not reasonable for an applicant to continue to occupy and yet it is suitable temporary accommodation for the applicant for the short or medium-term. The letter of 27 April 2018 did not address the question whether No.5 was suitable as temporary accommodation for any period.

287. The Council acknowledges that following the decision that Mr Al-Shameri was owed the main housing duty, until the pre-action protocol letter was received, it did not secure or seek to secure alternative accommodation for him. The Council's case is that omission is not a breach of section 193(2) because Mr Al-Shameri waived his right to be provided with temporary accommodation, choosing instead to remain homeless at home, until he requested temporary accommodation for the first time in the pre-action protocol letter.

288. Mr Manning relied on *R (Edwards) v Birmingham City Council* [2016] EWHC 173 (Admin), [2016] HLR 11, in which Hickinbottom J addressed the way in which the Council complies with its duty to provide interim accommodation at [104]-[105]:

> "The statute provides that, if an authority has reason to believe that the applicant may be homeless and in priority need, then it must secure that "suitable" accommodation is available for his occupation. As I have explained (see [29] and [86(ii)] above), that involves an evaluative exercise by the authority, which might conclude that the accommodation occupied by a homeless at home applicant is "suitable" for him to occupy temporarily, for the whole (or at least part) of the period in which the homeless application is being considered. However, the Council do not make an assessment of "suitability". As a matter of policy, if it considers an applicant may be homeless and in priority need, then it will provide him with interim accommodation, if he requires it. If the applicant indicates that he does not require it because (e.g.) he prefers to stay in his current accommodation, or at family or friends, until the homeless application has been determined – the accommodation the applicant voluntarily stays in is, equally, not assessed for suitability by the Council. This policy – of course more generous than the statutory requirements – is key to an understanding of how the Council purport to

> comply with its statutory duty under s.188 to provide interim accommodation pending a housing application decision.
>
> As I have said, the policy is that, if the Council considers an applicant may be homeless and in priority need, then it will provide him with interim accommodation, *if he requires it*. However, the evidence is that many applicants, although satisfying the s.188 criteria, prefer to remain in their current accommodation (if they have it) or stay with friends or family pro tem), whilst their homeless application is processed. In these circumstances, the Council does not seek to assess the current accommodation for suitability: it relies upon the applicant's "self-certification" of the fact that the relevant accommodation is such that the applicant can reasonably be expected to stay there temporarily. Of course, as the Local Government Ombudsman's report "Homelessness: How councils can ensure justice for homeless people" (July 2011) (the LGO July 2011 Report) emphasised (at p.5): "People must be made aware of their right to make an application if they wish to". However, so long as the applicant is aware that he is entitled to interim accommodation until a decision is made on the homeless application – and so can make an informed initial decision, and knows that he can return to the Council at any time to request interim accommodation – there is nothing objectionable in this." (emphasis added)

289. Although these observations were made in the context of considering the interim accommodation duty, Mr Manning submits they apply equally to the main housing duty. There is nothing objectionable in the Council accepting an applicant's preference to remain homeless at home, rather than be provided with temporary accommodation. He contends that is what occurred here. He relies on the homeless application form that Mr Al-Shameri completed with Ms Fenton on 30 January 2018, in which the answer given to the question "*Do you need temporary accommodation?*" was "*no*", and Ms Fenton's evidence that she would have discussed with him whether he wanted temporary accommodation.

290. Mr Nabi accepts that, in principle, an applicant may waive their right to be secured suitable temporary accommodation under section 193(2), but any such waiver must be fully informed. In *Aweys* Arden LJ addressed this issue at [67]:

> "*Waiver of right to be provided with accommodation*
>
> This subject arose in the course of argument. A person who is accepted to be homeless at home may be offered alternative accommodation on a temporary basis: see *Ex p Awua* [1996] AC 55. He may, however, in practice prefer to stay where he is until some more permanent accommodation is available for him. I see no difficulty in law in an applicant, if he chooses, opting to stay where he is while the local authority seeks more permanent accommodation which it is reasonable for him to occupy, but as he would be giving up his statutory right to be accommodated in

> that temporary accommodation, and on general principle, he would have to give a fully-informed and free consent."

