Neutral Citation Number: [2022] EWHC 1232 (Admin)

Case No: CO/3370/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 May 2022

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN

on the application of

MILTON LAINES ROMAN **Claimant**

- and -

LONDON BOROUGH OF SOUTHWARK **Defendant**

- -

- -

Jamie Burton QC and Caragh Nimmo (instructed by the **Public Interest Law Centre**) for the **Claimant**
Catherine Rowlands (instructed by **Legal Services**) for the **Defendant**

Hearing date: 5 May 2022

- -

Approved Judgment

Mrs Justice Lang :

1. The Claimant seeks judicial review of the decision made by the Defendant ("the Council"), on 2 July 2021, refusing his request to be placed in priority Band 1 of the Council's housing allocation scheme ("the Scheme").

2. The Claimant, his wife and two children live in a one-room studio flat in East Street, Southwark ("East Street"). In its decision, the Council accepted that their dwelling was statutorily overcrowded, applying the criteria in Part X of the Housing Act 1985 ("HA 1985"). However, the Council found that the statutory overcrowding had been caused by a "deliberate act" on the part of the Claimant, within the meaning of section 6.2 of the Scheme, which excluded him from Band 1. Instead, he was placed in priority Band 3, with a priority star. This greatly reduced his chances of being allocated social housing under the Scheme.

3. The Claimant's grounds of challenge may be summarised as follows:

   i) **Ground 1(a)**. It was irrational for the Council to conclude that the Claimant's statutory overcrowding was caused by a deliberate act of the Claimant, and in particular it was irrational to conclude that at the time the Claimant moved into his current accommodation he had the option of moving into suitable alternative accommodation which was not statutorily overcrowded.

   ii) **Ground 1(b)**. As the Claimant was not able to afford alternative suitable accommodation which was not statutorily overcrowded, his decision to move into statutorily overcrowded accommodation was not a "deliberate act" within the meaning of section 6.2 of the Scheme.

   iii) **Ground 2**. The Council's Scheme is unlawful as it does not explain the criteria that the Council applies when determining if an applicant has committed a "deliberate act" within the meaning of section 6.2 of the Scheme. Those criteria are set out in an unpublished document headed "Assessing Overcrowding - Overcrowding priority band assessment guidance" ("the Guidance"), which is only available to the Council.

   iv) **Ground 3**. The decision breaches Article 14, read together with Article 8, of the European Convention on Human Rights ("ECHR").

4. Permission to apply for judicial review was initially refused by a Judge on the papers, but granted at an oral renewal hearing by Freedman J. on 20 January 2022. Permission was granted on Ground 1. However, Freedman J. made no decision in respect of Grounds 2 and 3, instead ordering that the application for permission on those grounds be adjourned to a rolled-up hearing, to be listed on the same occasion as the substantive hearing on Ground 1.

Facts

5. The Claimant and his wife (Cecilia) originate from Ecuador. They have three children. Their older son, Hamilton, was born on 29 June 1997. Their daughter Rebeca was born on 9 August 2002. She was aged 14 when the family moved into East Street; she is

now aged 19. She has recently left school and is now attending the University of Westminster. Their younger son, Abraham, was born on 25 June 2007. He was aged 9 when the family moved into East Street; he is now aged 14 and attends school in Southwark.

6. In 2000, the Claimant and his wife relocated to Spain to look for work. The Claimant worked as a construction worker and his wife was a care assistant. Their two younger children were born in Spain. All members of the family, other than Hamilton, became citizens of Spain and were issued with Spanish passports.

7. In 2011/2012 there was an economic crisis in Spain and the Claimant lost his job, and was unable to find other work. So in June 2012, the Claimant returned to Ecuador, his county of origin, with his two younger children. His wife remained in Spain with their older son because she was still employed. His wife and son then returned to Ecuador in November 2012 so that the family could be reunited.

8. The Claimant had difficulty in finding work in Ecuador. He eventually found work in a gold mine, but the work was dangerous, and he had two accidents for which he was hospitalised. He left the mine and obtained work as a security guard, but the contract ended, and he was unable to find another job. He was struggling financially as he had debts from the cost of medical treatment after his mining accidents, and he had to support his family. His wife also found it difficult to gain employment in Ecuador, as a woman with children.

9. The Claimant's sister, who resides in London, suggested to the Claimant that he should come to London, where he would be able to find work. She paid for his flight, as he could not afford it.

2016

10. The Claimant arrived in London in early March 2016. As a Spanish citizen, the Claimant was able to exercise EU freedom of movement rights to live and work in the United Kingdom ("UK"). He hoped that his family could join him as soon as he could afford the cost of their flights. Through friends of his sister, who lives in the area, he obtained rented accommodation in Brixton, in a shared room in a flat.

11. From March 2016 onwards, he worked a cleaner for various companies and agencies, for low wages and uncertain hours. He sent money back to Ecuador to support his immediate family, as well as his parents and his mother-in-law.

12. The Claimant and his family did not want to be apart from each other, and so on 4 October 2016 the Claimant's wife and their two younger children came to London from Ecuador. The Claimant received help with the cost of the flights from a friend. They all moved into a vacant room in the Brixton flat where the Claimant was already living. Kitchen and toilet facilities were shared with the other residents of the flat. The Claimant's wife obtained work as a cleaner in October 2016.

13. At that time, their son Hamilton was not able to join them because he was not a Spanish citizen, but he was subsequently granted Spanish citizenship and came to London to join his family in May 2017.

14. When the landlord of the Brixton flat discovered that an entire family was living in one room, he evicted them. They were required to leave by the end of November 2016. At this time, the Claimant was unaware that the Council could provide assistance to homeless people, or that there was a housing register. He and his wife struggled as they could not speak or read English and were dependant upon others to translate for them.

15. The Claimant searched in Lambeth and Southwark for a two-bedroom flat, but the prices started at around £1,600 per month, which was more than he could afford. He also looked at renting a one-bedroom property, at a lower rent, but landlords and agents refused to let a one-bedroom flat to the entire family. Nearly all the landlords and agents asked the Claimant and his wife to provide a year's worth of payslips demonstrating full time work. This was impossible as the Claimant had only been working 7 months and his wife had only just started work. Landlords and agents also wanted up to 5 months' rent/deposit paid in advance, which the Claimant was unable to pay.

16. The Claimant and his family are practising Christians, and attend the New Covenant Church, in Bermondsey, Southwark. They first met the Pastor at the Church (Pastor Carlos) when they were living in Spain. Pastor Carlos assisted the Claimant to find a flat at 81A East Street SE17 2DH, and persuaded the landlord to accept only 1 month's deposit and one month's rent in advance. They moved into East Street on 21 November 2016.

17. East Street comprises one main room, which contains the kitchen and beds. There is also a bathroom. There is insufficient space for the family; it is uncomfortable and stressful, and there is no privacy. The children have grown out of their bunk beds; Abraham is sleeping on a sofa bed which is too small for him. The children do not have space to do activities or school/college work, and cannot have friends to visit.

2017 - 2019

18. In January 2017, the Claimant applied for universal credit, and it was awarded with effect from July 2017, initially at about £751 per month. Child benefit was also paid to the family from 2017, in the sum of about £137 per month.

19. In early 2018, the Claimant became aware of Housing Action Southwark and Lambeth ("HASL") which is a local housing campaign organisation, which provided the family with advice, as a result of which they applied to join the Housing Register.

20. Initially the Council stated that the family could not join the Housing Register because they did not meet the local connection criteria. With the assistance of HASL, the Claimant applied for a review of this decision. He was asked to supply documents in support, which took some time to gather and submit, in particular, because of a lack of co-operation by their landlord, and the Claimant's wife's employer. The Council also requested further information regarding sleeping arrangements at East Street.

21. On 17 April 2019, the Council sent a decision letter allocating him to Band 3 of the Scheme. However, the Council later stated that this was sent in error.

