Neutral Citation Number: [2024] EWHC 756 (Admin)

Case No: AC-2023-BHM-000257

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
Bull Street,
Birmingham

Date: 12th April 2024

Before:

HIS HONOUR JUDGE TINDAL
(Sitting as a Judge of the High Court)

- -

Between:

THE KING (on the application of)
REBECCA PICKFORD

Claimant

- and -

SANDWELL METROPOLITAN BOROUGH COUNCIL

Defendant

- -

Mr Zia Nabi (instructed by **Community Law Partnership**) for the **Claimant**
Ms Catherine Rowlands (instructed by **Sandwell MBC**) for the **Defendant**

Hearing dates: 12th March and 12th April 2024

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JUDGMENT

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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.

HHJ TINDAL:

Introduction

1. This judicial review claim concerns the 'suitability' of 'Bed and Breakfast' ('B&B') accommodation for homeless families. It arises under Part VII Housing Act 1996 ('HA') and the Homelessness (Suitability of Accommodation) ('England') Order 2003 ('the 2003 Order'). It also concerns mandatory orders in that context in the wake of *R(Imam) v Croydon BC* [2024] HLR 6. *R(Imam)* was handed down at the end of November 2023 and according to *Westlaw,* so far there are five first instance decisions citing it, but none on B&B accommodation. Indeed, according to both *Westlaw* and very experienced Counsel, there is effectively no direct authority on the 'suitability' of B&B accommodation for families under the 2003 Order even over the last 20 years. This may be because even if homeless families are initially provided with B&B accommodation, they are often moved into other accommodation once authorities are 'reminded' of what I shall call the '6-week limit' in the 2003 Order.

2. However, that has not happened with the Claimant (as I will call her), who having applied to the Defendant local housing authority as homeless on 9th October 2023, has now been in B&B accommodation for 26 weeks, with her son who turned 9 years old in the meantime (and whom I will call 'C' – as whilst I am not invited to make an anonymity order, there is no need to give his first name). Yet the Defendant did not make a decision on her homelessness application until 4th April 2024, after the circulation of my draft judgment on 19th March 2024 (after which the Easter break meant it was not practicable for us to reassemble for hand-down until 12th April 2024). Whilst in some of those respects this is an unusual case, it raises three questions of wider significance which from the researches of Counsel and myself have not previously been decided:

    a. To which homeless applicants under the HA does the 2003 Order apply ?

    b. If the 2003 Order does apply to a homeless applicant, when and for how long will B&B accommodation be 'suitable' for them under Part VII HA ?

    c. Once B&B accommodation becomes 'unsuitable' for a homeless applicant, when will a mandatory order to require an authority to provide them 'non-B&B accommodation' under s.188 HA be appropriate following *R(Imam)* ?

3. I say these questions are of 'wider significance' because the evidence before me is that some have suggested there may be a 'temporary accommodation crisis'. Certainly, according to the Defendant's evidence from its own Housing Operations Manager Ms Hayes, as at December 2023, it had 179 families being provided with temporary accommodation (up from 117 families in April 2023). Indeed, according to Ms Rowlands' updated instructions that I am prepared to accept, as at 11th March 2024, the Defendant had 206 families in temporary accommodation, of whom 125 families were in B&B accommodation, of whom 12 have been even longer than the Claimant (and all have more children). Yet as Ms Hayes also said in an email dated 15th November 2023 to the Claimant's solicitors, whilst the Defendant has experienced a 55% increase in demand for accommodation since 2021 and has 60 more households in temporary accommodation, over 2023 the Defendant mobilised an additional 40 units and plans another 34 units for April 2024 (to which I return).

4. In that respect, the Defendant seems to be doing rather better than many other housing authorities nationally. Ms Hayes reported the Defendant's number of families in temporary accommodation in late 2023 was less than half the national average. Indeed, in a January 2023 report to the House of Commons *'Households in Temporary Accommodation (England)'*, the authors reported at pgs.4-5 that:

> "There were 94,870 households in temporary accommodation the end of June 2022….A total of 120,710 dependent children were housed in temporary accommodation in June 2022….There was a sharp increase in households in temporary accommodation in the second quarter of 2020, primarily driven by an increase in single adult households placed in temporary accommodation at the start of the Covid-19 pandemic… Overall, the number of households in temporary accommodation is slightly lower than the 2020 peak, but there hasn't been a substantial decrease. Authorities use a range of types of temporary accommodation, the most controversial of which is bed and breakfast (B&B) accommodation…..By June 2022, there were 10,000 households in B&B-style accommodation. The number of families with dependent children placed in B&B-style accommodation increased from a low point of 400 at the end of December 2009 to 2,320 at the end of June 2022, although this figure represents a decrease from a peak of 3,450 in September 2016. The homelessness charity Shelter has said temporary accommodation is "not proving to be temporary at all" pointing out that some families have been in this accommodation for over ten years."