291. He submits that, on the facts, Mr Al-Shameri was only asked whether he needed temporary accommodation when the interim accommodation duty was owed. He was not asked once it was established that the main housing duty was owed, or fully informed about the nature of the right he was giving up.

292. I accept that the letter of 27 April 2018 informed Mr Al-Shameri that, as far as the Council was concerned, he had chosen to be homeless at home, and also that if he had questions about the letter he should ask his case officer. But even for a lawyer versed in housing law, the parts of the letter addressing the effect of the conclusion that Mr Al-Shameri was owed the main housing duty would have been difficult to understand.

293. In any event, while it is apparent that the Council took no steps to secure suitable accommodation for Mr Al-Shameri because it believed he had chosen to remain homeless at home, as reflected in the letter of 27 April 2018, he did not choose on a fully informed basis to give up his right to suitable temporary accommodation secured under section 193(2). At the point in time when Mr Al-Shameri was asked whether he needed temporary accommodation, the only accommodation duty owed to him was the interim one under section 188(1). Choosing to move out of a secure tenancy into temporary accommodation at that stage would have potentially left his family roofless, if the Council had subsequently determined that the section 193(2) duty was not owed. In addition, it is apparent from Ms Fenton's evidence that he would have been told that answering 'yes' to the question whether he needed temporary accommodation may have resulted in his family being placed in bed and breakfast accommodation for a time, located anywhere in the city. What Ms Fenton believes she would have told him reflected the position if the family needed immediate interim accommodation. In my judgment, the evidence shows that on 30 January 2018 Mr Al-Shameri waived his right to temporary accommodation provided under section 188(1).

294. However, he was not asked, once the main housing duty was accepted, whether he wished to waive his right to have suitable accommodation made available for him and his family under section 193(2). Nor was he fully informed of what he would be giving up, so as to enable him to waive his statutory right effectively. He was not informed, for example, that he could remain homeless at home for a short period (rather than moving his family into bed and breakfast accommodation) while the Council secured suitable, alternative, self-contained accommodation for him and his family. He was not told that if he asked for temporary accommodation his name would be put on the PML. Nor was any explanation given as to what that list is or what difference it might make to his prospects of obtaining suitable accommodation for his family if he chose not to waive his right under section 193(2).

295. In my judgment, the Council owed Mr Al-Shameri an unqualified duty under section 193(2), from 27 April 2018, to secure suitable accommodation for him. As he did not waive his right and the Council secured no suitable accommodation for him (and made no assessment that No.5 was suitable), in the 18 months prior to 28 September 2020 the Council was in breach of section 193(2).

296. On 28 September 2020, the Council determined that for the time being, while alternative accommodation was sought, Mr Al-Shameri's current accommodation was suitable. I

note that a statement of suitability was made a few days earlier, on 22 September, but as it was based on the mistaken factual premise that the Council had secured accommodation for the Al-Shameri family, it does not amount to a decision in respect of No.5. Mr Nabi submits that the Council could not lawfully decide that the accommodation was suitable because it was *functus* and, in any event, because such a decision was irrational.

297. In my judgment, the doctrine of *functus officio* does not apply given that the Council had not previously determined whether the accommodation was suitable. There is force in the claimant's submission that in circumstances where the Council had found, 18 months earlier, that it would be unreasonable for the Al-Shameri family to continue to occupy No.5, and since then a severely disabled child had been born into the family and another child was expected, making their accommodation difficulties worse, a decision that the accommodation could be regarded as suitable is hard to fathom. But it was open to the claimant to seek a review of the decision that No.5 was suitable (and if that decision was unfavourable to appeal to the county court). In these circumstances, and given the Council believed Mr Al-Shameri had chosen to remain homeless at home until he sought temporary accommodation on 1 September 2020, I am not prepared to conclude it was irrational to decide that it was suitable for the family to remain in their home for a few more weeks (rather than move into bed and breakfast accommodation) while alternative accommodation was urgently sought. Accordingly, I make no finding of breach in respect of the period 28 September 2020 to 23 November 2020.

Alleged ongoing breach of section 193(2): 23 November 2020 to the present

298. On 16 November 2020 the Council made an offer of accommodation at Flat 6 that was secured for Mr Al-Shameri and his family from 23 November 2020. Since the hearing, on 26 March 2021, the Council has determined on review that its offer of accommodation was suitable.

