Neutral Citation Number: [2017] EWHC 33 (QB)`

Case No: QB/2016/0172

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2017

Before :

THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

THE LONDON BOROUGH OF CROYDON	**Appellant**
- and -	
MS VANDA LOPES	**Respondent**

- -
- -

David Lintott (instructed by **London Borough of Croydon**) for the **Appellant**
Adrian Berry (instructed by **Hansen Palomares**) for the **Respondent**

Hearing date: 3 November 2016

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE LEWIS

The Honourable Mr Justice Lewis:

INTRODUCTION

1. This is an appeal by the London Borough of Croydon ("the Council") against a decision of HHJ Bailey sitting at the Central London County Court. The decision is dated 30 March 2015 and was served on the parties on about 9 April 2015. By his decision, HHJ Bailey ordered the Council to pay Ms Lopes 85% of the costs of an appeal brought by Ms Lopes under section 204 of the Housing Act 1996 ("the Act") against a decision of the Council dated 13 May 2014 on a review of an earlier refusal to provide Ms Lopes and her family with housing on the grounds that she was not homeless, or threatened with homelessness as she had accommodation available to her, her partner and her two children in Portugal, namely accommodation at a flat occupied by her mother-in-law.

2. Following the institution of that appeal, Ms Lopes produced evidence in the form of a letter from her mother-in-law stating that she would not be able to accommodate Ms Lopes and her family at her home in Portugal. Ms Lopes agreed to withdraw her appeal upon the Council agreeing to withdraw the decision of 13 May 2014 and issuing a fresh decision under section 202 of the Act. Ms Lopes contended that she should also be awarded the costs of the appeal as she had obtained the relief that she sought if she had won her appeal. The Council contended that Ms Lopes would have lost the appeal but that the Council would, in any event, have had to entertain a new application for housing assistance in light of the new evidence from the mother-law. The Council contended that it should therefore receive its costs of the appeal from Ms Lopes or there should be no order for costs. The judge ordered the Council to pay 85% of Ms Lopes' costs of the appeal. The Council appeals against that decision.

THE FACTS

The Application For Housing Assistance

3. Ms Lopes moved from Portugal to the United Kingdom in about July 2012. Prior to that, she had been living for some years with her partner, Joao, and her two children, in the home of her partner's mother (whom I will refer to as her mother-in-law) in Lisbon in Portugal. Ms Lopes' brother-in-law also lived, with his family, in the flat in Lisbon

4. Ms Lopes originally stayed at different temporary addresses in the United Kingdom. She eventually found employment in the United Kingdom. Her partner and her children remained living with her mother-in-law in Portugal until they came to the United Kingdom to join her in July 2013 after Ms Lopes had found employment. On about 29 August 2013, Ms Lopes applied to the Council for housing assistance for herself and her family under the homelessness provisions of the Act.

5. Ms Lopes was interviewed twice, on 29 August 2013 and 4 September 2013. A friend interpreted for her at the first interview. An interpreter interpreted for her at the second. The file notes of those interviews record the following. Ms Lopes said that she had lived in a two-bedroomed flat occupied by her mother-in-law in Portugal. She

and her partner lived in one bedroom. Her children slept with the mother-in-law in the other bedroom. Her brother-in-law (her partner's brother) lived in the other room. The file note of the first interview records that Ms Lopes said that "she left as there was no work in Portugal" and "she was not asked to leave and when her friend suggest to come to the UK to look for work she did". The file note records that Ms Lopes' partner and her children remained living with her mother-in-law until July 2013 and after she found employment in the UK and they were able to join her.

6. Essentially similar information was provided by Ms Lopes at the second interview. The file note of that interview again records that Ms Lopes "confirmed that her partner['s] mother had not asked her to leave", that there were disagreements after her brother-in-law moved in, that her mother-in-law said they needed to find a solution:

> "so when her friend suggested that she come to the UK to look for work she came here and her partner and children remained at home with her mother and she found work they came to reside with her in the UK".