The same report noted at pg.40 discussed that some homelessness stakeholders had suggested there was a 'temporary accommodation crisis':

> "Desk research conducted by The Smith Institute (2022) found increased demand for temporary accommodation in some areas (mainly London and Greater Manchester) 'is placing a huge strain on some boroughs'
>
> > "The situation is hitting a crisis point because of the lack of all types of suitable, affordable accommodation ([temporary accommodation or 'TA'] and settled, move-on housing). More and more London boroughs are now having to 'fish in the same property pool' for TA – mainly in lower housing cost areas."
>
> The cost of private sector leasing contracts, the preferred option for most local authorities, has "risen sharply in recent years, reflecting the competition for properties and the overall rise in market rents." Authorities reported increasing difficulties in finding affordable temporary accommodation for singles and families:
>
> > "We were told that finding affordable TA for singles and families – even with generous…incentives - is proving ever more difficult and more costly. It was reported there are now very few places in London where rents are affordable for homeless households on benefits."

As Ms Hayes also observed in this case, hard-pressed housing authorities in London and South-East England often place homeless applicants in the Midlands as it is cheaper to do so there, but that takes away accommodation that would otherwise be available to the Defendant's own residents. Likewise, the Defendant also has to compete with the Home Office placing asylum-seekers (including families) in the area. So, even if the present case is unusual in some ways, it has become

increasingly common, with housing authorities trying to juggle the needs and demands of an increasing number of homeless families in B&B accommodation.

5. I should say, the Defendant did not contend that the claim itself had been rendered academic by its decision on the Claimant's homelessness application after circulation of my draft judgment, although it does contend I should now in any event make no mandatory order even if it is found in breach of statutory duty. Indeed, that shows the claim is not academic on the principles in *R (L, M and P) v Devon CC* [2021] EWCA Civ 358 at [48]-[73]. There is still a dispute between the parties which affects their rights and obligations as to: (i) whether the Defendant was in breach of statutory duty (to which the Defendant's recent decision makes no difference); and (ii) if so what if any relief is appropriate (to which it might). Even if and to the extent that *relief itself* is now academic, there is good reason in the public interest for determining the whole dispute, especially as it is a temporary duty which often becomes academic by the time of a substantive hearing and so the point may not otherwise be decided – see *R(Brooks) v Islington LBC* [2016] PTSR 389, approved in *R (L, M and P)*). In this case, that applies with still greater force as unusually I had a fully-argued substantive hearing in a s.188 HA case and made my own decision in a draft judgment before the Defendant's decision. In this judgment, I will address the factual background, statutory framework, alternative remedy and the grounds of challenge, before the question of relief, where I will consider whether to make a mandatory order.

Factual Background

6. I propose to take the factual background shortly for three reasons. Firstly, unlike e.g. a homelessness *appeal* under s.204 HA, it is only since my draft judgment that I have the Defendant's reasoned 'decision' under Part VII HA (in which facts are for the authority to decide subject to rationality challenge, which must be read practically and without 'nit-picking': *Holmes-Moorhouse v Richmond-on-Thames LBC* [2009] HLR 34 (HL) at [17]/[50]). Secondly, in response to the Defendant's decision that the Claimant was intentionally homeless, she has invoked her right to a review under s.202 HA which if unsuccessful will entitle her to an appeal under s.204 HA (as the Defendant raises on the issue of costs I will deal with in a separate short judgment). Therefore, the less I say relevant to the issue of 'intentionality' the better, as it is not an issue before me. Thirdly, the rest of the factual background is largely agreed in the statements of Ms Hayes and the Claimant's solicitor, Ms Maher – and I do not have a statement from either the Claimant or Landmark Homes Ltd ('the landlord').

