Browne Jacobson

Balancing homelessness duties and housing stock: all change?

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On 4 May 2022, the Court of Appeal handed down judgment in the joint case of R (Elkundi and others) -v- Birmingham City Council and R (Imam) -v- London Borough of Croydon [2022] EWCA Civ 601.

Both cases sought to address the difficulties that local housing authorities face when reconciling an immediate duty to secure accommodation for applicants who are owed the main housing duty with budgetary and other constraints, including a shortage of suitable accommodation in their area.

The nature of the main housing duty

Birmingham City Council argued that the main housing duty should be interpreted as a duty to secure that accommodation becomes available within a reasonable period of the duty occurring. The reasonableness of the period depends on the circumstances of the case and the accommodation available.

Lord Justice Lewis (in giving the leading judgment with which Underhill LJ and Peter Jackson LJ agreed) rejected this interpretation, concluding (at [78] that: -

"[…] once the duty is owed, the obligation on the housing authority is to ensure that accommodation is available for that person. In that sense, the duty is immediate, arising when the duty is owed. It is non-deferrable and unqualified, in that the duty is to secure that accommodation "is available for occupation", not that accommodation will become available within a reasonable period of time."

It followed from Lewis J's findings on the immediate nature of the main housing duty in that a local housing authority cannot lawfully perform the main housing duty simply by placing an applicant on a waiting list for suitable accommodation.

Additionally, Birmingham City Council's Part VII waiting list (referred to in the judgment in the planned moves list) was held to be unlawful on the grounds that:

- the planned moves list failed to distinguish between those applicants who were owed the main housing duty and who were living in unsuitable accommodation and those who were owed the main housing duty and whose accommodation was suitable in the short term, although not in the longer term; and
- there was no evidence that Birmingham City Council's operation of the planned moves list had any regard to the impact on disabled applicants of time spent waiting for suitable accommodation.

As a consequence, it breached the public sector equality duty.

Suitability: a solution to the resource issue?

While the Court of Appeal declined to reinterpret the main housing duty as affording local housing authorities a reasonable period in which to perform the duty, Lewis J emphasised that the concept of suitability was sufficiently flexible to enable local housing authorities to perform the main housing duty, even in circumstances where the authority did not have long term accommodation available to meet the needs of a particular applicant.

Lewis J explained (at [82]) that:

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

Lewis J set out a non-exhaustive list of factors that may be relevant when determining whether accommodation is suitable:

- the nature of the accommodation
- the length of time that the homeless person has been in the accommodation
- the applicant’s needs and the needs of his family members/household
- the lack of alternative accommodation
- the fact that the local housing authority has limited resources available to secure accommodation

While further broadening the definition of ‘suitability’ is not a complete solution to the resource issue, it does provide local housing authorities with a lawful means of performing the main housing duty, at least for a time.

However, Lewis J cautioned that once a local authority decides that the accommodation currently occupied by an applicant is unsuitable (rather than unsuitable in the medium or longer term), the authority must immediately provide other accommodation which is suitable.

Local authority case workers and reviewing officers should therefore be mindful of the implications of accepting that accommodation is unsuitable, as a local authority will be in breach of duty if it cannot immediately provide alternative suitable accommodation.

Officers can decide that accommodation is suitable at least in the short or medium term. This enables the authority to continue searching for accommodation that will be suitable in the long term whilst avoiding a breach of the main housing duty if more suitable accommodation cannot be secured immediately.

Can a local authority decide that accommodation that it has previously decided is unsuitable is in fact suitable?

In Elkundi, the Judge held that a local housing authority would be bound by an earlier decision that accommodation was unsuitable, that the Act did not permit the withdrawal or review of a favourable decision and that the local housing authority was functus (i.e. it had no function or power to reach another decision on suitability).

As the issue did not arise on the facts, the Court of Appeal declined to set down any binding principles. However, in comments that were themselves obiter, Lewis LJ stated that: -

“I would not want it to be assumed that the obiter dicta of the Judge are correct. […] The section 193(2) duty arises once the criteria are satisfied and remains in operation until brought to an end by one of the events prescribed in section 193 itself. During that period, the housing authority will have to provide suitable accommodation. What is suitable may differ in the short, medium and long term. Furthermore, there may be changes which may affect the suitability of the accommodation being provided under section 193(2). It may be that an additional child is born, making a house even more overcrowded. Or a person's disabilities may worsen. Those matters may render accommodation that might otherwise have been suitable in the short term unsuitable. Conversely, matters may improve. One or more of the people in the household may move out, that may ease the overcrowding and that may affect the suitability of the accommodation in the short term. Given the continuing nature of the duty, and the circumstances, it may be incorrect to take the view that the local housing authority is " functus " and is unable to address changes when considering the suitability of the accommodation it is providing as part of the process of discharging its section 193(2) duty.”

The Court of Appeal has certainly opened the door to the possibility that a local housing authority may lawfully change its own decision on the suitability of accommodation provided to an applicant who is owed the main housing duty. However, as no binding legal principles were established in this case and as such a decision would itself be susceptible to statutory review, statutory appeal and/or judicial review, it is not a course of action that a local housing authority should take lightly (or without specific legal advice).

Waiving the right to interim accommodation

While an applicant for homelessness assistance could waive their right to accommodation, they could only do so if they provided fully informed consent (which required the local housing authority to be clear about the duty they had accepted). Applicants were also entitled to change their mind, in which case the local housing authority would be obliged to secure suitable accommodation for them.