22. On 29 April 2019, the Council sent a revised decision letter in which it accepted that he was able to demonstrate a local connection because of his wife's employment in the borough in accordance with section 5.14 of the Scheme. It was accepted that the East Street flat was statutorily overcrowded. However, he was allocated to priority Band 4, with a priority star for employment, for the following reasons:

    i) The Claimant was aware from the outset that the East Street flat was not suitable because of overcrowding, particularly since he had been evicted from the Brixton flat because of overcrowding.

    ii) By choosing to rent accommodation that placed the family in a situation of extreme overcrowding, the Claimant deliberately worsened his circumstances in order to qualify to join the housing register, under section 3.5.9(b) of the Scheme.

    iii) The Claimant rented the East Street flat in order to gain an unfair advantage on the housing waiting list. His housing need was therefore contrived.

    iv) The information provided in the application form was, in part, false and inaccurate.

    v) The Claimant planned his migration to the UK.

    vi) The Claimant had the financial means to rent a 2 bedroom property, which would have reduced the severity of the overcrowding.

    vii) The Claimant could have obtained accommodation in other boroughs further from the centre of London which would have been cheaper, but still easily accessible.

    viii) The Claimant could have applied to the Council for assistance to secure private sector accommodation, at reduced local housing authority ("LHA") rates.

    ix) Since a reasonable preference was owed to a household living in statutorily overcrowded conditions, the Claimant would be registered with a reduced priority in Band 4, in accordance with section 5.23.5(a) or (b) of the Scheme.

23. With the assistance of HASL, the Claimant applied for a review of the Council's decision to place him in priority Band 4. HASL submitted that he should qualify for Band 3 with a priority star for overcrowding.

24. On 19 July 2019, the Council reviewed and upheld its earlier decision of 29 April 2019. A priority star for overcrowding could not be awarded because the Council was satisfied that a deliberate worsening of circumstances had taken place.

25. In its letter of 29 April 2019, the Council questioned whether the family had emigrated from Spain, not Ecuador, because the children's birth certificates were issued in Madrid in November 2016. The explanation for this was that the birth certificates had been collected in November 2016 from Madrid by the Claimant's other sister who lives in Madrid. She brought them to London when she visited.

26. The Claimant accepts that factual errors were made in completing the application form, which were identified by the Council in its letter of 29 April 2019, including incorrect date of birth, incorrect date of arrival in the UK, and incorrect date when the tenancy commenced at East Street. The total family income figure accidentally omitted his wife's earnings, although the fact that she was in work was disclosed to the Council, and her pay slips were submitted, in support of the claim.

27. The family's financial position was set out in the Claimant's first witness statement. It corrected errors in the application for housing regarding his wife's earnings, which were accidentally omitted from the calculation. However, the fact that his wife was working was disclosed, and in 2018 the Claimant disclosed documents confirming her employment and her wages, as her employment was relied upon for the purposes of establishing a local connection.

28. The errors in the application form were not noticed or understood by the Claimant when he reviewed the completed form sent to him by the Council on 18 April 2019.

29. However, the circumstances in which the form was completed are relevant in assessing the reason for the errors. Volunteers at HASL assisted the Claimant in completing the online application form, as the Claimant is not computer literate and has limited knowledge of English. Izzy Koksal of HASL describes how she held a session assisting 5 families simultaneously to complete their applications on computers. The questions were difficult to understand and answer, and the volunteer translator was not fluent in English. The internet connection was poor and the software did not permit the application to be saved, and so the application had to be completed in one go. Earlier attempts to submit the form had failed. Among other problems, the Claimant was not able to enter different dates and different addresses for different members of the family. Ms Koksal advised applicants to make their best guess at providing accurate information, and reassured them that any inaccuracies could be corrected at a later stage, when the Council requested documents to be submitted. In her second witness statement, Ms Koksal explains that she now realises that this approach has led to unfortunate consequences. She accepts responsibility for their part in producing these errors and mistakes as they guided the Claimant through the application, describing the process as "a stressful and chaotic experience".

30. There were also factual errors on some of the documents which the Claimant had to provide from his employer, in particular incorrect dates and addresses. In due course, these errors were explained to the Council and corrected.

31. In June/July 2019, the Claimant, his wife and two younger children were granted pre-settled status under the EU settlement scheme.

32. The Claimant then received legal advice. On 2 September 2019, his solicitors sent a pre-action letter to the Council, challenging its review decision, and stating that the Claimant ought to be in Band 1, or alternatively Band 3 with a priority star. On 27 September 2019, the Council confirmed its previous decision.

33. On 20 December 2019, the Claimant's solicitors sent further representations to the Council as to why the Claimant should be in priority Band 1, supported by the Claimant's first witness statement, which exhibited copies of all original documents.

2020

34. On 13 January 2020, the Council responded, making three points. First, it set out alternative dates on which the Claimant and his wife allegedly moved into the flat in Brixton and the flat in East Street. It asserted that this raised credibility issues.

35. Second, the Claimant and his wife could, and should, have taken up more suitable affordable accommodation in another local authority area.

36. Third, the Council had a huge shortage of social housing, and it was not fair to allow an applicant to jump the queue into priority Band 1 by moving into statutorily overcrowded accommodation.

37. On 3 February 2020, the Claimant's solicitors requested a review of the decision of 13 January 2020. Shortly afterwards, they submitted the Claimant's second witness statement addressing the factual errors in the Council's letter of 13 January 2020. The dates on which it was alleged that the Claimant and his wife lived in the Brixton flat and the East Street flat were incorrect, and arose from the fact that the Claimant had not been able to notify his change of address to his employer and his bank, because of his inability to speak or write English. His post was being forwarded to him from the Brixton flat by a friend. The tenancy agreement for East Street stated that it commenced on 21 November 2016, confirming the Claimant's account.

38. On 3 April 2020, the Council sent its review decision, confirming its previous decision.

39. On 1 June 2020, the Claimant's solicitors sent a further pre-action letter. In June 2020, the Council awarded the Claimant priority stars for working and volunteering in the locality.

40. On 30 June 2020, the Council allocated the Claimant to priority Band 3, as an overcrowded household. It backdated his priority to April 2018 when he first applied. However, it maintained that the statutory overcrowding was the result of a deliberate act, and therefore he was not eligible for priority Band 1. The Council also refused to award a priority star for overcrowding.

41. Following another pre-action letter from the Claimant's solicitors, the Council conceded, on 13 August 2020, that a priority star for overcrowding should be awarded.

42. In September 2020, the Claimant's Housing Register account was activated.

2021

43. On 24 February 2021, following the decision of the Court of Appeal in *R (Flores) v Southwark LBC* [2020] EWCA Civ 1697, the Claimant's solicitors sent a pre-action letter to the Council. On 16 March 2021, the Council agreed to carry out another review of the Claimant's family circumstances.

44. The Council's rehousing manager asked the Claimant to attend a one and a half hour interview, which would relate to the Claimant's current and previous accommodation and the options available to him when he moved to his current accommodation.

45. The Claimant responded in emails of 8 and 18 April 2021 stating that he had repeatedly provided the Council with all the information about his current and previous accommodation and the situation the family faced when they moved into the East Street flat. The process had been very distressing for him and his family. If she had any questions arising out of the information already sent, he would be happy to answer them. The rehousing manager sent a set of written questions which the Claimant answered.

46. On 17 June 2021, the Claimant received an offer from the Council to view a three-bedroom property to rent at £1,800 a month in Deptford. The Claimant and his wife concluded that they were not able to afford this property, for the reasons set out in paragraph 6 of his third witness statement:

> "The only accommodation that we have been given a 'viewing offer' for by the council was a private three-bed flat to rent for £1,800 per month in Deptford. We were offered this viewing in June 2021. It has the number of rooms that we wished for and we were really excited about the thought of being able to move into a flat that was the right size for our family. However, the property was £750 more a month than our current place. I sat down with my wife and calculated that the costs would have been about £2,400 per month including bills, council tax and the increased cost of transport to our work and to university. Adding to this food costs of around £550 a month, the total costs would have been around £2,950 a month. At the time I was earning around £1,000 per month and my wife was earning around £550 per month. At this point we were receiving £150 a month in child benefit and around £800 to £1,000 per month in Universal Credit, which varied depending on our income. Taking the top end of the Universal Credit payments, we would have had an income £2,700 and outgoings of £2,950 a month. That is before any additional costs that might emerge such as clothing costs or unexpected expenses. Based on our income at the time, it was clear to us we were just not able to afford to pay this much."