299. I reject Mr Nabi's invitation to review the lawfulness of the decision to offer Flat 6, and in particular whether that accommodation was suitable for the family when the offer was made. *First*, the decision of 26 March 2021 is not the subject of this claim. Indeed, nor is the offer of 16 November 2020 or the decision of 14 January 2021. *Second*, it follows that the grant of permission does not extend to cover the decision that Flat 6 is suitable. *Third*, the four day hearing had finished two weeks before the decision was even made. The parties have not adduced evidence or made any oral submissions addressing the review decision of 26 March 2021. It would be unjust to the Council to allow that decision to be reviewed in the context of this claim. *Fourth*, the claimant has a right of appeal to the county court against the review decision and it would be inappropriate to allow him to circumvent the statutory review mechanism by permitting the decision to be challenged in this claim.

300. It follows that I can make no finding as to whether the Council has performed and discharged its duty under section 193(2) lawfully since 23 November 2020. Whether the offer was suitable will be a matter for the county court if an appeal is brought.

Legitimate expectation

301. Mr Al-Shameri claims that the letter of 27 April 2018 gave rise to a substantive legitimate expectation that the Council would make him an offer of suitable accommodation. It

would be unfair and abusive for the Council to seek to resile from this position. Mr Nabi relies on *R v North East Devon HA, ex p Coughlan* [2001] QB 213 in support of the proposition that a substantive legitimate expectation can arise where the expectation of a benefit is confined to a defined group of persons, giving the expectation the character of a contract. He also seeks to refute Mr Manning's contention that there is, here, no clear, unambiguous and unqualified representation, submitting that *Rowland v Environment Agency* [2005] Ch 1 at [68] shows that that there need not always be a clear, unambiguous and unqualified representation to found a legitimate expectation. Mr Manning relies on the statement of the relevant principles as explained by Laws LJ in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]-[69].

302. A legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 , Lord Fraser, at 401B). In this case, Mr Al-Shameri seeks to rely on an alleged promise.

303. The promise relied upon to found a legitimate expectation should be "*clear, unambiguous and devoid of relevant qualification*" (*R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, per Bingham LJ at 1569G). I reject the claimant's contention this test does not have to be met. Although not cited to me by the parties, it is important to note that this submission is flatly contrary to the summary of the law relating to legitimate expectation given by Lord Neuberger PSC (in a judgment with which Lord Mance, Lord Clarke, Lord Sumption and Lord Carnwath JJSC agreed) in *United Policyholders Group v AG of Trinidad and Tobago* [2016] 1 WLR 3383 at [37]:

> "In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be "clear, unambiguous and devoid of relevant qualification", according to Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569, cited with approval by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, para 60." (emphasis added)

Lord Neuberger's statement of the general principles, although given in the Privy Council, reflects the leading judgment of Lord Hoffmann in *Bancoult (No.2)* and has been adopted by the Court of Appeal (see, e.g. *R (Hely-Hutchinson) v HMRC* [2018] 1 WLR 1682, per Arden LJ at [36]).

304. The letter of 27 April 2018 said that the Council "*will look to meet or end our duty to you by securing a suitable offer of accommodation for you*". The words "*look to*" signify an intention, but imply no promise of an offer, let alone an offer within any specific timeframe. The letter also said the Council reserved the right to place bids for the applicant but made no promise that the Council would do so. At the same time, the letter

asserted that Mr Al-Shameri had agreed to remain homeless at home rather than be placed in temporary accommodation, indicating that the Council would not be making an offer of temporary accommodation. While it is understandable that Mr Al-Shameri gained the impression that the Council would make him an offer of suitable accommodation, the letter is ambiguous. No statement to that effect was made, let alone a statement that is clear, unambiguous and devoid of relevant qualification. In my judgment, the legitimate expectation claim falls at the first hurdle.

305. In any event, the claimed legitimate expectation does not assist Mr Al-Shameri. The Council has made an offer of accommodation which it asserts was suitable. As I have said, the question whether the Council's decision that Flat 6 was suitable cannot be challenged in these proceedings. Accordingly, Ground 3 fails.