7. The file notes record that the suggestion was that Ms Lopes find a solution, not the brother-in-law as he was younger and that, in response to a specific question, Ms Lopes said that "she wasn't asked to leave, but was told they needed to find a solution so she left and came to the UK". The file note records that the housing officer told Ms Lopes at the conclusion of the interview that:

> "based on the information provided in her previous interview she was not homeless I advised that whilst she had a difficult relationship with her 'mother in law' she had not been asked to leave I advised that she had come to the UK as her friend had suggested that she could find work her[e], I advised that the properties that she had stayed in since being in the UK were only temporary and that her family only joined her when she found work and that she planned her move to the UK rather than her mother-in-law evicting her from the property".

The Decision of 13 September 2013 on the Application

8. By letter dated 13 September 2013, the Council gave its decision on Ms Lopes' homelessness application. They found that Ms Lopes was eligible for consideration for assistance, but they found that Ms Lopes was not homeless or threatened with homelessness as she had accommodation in Portugal which she was entitled to occupy and which was available to her and any other members of her household with whom she did, or might reasonably be expected, to reside.

9. The letter noted the inquiries that had been undertaken, namely the two interviews on 29 August and 4 September 2013. It summarised the information that Ms Lopes had provided in those interviews in relation to the nature of the accommodation occupied and the circumstances in which she decided to leave the flat in Portugal and come to the United Kingdom, noting that:

> "When asked you confirmed you and your household had not been asked to leave, you said that you and Joao and been unable to find employment in Portugal so when a friend suggested that you come to the UK and look for employment you made a joint decision with Joao that you would come to

> the UK and once you found employment your partner and children would join you."
>
> and later in the letter that:
>
> "My reasons for reaching this decision are that you have accommodation that you are entitled to occupy by virtue of your interest in it which is available to you and members of your household including anyone that might reasonably be expected to reside with you.
>
> "Whilst you state the living conditions in Portugal were cramped, I am mindful that you and your household were residing in the accommodation in Portugal for the last three years. In addition you confirmed that you had not been asked to leave the accommodation in Portugal and although you state it was at Joao's mother's invitation that you find a solution to the arguments you were having with Joao's brother, you made a joint decision with Joao, following your friend's suggestion, to come to the UK to look for work. You confirmed that you planned your move to the UK and when you found work your partner and children moved from the property in Portugal to join you in the UK.
>
> "Therefore I am satisfied that you have accommodation in the United Kingdom or elsewhere which is available to you and any other members of your household that reside or might reasonably be expected to reside with you.
>
> "I am also satisfied that your accommodation is reasonable for you to continue to occupy having taken into consideration all your personal and housing circumstances including whether your accommodation is affordable for you to continue to live at your address".

The Request for a Review and the Decision of the Review Officer of 13 May 2014

10. On 22 September 2013, Ms Lopes wrote requesting a review of that decision. In her letter of 22 September 2013, Ms Lopes said that she had said that her mother had not given her an eviction letter as that was not the custom in Portugal but that she did ask Ms Lopes to leave the house and the fact that her children and her partner had continued to live there did not mean that her mother-in-law would allow the family to go back and live there. She said that coming to the United Kingdom was the result of not having a place to stay and she came to the UK to find a place where she could stay together with her family. Ms Lopes also completed a form requesting a review and stated that she did not have anywhere to stay in Portugal, and that at her mother-in-law's house her brother-in-law used to smack her children when no one was around and that she did not wish to put her children's life at risk.

11. A review was undertaken under section 202 of the Act. By letter dated 13 May 2014, the relevant officer of the Council concluded that there was no deficiency or irregularity in the original decision or the manner in which it was made, and there was no new information provided since the decision sufficient to justify further procedural investigations. The letter set out the background and the reasons why it was said that

Ms Lopes came to the United Kingdom. In response to the question of the mother-in-law's willingness to permit her to live at the flat in Portugal, the letter records that:

> "you stated that although your partner's mother would not confirm that you were homeless, this is because it is not the custom in Portugal but that despite the fact that your partner and children had returned to the property you were not able to do so. I am not satisfied that that is true, I am satisfied that your family bond is sufficiently strong to enable you to return to the property."