7. The Claimant is now 35 years old and as I said, her son 'C' recently turned 9 years old. From 2016 until 9th October 2023, they had lived together (with two dogs) in a one-bedroom flat in Sandwell in Birmingham ('the Flat') in the Defendant Council's metropolitan area, rented from the landlord. The tenancy was renewed as an Assured Shorthold Tenancy in November 2020. C attends a school close to the Flat. It is not disputed that C suffers from food allergies to nuts, bananas and tomato-based products which requires him to have an 'epi-pen' in case of allergic reaction or anaphylactic shock; as well as eczema, which needs special washing powder to launder his clothes and bedding. (I return later to whether C has a 'disability').

8. On 9th October 2023, the Claimant was required by agents of the landlord to leave the Flat at 1am. The landlord has subsequently informed the Defendant that this was due to a flood and occupation of the Flat was prohibited by the Fire Service. They have also been informed by the landlord that when it entered the Flat, it was in such poor condition they thought the Claimant had abandoned it - I have certainly seen photographs showing its poor condition – but when is disputed. The landlord has informed the Defendant that there was £25,000 of damage, in addition to rent arrears of c.£7,000. But the Claimant insists that it was not in that condition when she and C were present. However, she does admit to keeping two dogs in the flat which is said to be a breach of a term of the tenancy. Ultimately, I cannot make a finding on either issue either way and both these issues are due to be resolved by the County Court on the landlord's pending possession claim (which was last before that Court on 1st March 2024). Indeed, until my draft judgment, the Defendant had taken the view it should await the County Court's decision whether to make a possession order before making its own s.184 HA decision on the Claimant's homelessness application – in particular whether she is 'intentionally homeless'. However, it has now decided that she is intentionally homeless on grounds of her being responsible for the condition of the flat and rent arrears. As I say, I express no view on that as it is now also subject to review.

9. The Defendant accepts this is an unusual situation as the Claimant promptly made an application to it as homeless five months ago on 9th October 2023, immediately after she was locked out of the Flat by the landlord. Under s.188 HA (discussed below), the Defendant immediately accommodated her and C at the Saffron Hotel in Birmingham ('the Hotel'), where she and C have stayed ever since. Whilst I have been told little about their accommodation (despite its importance to the case), it is agreed they have their own bedroom and bathroom and access to communal cooking facilities; and a microwave in their room. As I will discuss, the Defendant concedes that this is 'B&B accommodation' for the purposes of the 2003 Order.

10. The Claimant contends that the Hotel is unsuitable because of C's allergies, as due to them she is unable to use the communal cooking facilities and simply prepares the two of them ready meals in the microwave in their room, because there is no freezer there. However, the Defendant says that the Claimant and C were placed in the Hotel *because* of C's allergies – it has (communal) cooking facilities which the Claimant could use to prepare meals to suit C's diet, rather than general catering. In fairness, whilst the Claimant understandably prefers not to use those facilities because of C's allergies, there have been no reports of any flare-up in C's allergies in his time in the hotel. Indeed, I have no medical evidence whatsoever about C. I am bound to say, *if* C was living in the poor conditions in the Flat that I see in the photographs, as a matter of common sense, I would have thought they would hardly have been very healthy for his allergies. But as I say, I cannot make any finding about that.

11. In any event, either on the day the Claimant and C were accommodated or in the days following, she had a conversation with the Defendant on which it places some reliance, as I discuss below. The Defendant's note of that conversation (which I accept) is that C would be able to stay with his father or grandfather in their accommodation, but when she was then told that as a single person, she would be

then placed in a hostel, she decided to keep her son with her and stay in the Hotel. However, the Defendant agreed C could stay elsewhere for up to two nights a week.

12. The Claimant was aggrieved at her housing situation: both at her landlord and at the Defendant. So far as the landlord was concerned, on 11th October 2023 she obtained a County Court injunction for unlawful eviction, eventually enabling her to re-enter the Flat on 15th October. However, she found her belongings had been removed and the kitchen, toilet and bathroom sink had also been taken out, so that the Flat was uninhabitable. Whilst I can see from the photographs which the landlord took that it entered the Flat, it is entirely unclear whether repair works have been undertaken. Certainly, no repairs had been undertaken by the landlord in early November 2023 when the Defendant checked. Indeed, Mr Nabi was instructed at the hearing before me in March 2024 that the Flat was still uninhabitable. I accept that, otherwise the Claimant doubtless would have moved back in. It is not only bigger than the B&B accommodation with its own kitchen, it is also close to C's school where the Claimant has to take C each day. The Claimant has been visiting the Flat and indeed briefly kept her dogs there, although they have now been re-homed. In any event, she issued proceedings for unlawful eviction on 25th October 2023 and the landlord issued a counterclaim for possession and damages on 17th December 2023 and served a Notice Seeking Possession on the Claimant on 16th February 2024. Those proceedings were initially wrongly allocated, but by consent on 1st March 2024 the County Court directed that the claims be re-allocated and the claim for possession be heard after the Claimant's claim for unlawful eviction, so she remains a tenant at the Flat. There is as yet no hearing date for these proceedings.