47. The Claimant addressed this matter further in his fourth witness statement:

> "24. I said to the council at the time that I was worried that the price of the property was too high and that we were worried about being able to afford the rent, particularly due to the economic uncertainty caused by COVID-19. I explained that we would have had to travel much large distances to attend work and school and that we would have been further from our social networks in Southwark.
>
> 25. I have previously described the calculations that my wife and I made at the time in my third witness statement (at paragraph 6). The figures that I gave in that paragraph were not meant to be a full account of all of our different outgoings, but were instead meant to give examples of how our costs would increase. That is why I said there would also be "additional costs" that

were not taken into account. I do not have detailed notes from the conversations we had at the time, but we calculated whether we could afford the property and we felt we could not. When making these calculations we had not properly understood how our Universal Credit would change as we moved into a larger and more expensive property. We were also not provided with any advice on this by the council. We were struggling at the time, and just barely getting by. We could not afford substantial increases to our cost of living.

26. I understand that the council have now said that there would only have been a £29.90 per month shortfall between the cost of the Deptford property and the cost of our housing in Southwark. However, that is not correct.

27. I had not understood at the time how the housing element of my Universal Credit would be increased to cover the majority of the costs of the property. However, I have done the calculation with my solicitor and there would have still been a £129.59 a month shortfall on the housing costs, even after this increase, and not a £29.90 a month shortfall as the council has calculated. This is because the Three Bedrooms Rate for Inner South East London is £385.48 per week. Per year this is £20,044.96 and per month it is £1,670.41. As the cost of the accommodation was £1,800 this would leave a £129.59 per month shortfall.

28. I think the fact that the council's lawyers have also made a mistake in calculating these figures shows how hard it was for us, without English, trying to navigate what we could afford.

29. Also, the local authority has only looked at the price of the accommodation. They have not considered the other costs that we would have incurred. The property was substantially larger than the current place we are living and we knew that our heating and electricity costs would increase. This could have increased our costs by around £30 a month.

30. Additionally, our current rent includes the cost of council tax, whereas the new property would have required us to pay council tax as well. The property would have been in Band B, based on the postcode. Therefore the council tax would have been £1,237.90 per year, or £103.16 per month more.

31. We knew our transport costs would increase. At the moment I get up very early and I commute to work by bus, but if I had moved to Deptford I would have had to take a train. The cost for a monthly bus and tram pass in 2021 was £84.10 per month. However, a travel card covering Zones 1 - 2 cost £142.10 per month, which is £58 per month more.

> 32. Additionally, my wife currently walks to work. If she had moved to Deptford she would have had to travel by bus. This would have cost her £84.10 per month for a monthly bus and tram pass.
>
> 33. My son would also have to travel a much greater distance to school. I do not know how I would feel about him travelling such a distance on his own, at only 14 years old. It is possible that my wife would have to travel with him, but in any case he currently walks and would no longer be able to. Whilst the bus would be free, it would take him around 40 minutes each way. I have concerns about him doing this journey on his own.
>
> 34. My daughter currently takes a bus to go to university but from Deptford she would also have needed to take the train. This would cost her £99.10 per month as a student aged over 18 years old in comparison to £58.80 per month for a bus pass. This is £40.30 per month more. However, the cost of transport for her would have been covered by her Student Loan from September 2021."

The decision under challenge

48. On 2 July 2021, Mr Herd, Housing Choice and Supply Manager at the Council, issued the decision which is challenged in this claim. It upheld the earlier decision to allocate the Claimant to priority Band 3, on the basis that the Claimant did not meet the Band 1 criteria as he had caused the overcrowding in the accommodation by a deliberate act.

49. The reasons for the decision were set out in the decision letter as follows:

> "7. I have considered all of the information put forward on review in support of your application, and have determined that your statutory overcrowding is as a result of a deliberate act in accordance with section 6.2 ….. [of the Scheme]….."
>
> "10. Given the above information, I have considered whether it was reasonable for your household to move into accommodation that was statutory *(sic)* overcrowded from the very start of your tenancy and have considered what other options were available to you at that time."
>
> "11. …. when living in Spain as a family you rented a 2 bedroom property and gave up this accommodation to move back to Ecuador…… Your accommodation in Ecuador was a 2 bedroom ….. property."
>
> "14. ….. It is without question that you would have been aware that the room in a shared house was not going to be suitable to accommodate your family of 4. You had no accommodation for your family and did not take any steps to secure suitable

accommodation for them. Despite this you made the decision to save money to buy plane tickets for them to join you in highly insecure accommodation rather than seek affordable and suitable accommodation for your entire household. You also state that you were supporting your family financially in Ecuador and you have not indicated any urgent need for them to join you in the UK other than the natural fact that a family desires to live together. You had not secured suitable accommodation for them to reside on arrival in the UK."

"15. …. you did not wish to be apart from your wife due to your Christian faith ….. Whilst it is not in dispute that you should be allowed to freely practice your faith, it is reasonable to consider whether this right should supersede the safeguarding of your children's welfare by bringing them to the UK to become homeless or to live in highly unsecure accommodation…."

"16. You have stated that you had no other choice but to rent the studio accommodation at … East Street ….because of your impending homelessness from [the Brixton flat] however it is my view that the circumstances that led you up to that predicament of homelessness were deliberate, as you have not submitted any evidence to suggest why it was necessary rather than desirable to have your family join you in the UK when they did. There are no rules within Christianity that prohibit a husband and wife living apart temporarily."

"17. Furthermore I have had regard of the income that was available to you at that time and your ability to access and engage with relevant services to assist you in promoting the welfare of your children when in the UK."

"18. I have considered that despite your lack of English and unfamiliarity with the UK, you were able to arrange national insurance numbers to permit you and your wife to engage in paid employment and then find employment, find schools for your children, find a place of worship, raise enough capital to secure accommodation in the private sector, apply for relevant welfare benefits for the children and to assist you in paying your rent, make an application for social housing and seek out and secure advocacy support from the organisation HASL."

"19. Whilst it is not being disputed that your unfamiliarity with the UK must have presented you with some challenges, I do not believe, given the resourcefulness that you have demonstrated to date that, you were prevented by way of a lack of knowledge or resource from securing suitable accommodation for you and your household, or, through seeking assistance from a local authority, or, advice from an independent agency or organisation to do so."

"20. However, from the information you have presented and the advocacy support you have received, I believe you have not been given sufficient support in this regard as an advocacy agency regarding housing and homelessness would recognise that you are living in overcrowded and unsuitable conditions and that you could approach your local authority under homelessness legislation for advice and assistance, to complete a homelessness application where assistance in obtaining accommodation in the private sector is available as part of the Homelessness Reduction Act 2017, as well as a decision under Part 7 of the Housing of the Housing Act 1996 for social housing, should you not have been relieved of your current housing situation. It appears in your situation that you have been failed in this regard ……"

"21. …..you would have had the means to rent at the very least a 2 bedroom property in the local area, or local boroughs. I acknowledge that given the size of your household and age of your children your household you may still have been overcrowded, however you would not have been in a position of statutory overcrowding had you chosen this or more suitable accommodation."

"22. As a household of 4; 2 adults and 2 children aged 11 and 17 given your income you were eligible for assistance with your rent to meet the cost of a suitable sized property. The local housing allowance rates (LHA) for a 2 bedroom property in Southwark in 2016/2017 was £265.29 and £330.72 for a 3 bedroom property….."

"23. … you were receiving £1007 in universal credit with a housing element. Your rent of £1050 works out at £242 per week and given your household composition and relevant income I am satisfied that you could afford to rent accommodation more suited to your household requirements, (whether this was 2 bedroom or 3 bedroom accommodation)."