The Appeal to the County Court

12. Ms Lopes appealed pursuant to section 204 of the Act to the county court against the decision of 13 May 2014. The appeal was filed, it seems, on about 4 June 2014. In the appellant's notice, Ms Lopes sought an order that the decision of 13 May 2014 be varied to a decision that Ms Lopes was homeless or, alternatively, that the decision be quashed. There were five grounds of appeal. The five grounds contended that it was unreasonable to conclude on the evidence available that (1) there was accommodation available to Ms Lopes in Portugal (2) that Ms Lopes had a licence to occupy it (3) that it was reasonable for her to occupy it, given the issue of her brother-in-law's conduct towards her children (4) that Ms Lopes had left the accommodation of her own volition and would be able to return and (5) it was reasonable to occupy the property notwithstanding the overcrowded nature of the property. Each of the grounds was accompanied by an alternative ground, namely that the Council had failed to make adequate and sufficient inquiries into the substantive matters forming grounds 1(a) to 5(a) inclusive.

13. Ms Lopes also provided a witness statement, dated 26 June 2014, in support of her appeal. Attached to that witness statement was a letter in Portuguese dated 19 May 2014 (that is, 6 days after the review letter being appealed against) from Ms Lopes' mother-in-law. It appears from the correspondence included in the file that the Council was first supplied with a copy of that letter when the witness statement was served (see the e-mail dated 18 July 2014 from the Council's solicitors to Ms Lopes' solicitors). The material part of that letter provides as follows:

> "I write this letter to inform you that I would not be able to accommodate Ms Vanda Lopes and his [sic] two children as well as my own son Joao Fernandes this because the house if have is very small and my other son is currently living with me, his wife and children. Furthermore, during the time that Vanda lived in my house with kids, we always had many problem and she's also not up very well with my other son and the wife. If she comes back to Lisbon, I do not have means of accommodating her. I understand that this matter involves my son Joao and my grandson Miguel but I do not want to go back to the same problems we had in the past and my son Joao Fernandes is very keen in defending his partner even when he knows that she is wrong. I am really sorry but there is no place in my house for Miss Vanda and her family".

14. In the light of these developments, there was correspondence between Ms Lopes and the Council about the continuation of the appeal. That correspondence indicated that the Council were of the view that the additional material from Ms Lopes' mother-in-

law would form the basis of a new application for homelessness assistance, irrespective of the outcome of the appeal, and indicated that they would be prepared to withdraw the review decision of 13 May 2014 and conduct a fresh review but wished Ms Lopes to pay the costs of the appeal. Ms Lopes was prepared to withdraw her appeal, on the basis that there be a further review of the initial decision refusing to recognise her as homeless but considered that the Council should pay her costs in appealing.

15. In the event, the parties agreed a consent order by which, on the Council agreeing to withdraw its decision of 13 May 2014 and issue a fresh decision under section 202 of the Act, Ms Lopes would withdraw her appeal and the question of costs would be determined by a judge following written submissions from the parties. In accordance with the provisions of that consent order, both parties lodged written submissions.