Mandatory relief: the requirement to take all reasonable steps

In Imam, the Deputy Judge refused to make a mandatory order requiring London Borough of Croydon to accommodate the Claimant within a specified period, on the grounds that:

- There was a spectrum of seriousness in relation to breaches of the main housing duty and this case was at the less serious end of that spectrum.
- London Borough of Croydon accepted that it was in breach but had demonstrated that it had done what it reasonably could to fulfil its statutory duty, consistent with the proper application of its policies and the limited resources available to it.
- There was a general shortage of accommodation in the area and it was unlikely that a suitable property would be found in the near future (that enhanced, rather than diminished, the case for a mandatory order).
- The Claimant had been waiting a long time for a suitable property but the passage of time was not itself determinative of whether an order should be made.
- London Borough of Croydon's resources were finite and it had a large estimated budgetary overspend (at the date of the hearing).
- Granting a mandatory order would have disadvantaged those who were ahead of the Claimant on the authority's Part VI housing list and those who were also owed the main housing duty and who were in more urgent need and/or who had been waiting longer for suitable accommodation.

However, Lewis LJ held that the Deputy Judge had erred in the following respects:

Budgetary constraints are not relevant to the question of whether a mandatory order is appropriate once a local housing authority has accepted that a person is owed the main housing duty and their current accommodation is unsuitable. While the limited number of suitable properties available may be relevant in assessing whether a local housing authority has done all it reasonably can, constraints on resources are not a reason for non-compliance with a duty imposed by Parliament.

The Deputy Judge had erred in his analysis of the steps that London Borough of Croydon had taken to fulfil the main housing duty. Specifically, London Borough of Croydon had needed to address whether there were any suitable properties available that it could use to secure suitable accommodation under Part VII (without offering a secure tenancy under Part VI).

Lewis J reasoned that: -

"The allocation under Part VI is intended to lead to the allocation of permanent accommodation in the form of a secure tenancy. Part VII is different. So long as the section 193(2) duty applies, that duty requires the housing authority to secure that suitable accommodation is available. That duty would end if the applicant is made a final offer of suitable accommodation under Part VI. If that position has not been reached, and the duty has not been brought to an end in that way, the housing authority is still obliged, so long as the section 193(2) duty applies, to secure that some suitable accommodation is provided. In Mrs Imam's case the housing authority needed to explain what steps it has taken to secure that suitable accommodation is available albeit on a non-permanent basis and without granting a secure tenancy of property under Part VI. Put simply, it needed to address why it is not using housing stock which could be used under Part VI to meet its different duties under Part VII."

While Lewis LJ emphasised that the obligation on the local housing authority was "to explain why it is not using its housing stock to secure accommodation that is suitable on a non-permanent basis to meet its Part VII duties", a local housing authority may now find it difficult to defend a decision to allocate a property on a secure tenancy under Part VI if that same property could instead be allocated on a non-secure tenancy to someone to whom it owed a duty under Part VII. The Court of Appeal certainly took the view that available housing stock should be used preferentially for applicants who are owed a duty under Part VII rather than for Part VI purposes (particularly given the immediate nature of the main housing duty and the circumstances in which it arose).

The Court's findings on this issue amount to a reversal of the way in which most local housing authorities currently prioritise competing rights when considering how best to manage their stock. It also sits uneasily with the reasonable preference afforded to those who are homeless under Part VI, and raises questions about how others in respect of whom the authority owes accommodation duties (such as those owed under the Children Act 1989 or the Care Act 2014, or to those without recourse to public funds who are destitute) should be prioritised for accommodation.

The Court's finding that a local authority's resources are not relevant to the issue of relief has wider implications beyond merely housing cases, and is difficult to reconcile with the 'all reasonable steps' test that the Court laid down.

Other points of note

The Court of Appeal held that while local housing authorities were not required to have a Part VII allocation scheme, it is good practice to adopt a policy for allocating properties to and amongst those who are owed homelessness duties under Part VII of the Act.

If a local housing authority wishes to resist a mandatory order where a breach of the main housing duty is admitted or found, then the authority will need to demonstrate with evidence that it has taken all reasonable steps to perform the duty. It is unlikely to be sufficient to refer generally to the demand for housing or the shortage of accommodation in the authority's area. Housing officers are likely to need to prepare detailed witness statements explaining precisely what steps were taken, what options were considered and rejected and why it has not been possible to secure suitable accommodation.

Next steps

While Birmingham City Council and London Borough of Croydon were refused permission to appeal by the Court of Appeal, they have until early June to seek permission to appeal directly from the Supreme Court.

Local housing authorities may well take the view that it would be best to wait and see whether the Court's findings are the subject of a further appeal, before taking steps to review their allocation schemes, policies and internal procedures to reflect the Court of Appeal's findings.

However, if the Court of Appeal's decision stands (because permission to appeal is refused or not sought), then local housing authorities will need to urgently review their procedures for allocating accommodation to reflect the fact that the main housing duty is immediate, unqualified and non-deferrable and to ensure, in the event that they are unable to secure suitable accommodation immediately, that they are in a position to evidence the fact that they have taken all reasonable steps including considering allocation of Part VI stock on a non-secure tenancy.

Contact

Victoria Searle

Principal Associate

victoria.searle@brownejacobson.com

+44 (0)330 045 2363

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