"24. …..although your employment may be in Southwark and the children schools *(sic)* may even be in Southwark, there is no special requirement for you to reside in the borough and in looking further afield in areas close Southwark such as Lewisham, Greenwich, Bexley or further out. I have considered your assertions, that being close to your place of work and the children school was important and you could not afford travel costs of living further away, you have not provided any information to support this. London bus rates run at a flat rate fee and transport across South London is accessible and used as a regular means of transport for the ordinary commuter and children travelling with parents or independently to and from school."

"25. As stated above you have demonstrated a level of resourceful *(sic)* since entering the UK, and prior in being able to move in and out of different countries across Europe and Latin America to secure employment. The suggestion that you had no other choice but to place your family in an immediate situation of statutory overcrowded is not accepted by this authority. It is our position that it is the choices you made that led to you occupying accommodation that was statutory overcrowded at the outset."

"26. …. you state that following being evicted by your landlord in Brixton it "made it very difficult to find a house in such a short space of time" and that "Pastor Carlos persuaded the person we now rent from to allow us to rent" which suggests that you were aware that the need for persuasion meant that the accommodation was unsuitable and that it would not normally be a property intended for a family of 4."

"27. Following moving into ….East Street, you have not demonstrated any efforts in finding alternative suitable accommodation. You have stated that you had a short space of time to find alternative accommodation and we agree that you will have been in a very difficult position where you needed to get a roof over the heads of your family, but once this was achieved and you were aware that the accommodation was unsuitable, you made no further effort to resolve your situation. You further state that "this lack of space is extremely uncomfortable for all of us" which we agree with. It must be extremely uncomfortable for a family of 4 to live in a studio flat. However, it is the lack of action to resolve your situation once you moved into this accommodation that adds to our position that it is the choices you made that led you to your situation and one of those choices was to cease looking for suitable accommodation."

"28. After carefully reviewing all of the available information on file, I am satisfied that your household does not meet the criteria to be assessed in band 1 as a statutorily overcrowded household because it is assessed that your current statutory overcrowding has been caused by a deliberate act in accordance with Section 6.2 (band 1) of the council's allocations policy. You do however meet the criteria to be awarded a priority star for overcrowding in accordance with our allocations scheme."

"29. On the basis of the information made available to the Council to date, I am satisfied that there were other options of considering other areas for suitable accommodation within reasonable travelling distance from your place of work, the children school, or social and cultural networks. There are accessible and affordable transport links in and around the city of London and I am satisfied that you would not in anyway, be

> placed at a disadvantage if you were required to move further afield."

50. In his covering letter, Mr Herd advised the Claimant:

> "……we will continue to help you resolve your housing situation with the housing solutions that we have available.
>
> The first of these solutions would be for you to continue to engage with our Housing Supply Team …. to be offered alternative accommodation in the private sector.
>
> …..An example of this option in practice was carried out on 17th June 2021…. We acknowledge that you have responded via email stating that you consider the property unaffordable. We can further work with you to establish a full affordability assessment to better match you with alternative suitable properties.
>
> The second of these solutions is to approach our service as a homeless applicant in the sense that your current accommodation has been noted it is not suitable (*sic)* for you and your family long term….."

Events after the date of the decision under challenge

51. The Council has issued a prohibition order stating that the East Street flat is not safe for the Claimant's family to live in because of issues with "Damp and Mould" and the "Crowding and Space". As a result, the Claimant has been moved into Band 2. The order has been served on the landlord. The landlord has now served the Claimant with a notice to quit which the Claimant seeks to challenge.

52. On 28 March 2022, the Local Government and Social Care Ombudsman ("the Ombudsman") issued a draft decision in the Claimant's favour, on which it has invited comments. Its draft recommendations included payment of compensation and allocation of the next available suitable three-bedroomed property to the Claimant. The final report has not yet been published.

Law

Overcrowding: Part X HA 1985

53. Section 324 HA 1985 defines overcrowding as follows:

> "Definition of overcrowding
>
> A dwelling is overcrowded for the purposes of this Part when the number of persons sleeping in the dwelling is such as to contravene-

> (a) The standard specified in section 325 (the room standard), or
>
> (b) The standard specified in section 326 (the space standard)."

54. Section 325 HA 1985 provides:

> "The room standard
>
> (1) The room standard is contravened when the number of persons sleeping in a dwelling and the number of rooms available as sleeping accommodation is such that two persons of opposite sexes who are not living together as a married couple or civil partners must sleep in the same room.
>
> (2) For this purpose –
>
> (a) Children under the age of ten shall be left out of account, and
>
> (b) A room is available as sleeping accommodation if it is of a type normally used in the locality either as a bedroom or as a living room."

55. Section 326(1) HA 1985 provides that the space standard is contravened when the number of persons sleeping in a dwelling is in excess of the permitted number, having regard to the number and floor area of the rooms of the dwelling available as sleeping accommodation. Section 326(3) HA 1985 sets out the permitted number of persons in relation to a dwelling for the purposes of the space standard.

Housing allocation schemes: Part VI Housing Act 1996 ("HA 1996")

56. Section 159 HA 1996 provides:

> "Allocation of housing accommodation
>
> (1) A local housing authority shall comply with the provisions of this Part in allocating housing accommodation.
>
> ……
>
> (7) Subject to the provisions of this Part, a local housing authority may allocate housing accommodation in such manner as they consider appropriate."

57. Section 166A HA 1996 states:

> "Allocation in accordance with allocation scheme
>
> (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.
>
> …..
>
> (4) 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);
>
> ……
>
> (c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions; *(emphasis added)*
>
> ….
>
> (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 …. 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.
>
> ….
>
> (14) A local housing authority in England shall not allocate housing accommodation except in accordance with their allocation scheme."

The Council's Scheme and Guidance

The Scheme

58. The current version of the Scheme dates back to November 2013 and it is currently under review. The Scheme is designed to ensure that social housing, which is in short supply in Southwark, is allocated fairly and in accordance with the statutory requirements.

59. The Scheme is described as a Choice Based Lettings scheme. An applicant for social housing is placed on the Housing Register which is the gateway to the major providers

of social housing in Southwark's area. In addition, accredited private rented sector landlords make their properties available through this scheme.

60. Section 3 of the Scheme provides:

> "3.1.3 The amount of choice that the London Borough of Southwark is able to offer is limited by the acute housing pressures it faces and legal responsibilities it has to some groups in housing need such as those found to be statutorily homeless.
>
> 3.1.4 The London Borough of Southwark believes that any applicant considered to be eligible under this Scheme should be able to express a preference/choice over the type of property and the area in which they would like to live. However applicants should be aware that the London Borough of Southwark's ability to satisfy their expressed preference/choice may be severely limited."

61. An applicant must meet the eligibility and qualification requirements in order to be placed on the Housing Register.

62. A person who is subject to immigration control, and so requires leave to enter or remain in the UK, is ineligible to be allocated housing under Part 6 HA 1996 (see section 160ZA(2) HA 1996). It is not in dispute that the Claimant and his family were, at all material times, eligible under Part 6 HA 1996. They are Spanish nationals and were lawfully exercising EU Treaty rights to freedom of movement when they arrived in the UK in 2016. They were not required to seek leave to enter or remain in the UK at that time. Therefore they were not ineligible under Part 6 HA 1996. Despite the UK's exit from the EU, and the consequent repeal of EU freedom of movement rights, the EU Settlement Scheme protects rights of residence acquired before 31 December 2020 (see the Allocation of Housing and Homelessness (Eligibility)(England) Regulations 2006, as amended by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional Provisions (EU Exit) Regulations 2020/1309)). In 2019, the Claimant and his family were granted pre-settled status under the EU settlement scheme. Therefore, the Claimant and his family remain eligible under Part 6 HA 1996.

63. By virtue of section 166A(5) HA 1996, the Council is able to specify, in its housing allocation scheme, a requirement for a local connection with its area. In its decision of 29 April 2019, the Council eventually accepted that the Claimant had established a local connection because of his wife's employment in the borough, in accordance with paragraph 3.3.3(b) of the Scheme. There is no minimum working period under the Scheme; the 5 year residence requirement does not apply. The Council explains at paragraph 5.13.1 of the Scheme that it offers increased priority to applicants that are working and making a contribution to Southwark's economy, to support the growth of the borough and raise levels of aspiration and ambition.