The Costs Order

16. By order dated 30 March 2015, HHJ Bailey ordered that the Council pay 85% of Ms Lopes' costs of the appeal on the standard basis, those costs to be the subject of a detailed assessment if not agreed. The judge also provided a written ruling on his costs decision, the material parts of which are as follows (references to the Appellant are to Ms Lopes and to the Respondent are to the Council):

> "1. The Appellant filed an appeal on 4 June 2014 in Lambeth County Court against the Review Officer's decision of 13 May 2014 that she was not homeless. At Section 8 of her appeal notice she set out the Order that she was seeking as:
>
> (1) The Respondent's decision of 13 May 2014 be varied to a decision that the Appellant is homeless.
>
> (2) In the alternative that the decision be quashed
>
> (3) The Respondent pays the Appellant's costs of the appeal to be assessed if not agreed.
>
> …..
>
> "2. Both parties filed skeleton arguments in support of the appeal. The Appellant's skeleton argument is a fully fleshed skeleton and argues strongly for the relief sought as outlined above. I will not rehearse the arguments advanced in this short ruling. Suffice it to say that the Appellant was able to mount a strong case that the Respondent should not have proceeded on the evidence before it and that it should have conducted proper and further enquiries before arriving at the settled conclusion. There was no effective case argued for a variation of the review officer's decision, with the court substituting it own decision in favour of the Appellant.
>
> …..
>
> "4. The Appellant's case is straightforward. By the compromise embodied in the Consent Order the Respondent has agreed to undertake a further

review. The Appellant has therefore 'succeeded in securing the relief that she would have obtained had she won her appeal'. She therefore submits that she is entitled to her costs.

"5. The Respondent's response draws attention to the fact that the Appellant's notice seeks an Order, first and foremost that the Court vary the Review Officer's decision to one that the Appellant be determined homeless. This is not relief granted to her under the Consent Order ,she only has her second ground of relief, namely the (implied) quashing of the Review Officer's decision and the holding of a further review. Not only this, the strength of the Appellant's case was greatly assisted by new evidence from the Appellant's mother-in-law. The appropriate order is no order as to costs.

"6. In reply the Appellant urges that while the mother-in-law's statement was new evidence the Respondent could very easily have obtained this evidence for itself, 'a simple matter of a phone call to Portugal' and indeed, given its obligations to undertake reasonable and proper enquiries this evidence should have been obtained by Respondent without the need for the 'new' evidence submitted in this appeal by the Appellant.

"7. In reality, this was a 'failure to make proper enquiries' appeal. There was never any prospect that the court would take it upon itself to vary the decision of the review officer but difficult for the Respondent to maintain that it had discharged its obligations to make enquiries. As I see the position there must be an Order for costs in favour of the Appellant. The issue is whether there should be a discount to reflect the fact that she sought to achieve more than she could reasonably expect to achieve in her appeal in seeking an order to vary, and fell back on the standard relief in such appeals, that of quashing the decision and a further review.

"8. In the modern climate parties are encouraged to restrict their claims to those reasonably achievable and not to additional claims for which they cannot realistically have much hope of success. The additional claim involves an amount of additional work although in the context of the claim as a whole this is very small indeed. It is only correct however that some deduction is made to reflect the fact that the Claimant raised but had, realistically, to abandon a claim that the Order be varied. In my judgment the appropriate order is that the Claimant should be awarded 85% of her costs."

The Application for Permission to Appeal against the Costs Order

17. The Council wished to seek permission to appeal against the costs order. It was uncertain whether such an appeal went to the Court of Appeal or the High Court. Three appeals, including the present appeal, were joined and heard by the Court of Appeal. That Court held that where, on an appeal, there had been a decision on costs only and the court had not considered the validity of the underlying decision, an appeal lay to the High Court not the Court of Appeal: see *Handley v Lake Solicitors, and others* [2016] 1 W.L.R. 3138, at para. 59. Christopher Clarke L.J., with whom Moore-Bick LJ. agreed, then remitted the matter to the High Court and, sitting as a

judge of the High Court, rather than the Court of Appeal, granted permission to appeal on the following basis (see paragraph 70 of the judgment):