K. Is the Council operating an unlawful system for the performance of its duty under section 193(2)?

306. I have addressed the evidence regard the Council's system for performing its duty under section 193(2) in §§80 to 112 above. In light of the foregoing, I can state my conclusions in respect of this ground shortly.

307. *First*, the Council has been operating on the basis that an applicant who is owed the main housing duty, and who is in unsuitable accommodation, may be left in that accommodation while the Council takes a reasonable time to secure suitable accommodation without the Council breaching section 193(2) (unless the accommodation is such that the applicant cannot remain there another night). For the reasons I have given in addressing Ground 1, I have concluded that the Council has misunderstood the nature of the duty under section 193(2). In my judgment, this misunderstanding of the nature of the duty has resulted in the Council operating an unlawful system for the performance of its duty under section 193(2).

308. *Second*, a proportion of the applicants on the PML may be in accommodation that is suitable, in the short or medium-term, but who need to move in the long-term. In such cases, the Council is currently meeting its duties to secure suitable accommodation and there can be no objection to the Council looking to the future by maintaining a spreadsheet of those for whom in a matter of weeks, months, perhaps even a year or so in some cases, it needs to find alternative suitable accommodation. Indeed, that would accord with the approach encouraged in *Birmingham v Ali.* But many of the applicants on the PML, including Mr Elkundi and Mr Ahmed (or those who have been inadvertently omitted, such as Mrs Ross) are in accommodation that is unsuitable. While I recognise the grave difficulties the Council faces in finding accommodation for the homeless, putting applicants who are owed the section 193(2) duty, and who are in unsuitable accommodation, on a waiting list for temporary accommodation is not a lawful means of fulfilling the unqualified and immediate duty to secure suitable accommodation for their occupation.

309. *Third,* if as the Council contends, applicants are placed in the queue by reference to the date on which they joined the PML, the system does not operate rationally. For example, family A may be in accommodation that the Council has decided is suitable for, say, a further six months while alternative accommodation is sought. Family B is the same size as family A, but in smaller, more overcrowded accommodation which the Council has accepted is unsuitable. If family B joins the PML after family A, family B will be further

down the queue, even though family A needs alternative suitable accommodation in six months, whereas the Council's obligation to secure suitable accommodation for family B is immediate.

310. *Fourth*, in a case involving a protected characteristic, such as disability, there has to be recognition that the applicant may need to be treated more favourably than others without asserted disabilities. A queuing system by reference to the date of joining the PML does not meet the obligations in section 149 of the Equality Act 2010. I recognise that the Council's evidence indicates that there is some discretion to take applicants out of their order in the queue and an example is given of a property with level access becoming available, which may be offered to an applicant with a disability who requires such level access, rather than to the first person in the queue. This is not underpinned by any policy and it is hard to see how it is implemented given, for example, the lack of any data on the PML specifying the disabilities of Mr Elkundi or two of Mr Ahmed's children. Moreover, this approach does not account for cases, for example, where the effect of a child's disability is not that he needs *specialised* accommodation, but that he has a greater need for space to develop than others without his disability. It appears that no regard would be had to whether a household with such a child should be treated more favourably.

311. *Fifth*, if the "*Days Waiting*" represent days since the applicant was placed on the PML, as the Council submits, then it would be evident that the Council is, in many cases, failing to comply with the section 193(2) duty for years. For example, in a case where an applicant's "*Days Waiting*" are 12 years and 10 months, if that is how long the applicant has been on the PML then the Council must have been in breach of its duty for many years. Even if the applicant may have been in accommodation that, at the outset, could be regarded as suitable for the medium-term, on any view, that period must have long passed. While this is the longest period, there are more than 60 applicants on the PML whose "Days Waiting" come to over three years. However, if (as I consider more likely) "*Days Waiting*" reflect the time since the applicant first applied for assistance, this point would fall away because the date of first application does not indicate the extent to which the applicant has been in suitable temporary accommodation since first applying.

312. *Sixth*, if the order of the queue is based on the date on which the applicant first made a homeless application, rather than the date of joining the PML, the system would still operate irrationally. For example, family C may have applied for assistance under Part VII 8 years ago. Suitable temporary accommodation has been secured for them throughout that time until six months ago when, as a result of an increase in the size of the family, it was decided their accommodation is no longer suitable. Even though family C has been in suitable temporary accommodation for all save the last six months, this family would be much higher up the list than family D who applied for assistance 4 years ago and have been in unsuitable accommodation throughout that time.