64. The Scheme provides, in section 3.5.9, that an applicant who has deliberately worsened their circumstances in order to qualify to join the housing register, is a "non-qualifying person". Examples are given at section 3.5.20 and include:

"(d) Deliberately overcrowding property by moving in friends and/or other family members who have never lived together previously and/or have not lived together for a long time, and then requesting re-housing to larger accommodation."

65. Section 4 of the Scheme provides:

"**Reasonable Preference**

4.1.1 The London Borough of Southwark is required by law to determine the relative priority that housing applicants are awarded. This is particularly important when, as is the case in Southwark, the demand for social housing is greater than the availability of homes.

4.1.2 The law, as it applies to local housing authorities, requires that Reasonable Preference for housing must be given to those in the categories set out in the Housing Act 1996 (as amended). The statutory Reasonable Preference categories cover:

a) All homeless people as defined in Part VII of the Housing Act 1996. Section 189 and 193 where a duty to accommodate is defined.

b) People who are owed a particular statutory duty by any local housing authority under certain provisions of homelessness legislation.

c) People occupying unsanitary, overcrowded or otherwise unsatisfactory housing

d) People who need to move on medical or welfare grounds (including grounds

relating to a disability).

e) People who need to move to a particular locality within the district to avoid

hardship to themselves or others.

……"

"**4.2 Determining priority between applicants with Reasonable Preference**

4.2.1 The London Borough of Southwark determines priority between applicants with Reasonable Preference by taking into account various factors including:

a) The financial resources available to a person to meet their housing costs.

> b) The contribution that an applicant makes to Southwark or their local community, for example through working or volunteering
>
> c) If a person has sufficient resources to rent privately or purchase a suitable property for their household within Southwark, then the applicant would not qualify to join the Housing Register."

66. An applicant must fall within one or more of the priority bands set out at section 6.2. Band 1 includes:

> "Applicants who are statutorily overcrowded as defined by Part X of the Housing Act 1985 and have not caused this statutory overcrowding by a deliberate act."

67. Band 2 includes applicants who have an urgent need to move on welfare or medical grounds. Band 3 includes applicants who are overcrowded but who are not statutorily overcrowded as defined by Part X of the Housing Act 1985. Band 4 includes all other applicants. Those in Band 1 are given greatest priority and those in Band 4 are given the least priority.

68. Once an applicant has been allocated to one of the four bands, they are then prioritised within that band by reference to a priority star system. A priority star will be awarded to *inter alia* "people occupying unsanitary or overcrowded housing (as defined by Part X of the HA 1985)" (section 5.2.2). Applicants are then prioritised according to registration date (section 5.3.1).

69. The Council will check periodically whether there has been a change of circumstances of applicants on the Housing Register (section 3.12.3). Applicants also have a statutory right to request a review (section 3.14).

70. Section 5.24 provides for reduced priority to be given where an applicant has deliberately worsened their housing circumstances, including occupying overcrowded occupation:

> "**5.24 Deliberately Worsening Housing Circumstances**
>
> 5.24.1 Where there is clear evidence and a conclusion can properly be drawn that an applicant has deliberately made worse their circumstances in order to achieve higher priority on the register or (in the case of an applicant who has not been disqualified for this reason) to qualify to join the housing register, then reduced priority will be given. The Group Services Manager of the Homelessness and Housing Options service will make this decision. Examples of this include:
>
> a) Selling a property that is affordable and suitable for an applicant's needs.
>
> b) Moving from a secure tenancy or settled accommodation to insecure or less settled or overcrowded accommodation.

> c) Requesting or colluding with a landlord or family member to issue them with a Notice to Quit.
>
> d) Deliberately overcrowding property by moving in friends and/or other family members who have never lived together previously and/or have not lived together for a long time, then requesting re-housing to larger accommodation.
>
> The above list is not exhaustive. This will ensure that households will not be treated as occupying overcrowded accommodation unless the overcrowding has come about by natural increases due to birth/adoption of a child or the addition of other persons to the household with the written consent of the London Borough of Southwark."

The Guidance

71. On 8 February 2021, the Defendant produced 'Assessing Overcrowding' – its 'Overcrowding priority band assessment guidance'. It is unpublished guidance, intended for the Council's officers in implementing the Scheme.

72. It provides that, if the space or room standards have been contravened, and therefore the household is statutorily overcrowded, the officer must:

> "assess whether the statutory overcrowding has been caused by a deliberate act of the applicant/s and consider whether any actions of the applicant has contributed to the household becoming statutorily overcrowded.
>
> Examples of this may include but are not limited to:
>
> - Applicants moving into accommodation that is statutorily overcrowded from the outset - Applicants overcrowding their accommodation by moving in any one that is not a spouse/civil partner/cohabitee or a dependent child under the age of 18
>
> - Applicants moving in any one that is not a spouse/civil partner/cohabitee or a dependent child under the age of 18 into accommodation that is already overcrowded
>
> - Applicants who previously had occupied accommodation that was larger and moved to a property that was smaller."

73. The Guidance also provides that "consideration will be paid to an applicant's financial resources when assessing housing need". The example given is:

> "….. a single person that moves into accommodation whereby they would be sharing a room with another adult or child or sleeping on a sofa may be considered to have deliberately overcrowded themselves, when they may have financial

> resources to rent accommodation that would not require them to be lacking a bedroom"

74. The Guidance explains that that the Council will use its powers under section 1.1.10 of the Scheme to place households in band 3 as opposed to band 1 where it has been identified that they are statutorily overcrowded due to a deliberate act.

Grounds of challenge

Ground 1(b)

Submissions

75. The Claimant submitted that the correct interpretation of the "deliberate act" provision in section 6.2 of the Scheme was that an act was only deliberate if a person intended to do it, in the sense that they had a real choice between two or more viable options and voluntarily elected to do the act. On the facts of this case, the Claimant had no real choice but to move into the overcrowded accommodation in East Street, because he was unable to find alternative more suitable accommodation.

76. The Council submitted that the correct interpretation was that the act was done deliberately if the person intended to do it. It has the opposite meaning to accidental, unintentional or involuntary. It is not part of the definition that it should be done with unfettered freedom of choice, or with full understanding of the potential alternatives or consequences.

Conclusions

77. The interpretation of paragraph 6.2 of the Scheme was considered recently by the Court of Appeal in *R (Flores) v Southwark LBC* [2020] EWCA Civ 1697.

78. In *Flores* the appellant had moved into accommodation with his wife and two children in 2014 which became statutorily overcrowded in December 2018 when the appellant's child attained the age of 10 years. The Council had decided that the appellant was not entitled to be included in Band 1 of the Scheme because the appellant had caused the overcrowding by his own "deliberate act" of moving into the property in the first place. The appellant had appealed against a High Court decision which dismissed his challenge to the council's decision.

79. The decision was overturned by the Court of Appeal which held that the cause of the statutory overcrowding was the appellant's children growing older, as opposed to his earlier decision to move into the accommodation, and that natural growth could not be regarded as a deliberate act on the part of the appellant (at [45]). Males LJ said as follows:

> "39. The meaning of a housing allocation scheme, like that of any other comparable policy document, is for the court to determine….but the court's approach to its interpretation should be in accordance with the guidance given by this court in *R*

(Ariemuguvbe) v Islington LBC [2009] EWCA Civ 1308…Sullivan LJ said:

> "24 … since this is a local authority housing allocation scheme and not an enactment, it has to be reads in a practical, common sense, and not in a legalistic way."

…..

41…"Deliberate" is an ordinary English word which requires no explanation or glossing. An act is deliberate if it is something which the person who does it intends to do. It need not be culpable or planned…

42. The relevant paragraph of the Scheme requires the council to focus on the cause of the statutory overcrowding and, having identified that cause, to ask itself whether the cause was a deliberate act by the applicant…

…..