> "70 The council has, in my view, a realistic prospect of establishing that the judge was in error on the following basis, which is well arguable. The judge's order effectively gave the applicant her costs save for a modest deduction to take account of the fact that she had sought more than she got. However, the critical aspect of the case was that the council had declined to find that she was homeless on the strength of her own repeated statements as understood and recorded by them on 29 August and 4 September 2013 that she had not been asked to leave her mother-in-law's flat in Portugal. The scope of the inquiries required to be made is, absent perversity, for the council to decide: see *R v Kensington and Chelsea Royal London Borough Council, ex p. Bayani (1990) 22 HLR 400* and *Cramp v Hastings Borough Council [2005] 4 All ER 1014*. The judge did not refer to these cases and does not appear to have taken them into account. The council could not be regarded as perverse in taking the applicant at her word on more than one occasion; or for remaining of the view that she could live with her mother-in-law in Portugal despite what she claimed in her letter of 22 September. In short the council was, originally and on review, entitled to make the findings that it did. What then happened was that the appeal was rendered academic by the production of the mother-in-law's letter. That could realistically be said to be good reason not to award the applicant her costs. The council should have recovered its costs subject to the costs protection provided for a legally aided litigant. At the highest there should have been no order as to costs—the default order envisaged by Stanley Burnton LJ in *R (M) v Croydon London Borough Council [2012] 1 WLR 2767*, para 77.

This is the judgment on the appeal.

THE ISSUES

18. Against that background the following issues arise:

    (1) Was the judge wrong in ordering the Council to pay 85% of the costs of the appeal? and

    (2) If so, what is the correct order for costs, is that (1) Ms Lopes pay the costs of the appeal or (2) that there be no order for costs?

THE FIRST ISSUE – DID THE JUDGE ERR IN ORDERING THE COUNCIL TO PAY 85% OF THE COSTS OF THE APPEAL?

19. An appeal against the decision of the judge below will only be allowed if the decision of the lower court was wrong or unjust because of a serious procedural irregularity: see CPR 54.11. In the present case, the first question is whether the judge was wrong in ordering the Council to pay Ms Lopes 85% of the costs of the appeal

20. The legislative structure in the present case is as follows. A person may apply for assistance under the provisions governing homelessness contained Part 7 of the Act. Section 184 of the Act provides that:

> "… if the local housing authority have reason to believe that an applicant may be homeless or threatened with homelessness, they shall make such inquiries as are necessary to satisfy themselves—
>
> (a) whether he is eligible for assistance, and

> (b) if so, whether any duty, and if so what duty, is owed to him under the following provisions of this Part."

21. A variety of duties may be owed depending on whether the applicant is eligible for assistance, is homeless or threatened with homelessness, is in priority need and whether he or she is homeless intentionally. The authority will determine what, if any, duty is owed. Section 202 of the Act provides for the applicant for housing assistance to request a review of a decision of the local authority. Section 204 of the Act provides for an applicant for a review to appeal to the county court on a point of law against a review decision.

22. In the present case, the Council made inquiries in the form of conducting two interviews with Ms Lopes. On the basis of the information provided in those interviews, the Council decided that Ms Lopes was not homeless as she had accommodation available to her and those reasonably residing with her (her partner and children) in the form of the flat occupied by the mother-in-law in Portugal. On a review, the officer upheld the decision and relied upon the information provided by Ms Lopes in the two interviews. Ms Lopes appealed contending that the decision reached by the Council was not open to it and, in essence, that they had failed to make proper and adequate inquiries in that they had failed to contact the mother-in-law in Portugal.

23. The judge considered that the essence of the appeal was that there had been a "failure to make proper enquiries". He further concluded that it was difficult for the Council to maintain that it had discharged its duty to make enquiries: see paragraph 7 of the ruling on costs.