313. *Seventh*, if I am wrong about the nature of the duty, and the Council has a reasonable time to find suitable accommodation, the reasonableness of the period depending on the circumstances of each case and on what accommodation is available, in my view the system in place would fail lawfully to meet such a duty. That is because, on the evidence before me, beyond a decision whether an applicant cannot remain where he is for another night, no thought goes into the question what period is reasonable in the individual case. The system operated by the Council is premised on a reasonable time being however long it takes an applicant to reach the head of the bedroom queue and be made an offer. The placement in the queue takes no account of the fact that time spent in unsuitable

accommodation may be worse in some cases than in others. Taking just a few examples from these cases: mobility difficulties may have the effect that accessing the unsuitable accommodation causes a member of the household pain; a child's operation may have to be postponed until suitable accommodation is available; unsuitable accommodation may affect the physical development of a disabled child; or unsuitable accommodation may result in a parent being effectively housebound for much of the day with a baby and disabled child.

314. Finally, I grant Mr Al-Shameri permission to pursue this ground, alongside Mr Ahmed. The ground is not only arguable, but well-founded. I consider that Mr Al-Shameri has standing, because he was not put on the PML when he made his homeless application in January 2018 or told about its existence and he was then put on the PML briefly in October 2020, before being offered a three-bedroom flat. Given the lack of explanation as to why he was not put on the PML in 2018, which bedroom queue he was placed in, and where, when he was put on the PML in 2020, and whether the offer that he rejected was made outside the operation of the PML, Mr Al-Shameri has a sufficient interest in the transparency and lawfulness of the system to pursue this ground of claim. I do not consider that the developments in Mr Al-Shameri's case are such as to deprive him of standing in respect of this ground.

L. Relief

315. Mr Elkundi, Mr Ahmed and Mrs Ross have succeeded in establishing that the Council is in on-going breach of section 193(2) in each of their individual cases. The question therefore arises whether the court should grant a mandatory order requiring the Council to secure suitable accommodation, and if so within what period, in any of these three cases.

316. There was a difference between the parties as to the threshold for granting a mandatory order. The claimants contend such relief should be ordered unless the Council can show that it would be "impossible" to comply, a proposition the Council refutes.

317. In *Begum* Collins J said that no court will enforce the duty unreasonably but bearing in mind the unqualified nature of the duty, the court must not be too ready to accept the Council is taking all appropriate steps (p.816). He also said that the court "*cannot order the council to do the impossible*", but the court "*should not be persuaded by alleged impossibility in finding suitable accommodation unless satisfied that all reasonable steps have been taken*" (p.818). His judgment was cited in *Codona* at [38] (see §199 above). In my judgment, while the court will not order an authority "*to do the impossible*", it does not follow that nothing less than impossibility will suffice to persuade a court not to grant a mandatory order. Collins J in *Begum* and Auld LJ in *Codona* also focused on the reasonableness of the authority's position, by reference to the steps and time taken. But the context in which the steps taken by the Council fall to be considered is one in which Parliament has imposed an unqualified duty with which the Council has failed to comply.

318. In *M v Newham* at [119], Linden J drew on the judgment of Scott Baker J in *R (Khan) v Newham LBC* [2001] EWHC 589 (Admin)

> "as potentially being of assistance in deciding whether to take the relatively unusual step of making a mandatory order in this type of case. Without suggesting that he was proposing an

> exhaustive account of the relevant factors in relation to the court's discretion Scott Baker J considered, first, the nature of the temporary accommodation being occupied by the family; second, the length of time for which the housing authority had been in breach of its statutory duty; third, the efforts which had been made by the authority to find suitable accommodation; fourth, the likelihood of accommodation becoming available in the near future (an order might not be made if there was an undertaking to provide accommodation in the near future); and, fifth, any of the other particular factors in the case."

319. Linden J granted a mandatory order in circumstances where the deficiencies in the current accommodation were serious in terms of their nature and effect, the authority had been in breach of statutory duty for a considerable time (nearly two years), the authority's evidence as to the efforts it was making to find suitable accommodation for the claimant was unsatisfactory, and he was not satisfied that it was "*impossible or unreasonably difficult to find suitable alternative accommodation for the claimant*".