44. In my judgment it is artificial on the undisputed facts to regard the cause of the overcrowding as the appellant's decision, some five years before his application to the council to be placed on the housing register, to take a tenancy of his existing accommodation. At that time he obtained for himself and his family the best accommodation which he could afford. He did not take it with any thought of improving his position on the register, a possibility of which at the time he had no knowledge. As Ms Tait expressly and rightly accepted in the decision letter, this was accommodation which it was reasonable for him to occupy with his family. One might ask, what else was he to do? As he could not have afforded any more spacious accommodation, either in Southwark or in any other central London borough, the only "choice" available to him was to continue living in the one room in Gordon Road or to leave his job and move his family elsewhere, to seek other employment and accommodation, either within the United Kingdom or abroad.

…..

49. Thirdly, the council's approach leads to some odd, or even perverse, consequences. It means that an applicant who acts reasonably in taking the most suitable accommodation for his family that he can afford disqualifies himself from priority once his children grow to an age which renders that accommodation statutorily overcrowded. An interpretation of the Scheme which has that consequence, or which incentivises an applicant to refuse accommodation which is suitable for his current needs because of the consequences which will ensue when his children

> reach the age of 10, is to say the least counter-intuitive and requires careful scrutiny."

80. Thus, the Court of Appeal's judgment in *Flores* confirmed that an act is deliberate if it is something which the person "intends to do". It did not directly address the question whether a person can be considered to have intended to do an act where the act was not voluntary because the person had no real choice. However, I consider that the reasoning at [44] lends some support to the Claimant's interpretation, where Males LJ observed that it was reasonable for the appellant to take the best accommodation he could afford at the time in the local area, as his only other "choice" was to leave his job and move away from the area.

81. I accept the Claimant's submission that the Council's interpretation may have perverse consequences, since applicants who can only afford statutorily overcrowded accommodation, but wish to avoid being penalised under the Scheme, may have to apply for accommodation as homeless persons under Part VII HA 1996 instead, which will place a greater burden on the Council's limited resources.

82. There is further support for the Claimant's interpretation in the case of *Al-Ameri (FC) v Royal Borough of Kensington and Chelsea* [2004] UKHL 4, where the House of Lords held that where a person must "choose" between two options, one of those options being destitution, a person does not elect the alternative option of their "own choice". Lord Bingham at [17] said it was "wholly unrealistic" to suggest that a person made a choice in such circumstances.

83. Both parties referred to the homelessness provisions and the relevant case law. Under Part VII of the HA 1996, local housing authorities have certain duties to persons who are homeless. The nature of the duty differs if the person is intentionally homeless. The test which must be applied to determine whether a person is homeless intentionally, so far as is relevant, is set out in section 191 HA 1996:

> "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."

84. The courts have held that the word "deliberate" relates to the action rather than the outcome, and there may be multiple causes of homelessness. In *Noel v LB Hillingdon* [2013] EWCA Civ 1602, Lewison LJ said:

> "7. If B happens in "in consequence of" A, then A must play a causative part in the occurrence of B. In the context of section 191, A must be a deliberate act or omission of the applicant. It need not be shown that the applicant deliberately did something for the purpose of getting himself turned out. It is enough that he deliberately did something or omitted to do something which had that consequence; *R v Salford City Council ex parte Devenport* [1983] 8 HLR 54.

> 8. The cases show that where there are potentially multiple causes of a person's homelessness, the decision maker must carefully evaluate the facts in order to see whether the applicant's homelessness is shown to have been the likely consequence of his deliberate act or omission; see *Watchman v Ipswich Borough Council* [2011] EWCA Civ 358, [2011] HLR 33. Sometimes this has been described as the "effective" cause.
>
> 9. The ultimate question is: what is the real or effective cause of the homelessness? That question should be answered in a practical common sense way and it is more than a "but for" test. The effective cause will often be the chronologically proximate cause, but it need not be; see *R v Hackney LBC ex parte Ajayi* [1997] 30 HLR 473.
>
> 10. If there is more than one operative or effective cause, it suffices that only one of them is the deliberate act or omission of the applicant; see *R v London Borough of Hammersmith and Fulham ex parte P* [1989] 22 HLR 21 and *O'Connor v Kensington and Chelsea RLBC* [2004] EWCA Civ 394, [2004] HLR 37.
>
> 11. In some cases, the chain of causation will be linear. If a set of dominos falls over, it does not matter that the applicant did not knock over the last domino if he set the domino effect in motion. In such a case, the control mechanism is that of the objective likelihood that effect of the deliberate act or omission is that homelessness will be the end result; see *Stewart v Lambeth LBC* [2004] EWCA Civ 753, [2002] HLR 40. In other cases, there will be parallel causes. In such a case, the test will be satisfied if one of those causes was the deliberate act or omission of the applicant. Ultimately the question is one of fact for the local authority, directing itself properly in accordance with the law."

85. The Claimant relied upon cases in which the courts have concluded that a failure to pay rent or mortgage repayments should not be regarded as deliberate where the person has no real choice in the matter, or where an act is forced upon a person through no fault of their own, for example, by poverty or an inability to make ends meet.

86. In *William v Wandsworth London Borough Council* [2006] EWCA Civ 535, Chadwick LJ said, at [36]:

> "….it was for the authority to explain why it took the view that the failure to pay monies due under the mortgage was "deliberate" within the meaning of s.191(1) of the 1996 Act: or to put the point the other way, why the failure to pay monies due under the mortgage was not properly to be treated as "non-deliberate" – in the sense that it was forced upon the applicant through no fault of his own."

87. In *R v Brent LBC ex parte Baruwa* [1997] 2 WLUK 217, Schiemann LJ referred to the statutory test for intentional homelessness and observed:

> "On a strict reading of the statute, a person who deliberately refrained from paying his rent in circumstances where he used the only assets at his disposal for buying necessary food for himself and his family would be regarded as homeless. There is ample authority for the proposition that this is not so."

88. In *R. v Wandsworth London Borough Council, ex p. Hawthorne* (1994) 1 WLR 1442, Nourse LJ explained the rationale behind this interpretation of "deliberate" in the statutory test at 1447C-F as follows:

> "Both here and below Mr. Straker, for the council, has submitted that a person does or fails to do something "deliberately" if he makes a considered choice between two courses of action or inaction, either of D which he is able to take. Thus, if he makes a considered decision to apply the only money he has in his pocket in maintaining his children instead of paying it to his landlord, he deliberately fails to pay the rent.
>
> Like the judge, I reject these submissions. Mr. Straker's construction, while it might be correct in other contexts, cannot be correct here. The purpose of Part III of the Act of 1985 is to house the homeless. Admittedly it is not part of that purpose to house those whose homelessness has been brought upon them by their own fault. But equally it is no part of it to refuse housing to those whose homelessness has been brought upon them without fault on their part, for example by disability, sickness, poverty or even a simple inability to make ends meet. Whether, in a case of non-payment of rent, there is a sufficient nexus between the cause relied on and the failure to pay to establish that it was not deliberate will be for the housing authority to consider and decide upon. But, as the judge said, consider it they must."

89. In my judgment, the principles in the case law set out above ought to apply to this Scheme. I conclude that the correct interpretation of the "deliberate act" provision in section 6.2 of the Scheme is that an act is only deliberate if the applicant intended to do it, in the sense that they had a real choice between two or more viable options and voluntarily elected to do the act.

90. Therefore Ground 1(b) succeeds.

Ground 1(a)

Submissions

91. The Claimant submitted that the Council's finding that the Claimant could have chosen, in 2016, to move into suitable accommodation instead of East Street was irrational. Furthermore, in so far as the decision relied upon a subsequent failure by the Claimant

to move to suitable accommodation after 2016, it was illogical and unsupported by the evidence.

92. The Council submitted that, even if the Claimant's interpretation of section 6.2 was correct, its decision should be upheld because the decision-maker (Mr Herd) did properly consider and reject the Claimant's case that he had no real choice but to move into the overcrowded accommodation in East Street, because he was unable to find alternative more suitable accommodation. Insofar as the Claimant was placed in a difficult position, seeking to find accommodation at short notice, this was a result of his own irresponsible actions. As this was a review, the Council was entitled to consider the Claimant's acts and omissions after 2016.