24. The obligation under section 184 of the Act is an obligation on the Council to make such inquiries as are necessary to satisfy themselves whether a duty is owed. That includes, on the facts of this case, making such inquiries as are necessary to enable them to decide if Ms Lopes was homeless or threatened with homelessness. The correct approach to that duty is set by the Court of Appeal in decisions such as *R v Royal Borough of Kensington and Chelsea ex p. Bayani* (1990) 22 HLR 406, and *Cramp v Hastings Borough Council* [2005] H.L.R. 48. It is, in the first instance, for the decision-maker to determine what inquiries are necessary to enable it to be satisfied of the relevant matters under the Act and its decision is subject to challenge on traditional public law grounds. As Brooke L.J., with whom Arden and Longmore L.JJ. agreed, expressed it in *Cramp* at paragraph 58:

> "it was for the council to judge what inquiries were necessary and it was susceptible to a successful challenge on a point of law if and only if a judge in the county court considered that no reasonable council could have failed to regard as necessary the further inquiries suggested by the appellant's advisers".

25. As Brooke L.J. observed in *Cramp* at paragraph 58, it is not open to a judge to quash a decision on an appeal on a point of law on the grounds that "it would have been helpful" if the inquiries advocated by the appellant had been carried out or "that there might well be additional information" which a person could have given.

26. In the present case, the judge did not identify the relevant test, and did not refer to the statutory provisions or the decisions of the Court of Appeal. Furthermore, the decision

appears to have been predicated upon the basis that either the original decision-maker or the review officer of the Council could, and should, have contacted the mother-in law to obtain further information. However, there was no basis upon which the judge could legitimately conclude, on the facts of this case, that the Council had erred in law in not making such inquiries. The Council had conducted two interviews with Ms Lopes herself, with a person present who could interpret for her. The Council had expressly asked Ms Lopes about the nature of the accommodation she and her family occupied in Portugal, why she had left, and whether or not her mother-in-law had asked her to leave. The Council was entitled to reach its conclusion on the information provided by Ms Lopes that she was not homeless or threatened with homelessness as she had accommodation available to her and her family which it was reasonable for her to continue to occupy. The officer who took the original decision did not act unlawfully in not making further inquiries of the mother-in-law but relying on the information provided by Ms Lopes herself. Similarly, the review officer was entitled to rely upon the information provided by Ms Lopes, and the fact that her partner and her children had continued to remain with her mother-in-law whilst Ms Lopes looked for employment in the United Kingdom.

27. In the circumstances, therefore, I am satisfied the judge erred in law in concluding that the Council would have been unable to establish that it had made proper enquiries. He failed to identify and apply the relevant test and the decision he reached was one that was not open to him on the evidence. His order dated 30 March 2015 must therefore be set aside.

THE SECOND QUESTION – THE APPROPRIATE COSTS ORDER

28. The next question is what was the appropriate costs order in the present case. The position is that the appellant, Ms Lopes, had withdrawn her appeal on the Council agreeing to withdraw its review decision of 13 May 2014 (the decision under appeal) and taking a fresh review decision. A consent order was agreed embodying those terms, and providing for the making of written submissions on the question of costs so that matter could be determined by the court.

29. First, the Court of Appeal has summarised the appropriate principles to be applied in deciding whether or not costs should be awarded in cases where the parties agree on the proper disposition of the underlying proceedings in *R(M) v Croydon London Borough Council* [2012] 1 W.L.R. 2607, and the cases referred to in that judgment. The principles established by the Court of Appeal reflect the provisions on costs contained in CPR 44.3. The cases involve principally judicial review proceedings rather than an appeal to the county court on a point of law under section 204 of the Act but similar principles, with any necessary adaptation to reflect the different statutory context, are in my judgment applicable to such appeals.

30. In essence, for present purposes, the position to be considered is one where the parties have agreed on the disposition of the underlying appeal and the issue is whether or not costs should be awarded to either party. The precise approach depends upon the particular facts and circumstances of the case. Where a party has obtained the entire relief sought on the statutory appeal, so that that party can be said to be wholly successful, then, in general, that party should recover his or her costs unless there is some good reason to depart from that position. Where a party has succeeded in part, then a number of factors may be relevant as explained in paragraph 62 of the decision