320. In *Elkundi*, the accommodation is unsuitable for Mr Elkundi because the four flights of communal stairs cause him pain. Mr Elkundi first raised the unsuitability of this property with the Council more than four years ago, and he submitted medical evidence supporting his request to move three years ago. The review decision was made on 3 January 2020 and, since then, for more than 15 months, the Council has been in breach of statutory duty. The Council put Mr Elkundi on the PML and then, as Ms Bell described the process (§89 above), the Council waited for a suitable property to become available. Other than conducting a general daily check whether any of the Council's Part VII accommodation had become available, no steps were taken until after Andrews LJ granted permission. At that point, an offer of temporary accommodation was made which the Council subsequently conceded was unsuitable due to statutory overcrowding giving rise to a category 1 hazard.

321. Although I appreciate the reasons the Council seeks to avoid using its own stock as temporary accommodation, in taking this approach the Council fails to appreciate the unqualified nature of its duty under section 193(2), which stands in contrast to the duties under Part VI (see *Begum* at p.817, §185 above). The Council does not contend that it would be impossible to comply with a mandatory order and in my judgment it would not be unreasonably difficult. In these circumstances, I consider that a mandatory order should be granted in favour of Mr Elkundi.

322. In *Ahmed*, the accommodation is unsuitable on the basis of overcrowding. The impact of such lack of space is made more severe for the Ahmed family because one of Mr Ahmed's sons has severe autism and epilepsy. Mr Ahmed requested a review of the suitability of the accommodation 18 months ago and the Council has been in breach of statutory duty for 16 months. The Council has done nothing to perform the section 193(2) duty in his case, other than put his name on the PML and wait. Paragraph 321 above applies equally to Mr Ahmed's case, and in the circumstances I consider that a mandatory order should be granted.

323. Having regard to the difficulties the Council faces in meeting its housing obligations, including those resulting from the pandemic (which I accept has seriously exacerbated the problems, albeit as Mr McIlvaney points out, some of the measures taken are likely

to have reduced the numbers of homeless persons to whom the Council currently owes Part VII duties), I will make mandatory orders in *Elkundi* and *Ahmed* which give the Council 12 weeks to secure suitable accommodation is available to the claimant in accordance with section 193(2).

324. In Mrs Ross's case, the Council has been in breach of section 193(2) for seven months. The accommodation secured for her is a semi-detached two-bedroom bungalow, with a level path to the front door, a wet room and a garden, in respect of which she has been granted a secure tenancy. Mrs Ross does not drive, but she has a Motability car in which she can be driven by a carer, and the property has off road parking. The accommodation is unsuitable because it has not been adapted internally for a wheelchair user. The lack of adaptation has a significant impact, not least as Mrs Ross is effectively unable to access the kitchen. Mrs Ross has lived in this unadapted property for over 2 ½ years.

325. However, the Council has made active and determined efforts to secure suitable accommodation for Mrs Ross. *First*, the Council has determined the adaptations that are required to her current accommodation and secured funding for those adaptations to be made. The property would have been adapted by now, but Mrs Ross wishes to move location and, in the particular circumstances of Mrs Ross's case, the Council has sought to facilitate such a move. The offer to adapt her current accommodation to make it suitable for her remains open. I note that the claimant's occupational therapist, Jacqui Summerfield states:

> "I am not able to offer expert structural advice on the ability to suitably adapt Mrs Ross's existing property, but my level of expertise leads me to an opinion that this particular property could not be fully, suitably adapted to create access of all areas; mainly because of the architectural layout with the narrow hallway from which the kitchen, wet-room and lounge are accessed."

However, I accept the Council's evidence that it has undertaken feasibility assessments, in light of which the Council remains of the view that the property can be suitably adapted. I also note that Mrs Ross has had difficulties in her current accommodation with what she describes as "toxic fumes". Mrs Ross is not alone in having noticed a problem; a carer and an occupational therapist have noticed it, too. But numerous gas safety checks have been undertaken and have found no evidence of any carbon monoxide or other gas leak, or any toxic fumes. So the reason Mrs Ross's accommodation is unsuitable is solely due to it not having been adapted.