Conclusions

93. It is a curiosity of this case that the decision under challenge did not apply the strict interpretation of section 6.2 of the Scheme which was propounded by the Council at the hearing. As Mr Herd said, at paragraph 10 of the decision letter:

> "I have considered whether it was reasonable for your household to move into accommodation that was statutory overcrowded from the very start of your tenancy and have considered what other options were available to you at that time."

94. The Council had a legitimate policy of seeking to prevent abuse of the overcrowding priority category, which it achieved in two ways. First, by application of the "deliberately worsening of circumstances" test in sections 3.5.9 and 5.24 of the Scheme. Initially the Council found that the Claimant had deliberately worsening his circumstances by moving into the East Street flat, but after further consideration, it withdrew that finding. Second, by application of the "deliberate act" test in section 6.2, which was the basis for the decision under challenge. The Council must investigate and then exercise its discretionary judgment in applying those tests, which is subject to the supervisory jurisdiction of this Court, on public law grounds.

95. The test for irrationality was described by the Divisional Court (Leggatt LJ and Carr J.) in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649:

> "98. ….The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is 'so unreasonable that no reasonable authority could ever have come to it': see *Associated Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223*, 233–234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see eg *Boddington v British Transport Police [1999] 2 AC 143*, 175, per Lord Steyn. The second aspect of

> irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it—for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."

96. In *R v Parliamentary Commissioner for Administration ex parte Balchin* [1998] 1 PLR 1, Sedley J. described "irrationality" as "a decision which does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic".

97. In paragraph 11 of the decision, the reliance upon the Claimant's decisions to leave Spain in 2012 and Ecuador in 2016 was, in my view, irrational. Those decisions were not the proximate cause of his overcrowding in 2017. Furthermore, the Claimant gave sound reasons for the move from Spain and the move to London, which Mr Herd simply did not consider at all. In Ecuador, neither he nor his wife were able to find work, there is no state welfare system, they had two children and elderly parents to support, and they were facing destitution. The Claimant's sister lives in the Southwark area and correctly advised him that they would be able to find work in London. She paid for his air fare, and helped him to find accommodation with a friend of hers.

98. In paragraphs 12 to 16 of the decision, Mr Herd found that the Claimant unreasonably arranged for his wife and children to join him in London without first finding suitable accommodation for them, which in turn led to his eviction from the Brixton flat and his decision to rent the East Street flat. In my judgment, this was an irrational conclusion, which did not have proper regard to the Claimant's account of his circumstances. The Claimant's wife could not find work in Ecuador and so the Claimant had to pay for their home in Ecuador as well as his home in London. In London, both the Claimant and his wife could obtain work as cleaners, and with the benefit of two wages, and only one household to maintain, they believed that they would be able to support the family and afford accommodation.

99. The family had been separated for months, because of their impoverished circumstances, and understandably wanted to be reunited. Although Mr Herd acknowledged that the Claimant and his family had "every right to live together and this is what you all wanted at that time", I consider that he failed to give effect to their right to family life in his reasoning and his conclusions, treating it as a secondary consideration, rather than accepting that it was a paramount consideration for this family. The Council's Guidance which indicates that overcrowding caused by a spouse/partner and children moving in with an applicant should be treated as non-deliberate does not appear to have been considered in this case.

100. Mr Herd's findings, in paragraphs 21 to 26, that the Claimant could have chosen to move into more suitable accommodation failed to have regard to some undisputed aspects of the Claimant's account. The Claimant's evidence was that he did search for more suitable accommodation, without success. The family's income was a mere £1750 per month and the cheapest 2 bedroom property they could find cost £1600 per month. He only had a short space of time before family was evicted. This was accepted by Mr Herd, at paragraph 27, where he said "we agree that you will have been in a very difficult position where you needed to get a roof over the head of your family".

101. Mr Herd's assessment of the family income in November 2016 was incorrect. Mr Herd stated that he was in receipt of universal credit with a housing element. In fact, the Claimant was not claiming welfare benefits at the time. He applied for universal credit in January 2017 and it was awarded in July 2017. Without benefits, the local authority housing rates set out in paragraph 22 of the decision would have unaffordable. Furthermore, without the assistance of the Council, the prospect of the Claimant finding accommodation at the local housing authority rates was negligible.

102. Aside from the problem of affordability, the Claimant was unable to provide a years' worth of payslips demonstrating full time employment, and five months rent up front, which agencies and landlords required. This effectively barred the Claimant from being accepted as a tenant. As Mr Herd knew, the Claimant was only able to find any accommodation at all with the assistance of his Pastor, who was able to persuade the landlord to accept only one month's deposit and one month's rent in advance.

103. The Claimant explained that when they were searching for accommodation in 2016, they had no professional advice and they were unaware of their right to seek assistance from the Council. They only became aware of this in April 2018. Although in paragraphs 18 and 19 of the decision Mr Herd stated that he did not believe that the Claimant was unable to obtain advice on housing from an independent agency or the Council, this view appears to be contradicted in paragraph 20 where he stated, in the context of homelessness applications, "I believe you have not been given sufficient support in this regard" and then "you have been failed in this regard". In my view, it was irrational to assume that the Claimant deliberately failed to obtain assistance from the Council, given the emergency situation that he and his family were in when they were given notice to quit.

104. In paragraph 24, Mr Herd criticised the Claimant for not seeking accommodation in areas other than Southwark, further from the centre of London, where property was more affordable. In my view, he did not fairly take into account the Claimant's circumstances in November 2016. As the Claimant did not speak English and was making his way in a new country, it was reasonable for the Claimant to look for accommodation near his sister who lives in Southwark, and to benefit from her local contacts and knowledge. The Claimant had to find accommodation in November 2016 at very short notice before he was evicted from the Brixton flat. In the event, he was only able to secure a tenancy with the assistance of the Pastor in the local Church, who by chance knew the Claimant when they were both living in Spain. The Pastor was able to assist the Claimant in finding accommodation through his contacts, with greatly reduced deposit and advance rental payments. The Pastor's contacts were unsurprisingly in Southwark, as that was where the Church is based. Arguably, the East Street flat was the only viable option for the Claimant at that time, and it was not rational to expect the Claimant to have found suitable accommodation in another borough, further out from the centre of London, in the circumstances in which the Claimant found himself in November 2016.

105. In paragraphs 27 to 31, Mr Herd criticised the Claimant for not taking steps to find suitable alternative accommodation while living in the East Street flat, and stated, at paragraph 27:

> "…..it is the lack of action to resolve your situation once you moved into this accommodation that adds to our position that it

> is the choices you made that led to your situation and one of those choices was to cease looking for suitable accommodation."

106. In my view, this reasoning was illogical as any failure to look for suitable alternative accommodation after the Claimant had moved into his current accommodation was not the cause of the Claimant's statutory overcrowding; it having been caused by the earlier act of moving into the property with his family. It is also difficult to see how a failure to look for accommodation could be a "deliberate act" within the meaning of section 6.2 of the Scheme, as it is an omission not a deliberate act.

107. Furthermore, the factual basis for Mr Herd's findings was inadequately investigated and he failed to take into account matters which ought to have been known to him from his knowledge and experience of the local housing market, including the reluctance to let to low income families on benefits. The Claimant's account was that he was looking for other larger properties while living in the East Street flat. In his third witness statement, he said at paragraph 7:

> "We have also continued throughout this process to look for properties through several different agencies. We have never been offered anything that we are able to afford.
>
> Whenever we contacted the agents we were always asked to show that we had 3 or 4 months payment in advance, which we have never been able to afford. They also told us that we would need to verify our incomes and we were asked to provide payslips and work contracts. At the end of this process they would tell us that they would call us but then they would never call us back. We were not able to find even a two bedroom property that was affordable for us. I also wonder whether part of the reason we were constantly refused was because we were claiming benefits, did not speak English and were not from the UK. Every week we try to bid for housing using our Band 3 priority, but we are always in position 30 to 40. This means we are never close to the 1st, 2nd or 3rd positions we would need to be able to get a property."