in *R (M) v Croydon London Borough Council*. In such circumstances, it may be appropriate to make no order for costs, or, if it is reasonably clear who would have succeeded if the appeal had gone to a hearing, that may indicate that that party should be awarded his or her costs. Where a settlement is reached which does not in fact reflect the claimant's claims., it may be possible in some cases to consider the underlying claims and determine who would have been the successful parties and award costs accordingly. In other cases, that may not be possible and it may be that the appropriate order is no order for costs. It may also be that the appropriate order may be no order for costs where the judge cannot sensibly and fairly make an order in favour of either party without a disproportionate expenditure of judicial time: see per Lord Neuberger M.R., as he then was, at paragraphs 60 to 65 and per Stanley Burnton L.J. at paragraph 77 in *R (M) v Croydon London Borough Council* [2012] 1 W.L.R. 2607.

31. Secondly, Practice 52A – Appeals: General Provisions deals with the general position on costs on the withdrawing of an appeal and provides as follows:

> "6.1. An appellant who does not wish to pursue an application or appeal may request the appeal court to dismiss the application or the appeal. If such a request is granted it will usually be subject to an order that the appellant pays the costs of the application or appeal.
>
> "6.2 If the appellant wishes to have the application or appeal dismissed without costs, his request must be accompanied by a letter signed by the respondent stating that the respondent so consents.
>
> "6.3 Where a settlement has been reached disposing of the application or appeal, the parties may make a joint request to the court for the application or appeal to be dismissed by consent. If the request is granted the application or appeal will be dismissed."

32. Against that background, the position in the present case is, in my judgment, as follows. First, the relief obtained by the appellant, Ms Lopes, was in large part the relief that she sought, namely withdrawal of the review decision and a fresh decision. Secondly, and importantly, the reason for the Council agreeing to that outcome was that Ms Lopes had provided new evidence, in the form of the letter from her mother-in-law, after the institution of the appeal. That information indicated that the mother-in-law would not, as at 19 May 2014, be able to accommodate Ms Lopes and would not allow her and her family to return and live at the mother-in-law's flat in Portugal. As that letter revealed new facts, and indicated that the accommodation in Portugal might not, or might no longer, be available for Ms Lopes and her family, that would in any event be sufficient to enable her to make a fresh application for housing assistance: see *Rikha Begum v Tower Hamlets London Borough Council* [2005] 1 W.L.R. 2103.

33. In those circumstances, irrespective of the outcome of the appeal against the review decision of 13 May 2014, the Council would have to conduct the necessary inquiries under section 184 of the Act and determine afresh whether, on the basis of the new information and any other information obtained, any duty was owed to Ms Lopes under the Act. It was sensible and appropriate, therefore, for the Council to indicate that it would be prepared to withdraw the review decision and reconsider the matter, rather than fight the appeal and then, even if it won, entertain a further application for housing assistance. In reality, that factor indicates either that Ms Lopes obtained the

relief she sought in the appeal because of the new evidence and not because she was likely to succeed in the appeal (and therefore, the premise for awarding her the costs of the appeal disappears) or, in any event, that factor would justify departing from any assumption that she ought to be awarded the costs on the basis that she had obtained the relief she sought. Furthermore, this is not one of those cases that occur in judicial review where the claimant sends a letter before claim in accordance with the relevant protocol and the time for the respondent to determine whether or not to fight or simply agree to reconsider the matter is at that stage, not after proceeding are issued (see the observations of Lord Neuberger M.R. in *R (M) v Croydon London Borough Council* [2012] 1 W.L.R. 2607 at paragraph 55). Here the appellant, Ms Lopes did not provide any new material until after instituting the appeal. The Council could not have avoided the costs of the appeal by agreeing to entertain a fresh application for assistance (or by agreeing to withdraw the review decision) as the appeal had been instituted before that information was produced.