326. *Second*, as Mrs Ross wishes to move, the Council has made clear its willingness to adapt any property that Mrs Ross moves into to meet her needs. As it is likely that adaptations will have to be made, the Council is seeking to assist Mrs Ross to secure permanent accommodation. Mrs Ross is on the housing register and eligible to bid for two-bedroom properties. She is in the highest priority band and has a good prospect of being the highest placed bidder for any property for which she bids. This was demonstrated by the fact that when she put in a bid for a two bedroom bungalow on 13 January 2021 she was the first placed bidder and was offered the property by the Council. However, she had thought the property was closer to the area she wishes to move to than it is and so the Council, taking a commendably considerate approach, has accepted that she does not wish to take up that offer.

327. *Thirdly*, the Council has offered Mrs Ross assisted bidding. It has also offered Mrs Ross advice, as the effect of selecting as "Excluded Areas" seven out of ten ward areas is that Mrs Ross is not able to view or bid on any properties in those areas, effectively excluding 87% of the Council's area. When a two-bedroom property became available in Mrs Ross's preferred area, Handsworth, the Council immediately, on 3 December 2020, notified Mrs Ross's solicitors. Unfortunately, she did not bid for it. While it is understandable that she was concerned that there was insufficient information available as to whether the property would be adaptable, the Council has explained that if she is successful in a bid, steps can then be taken to ascertain whether the property can be suitably adapted and, if not, she will have an opportunity to bid again.

328. *Fourthly*, the Council made extensive efforts to secure accommodation for Mrs Ross at Pannel Croft Extra Care Scheme. This accommodation is 1.6 miles from Mrs Ross's mother's property and it is fully wheelchair adapted, ground floor, self-contained accommodation. Since October 2020 there have been eight two-bedroom properties at Pannel Croft available on Birmingham Choice. Mrs Ross chose not to place bids for any of these properties. Nevertheless, the Council explored the option of making a direct nomination. Ultimately this was unsuccessful because Pannel Croft took the view that "*Mrs Ross's demands and behaviour in respect of the assessment*" were such that it was "*felt that she would not fit into the Scheme with the other residents*".

329. In all the circumstances, although the Council is in breach of its section 193(2) duty towards Mrs Ross, and she is entitled to a declaration to that effect, I am satisfied that the Council has been taking all reasonable steps to secure suitable accommodation for Mrs Ross and, at this stage, if the court were to make a mandatory order it would be enforcing the duty unreasonably.

330. In respect of Ground 1, Mr Al-Shameri is not entitled to mandatory relief, as I have dismissed his claim that the Council is in on-going breach of section 193(2) on the basis that the review decision determining that the offer of Flat 7 was suitable has not been challenged, and he has an alternative remedy. However, I have made a finding of a past breach of section 193(2). A claimant who establishes that a public body has acted unlawfully will normally be entitled to a declaration to mark the illegality in cases where no other relief is appropriate (*R (Good Law Project) v Secretary of State for Health* [2021] EWHC 346 (Admin), Chamberlain J at [152]). I will therefore grant Mr Al-Shameri a declaration that during the period from 27 April 2018 to 28 September 2020 the Council was in breach of its duty to him under section 193(2).

331. I will also grant a declaration that the duty under section 193(2) to secure suitable accommodation for an applicant to whom the duty is owed is unqualified, immediate and non-deferrable. The Council's system of putting applicants who are owed the section 193(2) duty, and whose accommodation is currently unsuitable, onto a waiting list for temporary accommodation is not a lawful means of performing the duty.

332. In conclusion, the claimants have succeeded on Ground 1 (save to the extent indicated in Mr Al-Shameri's case) and Ground 2. Ground 3 is dismissed. I will hear from the parties, in writing, on the precise terms of the order.

Postscript

333. Since providing the parties with a draft of this judgment, I have been informed that an offer of accommodation was made to Mr Elkundi on 12 March 2021. He refused the offer on the basis that it is, he contends, unsuitable. On 1 April 2021, the Council discharged its duty to Mr Elkundi and, on 21 April 2021 Mr Elkundi sought a statutory review which remains to be determined.