108. The Claimant has filed evidence in this claim which confirms the practice by landlords operating a bar on letting to applicants who are on benefits, and the unaffordability of most rental properties for lower income applicants. (See the first witness statement of Ms Koksal at paras. 8-12; Shelter (Feb 2016) "42% of landlords surveyed had an outright bar on letting to HB claimants and a further 21% preferred not to let to them"; Crisis (May 2019) "92 per cent of areas in Great Britain were unaffordable to single people or a couple or a small family in 2018/19..By nation, 97 per cent of areas in England.."; National Housing Federation (July 2019) "Only 7.54% of rental properties advertised in England are affordable to LHA claimants… with two or more bedrooms, …even less affordable with only 6.5% being affordable at the relevant LHA").

109. On 17 June 2021, the Claimant received an offer from the Council to view a three-bedroom property to rent at £1,800 a month in Deptford. The Claimant and his wife were excited at the thought of being able to move in to a property of this size, but they concluded that they were not able to afford it, for the reasons set out in paragraph 6 of

his third witness statement and paragraphs 22 to 34 of his fourth witness statement (set out earlier in this judgment).

110. As this was the only property that the Claimant has been offered, it must have been a significant consideration in Mr Herd's conclusion that the Council could facilitate a move to a suitable and affordable property outside Southwark, in the private rental sector. However, the Council's assessment of affordability was, in my view, flawed. The Council assessed a £29.90 per month shortfall between the cost of the Deptford property and the cost of the East Street flat, whereas there appeared to be a £129.59 per month shortfall on the housing costs, not £29.90.

111. Furthermore, the Council only assessed the price of the accommodation. They did not assess the other costs that the Claimant would incur. The property was substantially larger than their current flat and so heating and electricity costs would increase. Council tax is inclusive in their current rent, but not in the Deptford property where they would be liable to pay council tax in the sum of £1,237.90 per year. Also, the daily transport costs for the Claimant, his wife and daughter would increase significantly.

112. In Mr Herd's covering letter of 2 July 2021, he invited the Claimant to continue to engage with the Council's Housing Supply team, to assist in finding accommodation in the private sector. He said:

> "We acknowledge that you have responded via email stating that you consider the property unaffordable. We can further work with you to establish a full affordability assessment to better match you with alternative suitable properties."

113. In my view, the Council ought not to have rejected the Claimant's assessment that the Deptford property was unaffordable without first carrying out a "full affordability assessment", and fairly considering the points that the Claimant was making.

114. The Claimant and his family have since developed community ties in the Southwark area. The family attends his Church regularly, and they are very dependant on the Church for friendship and support. There is a large Latin American community in the Elephant and Castle area of Southwark (per Males LJ in *Flores* at [2]), which has provided support and contacts for the Claimant. Both the Claimant and his wife were only able to find work because of word-of-mouth recommendations within the local community. The children's schools were in Southwark, and the Claimant's wife mainly worked in the Elephant and Castle. It is therefore understandable that the Claimant and his family wish to remain in Southwark. However, given the difficulty in finding suitable accommodation in London, I consider it was rational for the Council to take the view, in paragraph 29, that there are other accommodation options which are within reasonable travelling distance of the family's schools, work and social/cultural networks.

115. Although not a point relied upon the letter of 2 July 2021, the Council has suggested that the family's monthly contribution towards the living costs of the Claimant's mother, and his wife's mother, should instead be used for housing costs. The Claimant explained in his fourth witness statement, at paragraph 35:

> "We send money to both my mother and my wife's mother because they do not have any form of support beyond their family. They are both in their 80's, their health is poor and they are widows. They both need to take medicine daily, some of which is expensive. If they did not take the medicine their health would deteriorate dramatically. This is not something we could possibly allow."

116. In my view, this raises an issue as to whether the family support payments were reasonably necessary, looked at objectively, and if not, whether any financial assessment should discount those payments, treating them instead as available income.

117. Although not a point relied upon in the letter of 2 July 2021, the Council has suggested that, as there are three adults living in the flat, the family has the benefit of three incomes. In paragraph 22 of the Claimant's fourth witness statement, he explains that his daughter is a full-time student. She receives a student maintenance loan for someone living at their parents' home and therefore it is not designed to cover any housing costs. She does not have enough money to contribute to the family's rent or to rent her own place. Her student maintenance loan is used to pay for her own needs, and she makes contributions to the family's food and energy bills. In my view, it would not be rational to treat a full-time undergraduate student as if she had the earning capacity of an adult who is not a student and therefore can work full-time. Such an approach would be likely to deter her and other young people from poor backgrounds from pursuing higher education, which would be regrettable.

118. For the reasons set out above, I have concluded that some of the reasoning in the letter of 2 July 2021 was demonstrably flawed, and some of its conclusions were unreasonable. Therefore, Ground 1(a) succeeds. In the light of my findings, I cannot be satisfied that it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred, under section 31(2A) of the Senior Courts Act 1981.

Ground 2

Submissions

119. The Claimant submitted that the Council's Scheme is unlawful as it does not explain the criteria that the Council applies when determining if an applicant has committed a "deliberate act" within the meaning of section 6.2 of the Scheme. Those criteria are set out in the Guidance, which is unpublished.

120. In response, the Council submitted that the Guidance was not the type of document that is normally published as it is guidance to officers who are applying the policy set out in the Scheme. It is not inconsistent with the policy and does not provide extra or different criteria. It only gives examples of deliberate acts.

Conclusions

121. The leading case on publication of policies is *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, in which the Supreme Court held that "the rule of law calls for a transparent statement …. of the circumstances in which the broad statutory criteria will be exercised" and there was "a general rule of law that policies must published" (per Lord Dyson at [34] and [27]).

122. In *R (ZLL) v Secretary of State for Housing, Communities and Local Government* [2022] EWHC 85 (Admin), Fordham J. considered the authorities on the duty to publish policies and concluded at [7(5)]:

> "The 'duty of publication' is therefore linked, not only to the virtues of consistency and lack of arbitrariness, but also to the basic rights of affected individuals: to make representations as to how their case should be decided, and to consider and make an informed challenge to an adverse decision. The 'duty of publication' will therefore apply to any new policy or practice which curtails or discontinues a relevant policy which has previously been published, as was the position in *Lumba* itself."

123. An allocation scheme which does not explain the criteria applied for awarding reasonable preference or indicate in what circumstances it will be applied will fail to comply with the HA 1996: *R (Cali) v Waltham Forest London Borough Council* [2006] EWHC 302 (Admin), [2007] HLR 1 at [46].

124. In my judgment, the Council has complied with its legal obligations by publishing the Scheme. The Guidance is intended to assist officers of the Council in applying the Scheme. I accept the Council's submission that the Guidance is not inconsistent with the Scheme and it does not provide extra or different criteria. It provides non-exhaustive examples of the types of conduct that may amount to a deliberate act under section 6.2, and an example of the way in which consideration may be given to an applicant's financial resources when assessing whether there has been a deliberate act. In my judgment, the Council was not under a legal obligation to publish the Guidance.

125. I grant permission on Ground 2, as the point is arguable, but the ground does not succeed.

Ground 3

126. The Claimant submits that the decision breaches Article 14, read together with Article 8, of the ECHR. The Claimant accepts that this Ground only arises if the basis of the Council's decision was that, even if the Claimant had no option but to move into the East Street flat, his act of doing so was deliberate for the purposes of section 6.2 of the Scheme.

127. I have found that the decision of 2 July 2021 did not apply the strict interpretation of section 6.2 of the Scheme, which the Claimant challenges, and which I have found to be incorrect. As I have already said, Mr Herd explained at paragraph 10 that he had "considered whether it was reasonable for your household to move into accommodation

that was statutory overcrowded from the very start of your tenancy and have considered what other options were available to you at that time".

128. Therefore, Ground 3 cannot succeed and permission to apply for judicial review is accordingly refused.

Final conclusions

129. The Claimant's claim for judicial review is allowed on Grounds 1(a) and (b). Permission is granted on Ground 2, but the application for judicial review on this ground is dismissed. Permission is refused on Ground 3.