34. Thirdly, and significantly, it is clear, in my judgment, that the Council would have succeeded in resisting the appeal against the review decision of 13 May 2014. On the material before the review officer, that officer was entitled to conclude that (1) there was accommodation available to Ms Lopes in Portugal (2) that Ms Lopes had a licence to occupy it (3) that it was reasonable for her to occupy it notwithstanding the alleged the issue of her brother-in-law's conduct towards her children (4) that Ms Lopes had left the accommodation of her own volition and would be able to return and (5) it was not unreasonable for her and her family to occupy the property by virtue of the overcrowded nature of that property. The information provided at two interviews by Ms Lopes was to the effect that she and her family had lived in the property, together with her mother-in-law and her brother-in-law and his family. Although there were tensions between some of them, Ms Lopes was not asked to leave. She went to the United Kingdom to look for employment. Her partner and her children remained living in the flat and joined her when she had found employment. The conclusions reached by the review officer that Ms Lopes was not homeless, or threatened with homelessness, so that no duty was owed to her under the Act was one that the review officer was entitled to reach. Further, for the reasons given above, the Council did make sufficient inquiries in relation to the relevant matters under the Act.

35. For those reasons, the Council would, in my judgment, have succeeded in resisting the appeal and would have been the successful party. The reason why it agreed to withdraw the review decision, and take a fresh decision, was because Ms Lopes produced new material after the institution of the appeal which indicated that, even if the Council won the appeal, they would have to entertain a fresh application for housing assistance, and make fresh inquiries under section 184 of the Act. In those circumstances, in my judgment, the appropriate order is that Ms Lopes pay to the Council the costs of the appeal (subject to any protection to which she is entitled by reason of the fact that she is a publicly funded litigant).

36. For completeness, Mr Lintott for the Council contended that the fact that the new material was supplied after the institution of the appeal (and could have been provided by Ms Lopes before) was sufficient to justify the award of costs against her, irrespective of whether or not the Council would have succeeded on the appeal as it was that action (the provision of new material) which rendered the appeal academic. It is not necessary, on the facts of this case, to express a concluded view on that issue.

As a minimum, the fact that the actions of an appellant has rendered the appeal academic may be a good reason for not awarding an appellant any costs. Whether that would also justify ordering the appellant to pay the respondent's costs may depend upon a number of matters (including the provisions of the CPR, the Practice Direction and the particular facts of the case). It is neither necessary, nor appropriate, to determine the outcome to that question in the present case as, for the reasons given, the appropriate order in all the circumstances is that Ms Lopes, be ordered to pay the costs (subject to any protection to which she is entitled by reason of the fact that she is publicly funded)

CONCLUSION

37. The court below was wrong to order the Council to pay 85% of the costs of the appeal on the basis that the Council had failed to make adequate and proper inquiries. The court below did not identify, and did not apply, the appropriate test in that regard. In the present case, the true position was that the Council would have succeeded on the appeal. It had made appropriate inquiries by interviewing Ms Lopes twice, with a person present who could interpret for her, and obtaining information from her as to the nature of the accommodation in Portugal which she and her family were occupying, that she had not been asked to leave that accommodation and that she had come to the United Kingdom to look for employment with a view to her partner and children joining her in the United Kingdom at that stage. The Council did not act unlawfully by not making further inquiries or by not contacting the mother-in-law in Portugal. The Council was entitled to conclude on the material before it that Ms Lopes was not homeless or threatened with homelessness as accommodation was available for her and her family at her mother-in-law's flat in Portugal.

38. Furthermore, the reason for the Council agreeing to withdraw its review decision rather than fighting the appeal was that Ms Lopes had produced new material, after she had instituted the appeal proceedings, indicating that the flat in Portugal would no longer be available for occupation by her and her family. The Council would be obliged to conduct further inquiries into any fresh application for housing assistance made on that basis irrespective of the outcome of the appeal. The appeal was rendered academic, therefore, by Ms Lopes producing new evidence and, had the appeal been fought, the Council would have been successful in resisting it. In all those circumstances, the proper order was that Ms Lopes be ordered to pay the costs (subject to any protection to which she is entitled by reason of the fact that she is publicly funded).