13. The Claimant is also aggrieved at the period for which she and C have been in the Hotel. She was initially told it would be a short-term accommodation, but once it was clear that the Flat was uninhabitable, on 12th October 2023 her solicitors requested alternative accommodation for her and C. This was due to his allergies, the Hotel being 45 minutes from C's school near the Flat and also to enable the family to be reunited with their dogs. Whilst Mr Nabi suggested that C had been 'traumatised' by the events surrounding the eviction, the only evidence I have about that (which I accept) is from the Claimant's solicitor's statement which describes C as finding it 'difficult to cope'. In fairness, C has lost his home at the Flat he had known since a baby (and the dogs), he now has a long journey to and from school and he struggles to sleep in the Hotel. Given all that disruption, I entirely accept that C's behaviour has deteriorated, including outbursts of frustration and anger.

14. On 16th October 2023, the Defendant accepted the Claimant was homeless and decided it was under a 'homelessness relief duty' under s.189B HA (discussed below) for 56 days. The Defendant dated that period from 9th October to expire on 4th December 2023, after this claim was issued. (However, as I have said, the Defendant's final s.184 HA decision on the Claimant's homelessness application only came after my draft judgment and it notified the Claimant on 4th April 2024 the relief duty had come to an end. Whilst there is no *challenge* about the Defendant's delay in making a decision, I return to the *consequences* of it later).

15. On 8th November 2023, the Claimant's solicitors sent a pre-action protocol letter to the Defendant making two contentions, which it is important to consider separately:

a. Firstly, it was contended that the accommodation of the Claimant and C in the Hotel was not 'suitable' under the HA, referring to the 2003 Order and the Homelessness Code of Guidance (both quoted below) and contending that for applicants 'with family commitments' (the contested statutory phrase on the first of the three key questions noted), B&B accommodation is not to be regarded as suitable unless no other accommodation is available and even then, only for a maximum of six weeks. By 8th November, the Claimant had been residing in the Hotel for just over four weeks. The Claimant's substantive grievances about accommodation in the Hotel were also set out in detail: that he suffered from allergies requiring the Claimant to rely on ready meals and take-aways as she could not prepare food in communal facilities; that she had been told C could not stay away from the Hotel with his wider family for more than two nights a week, otherwise the Claimant would have to move to a hostel and be separated from her son; that the Hotel was at some distance from that family support network and the school; and that the Hotel could not accommodate the Claimant's dogs.

b. Secondly, it was contended that the Defendant had failed to make a s.184 HA decision on the Claimant's homelessness application presented to it on 9th October, even though it had known since 11th October that she and C could not live in the Flat. The Claimant contended that the landlord's contentions about her responsibility for the condition of the Flat and rent arrears were disputed and other matters irrelevant and complained that the Defendant had said her application would have to be considered by a special panel.

16. On 15th November 2023, Ms Hayes responded in the email I mentioned above:

a. On the second point - the Defendant's s.184 decision on the Claimant's homelessness application – Ms Hayes explained the 'panel' the Claimant had been told about was for the Claimant's application for allocation of long-term housing under Part VI HA, not her application as homeless under Part VII HA. Ms Hayes also confirmed that the Defendant had accepted the 'homelessness relief duty'.

b. On the first point - the suitability of the Hotel as accommodation for the Claimant and C - Ms Hayes made the general points about the Defendant's numbers of families in temporary accommodation I summarised above and 'recognised that B&B accommodation is not the most suitable of temporary accommodation types'. Notably, whilst Ms Hayes referred to the Claimant discussing C staying with family but then deciding to remain in the Hotel with him, Ms Hayes did not suggest that the 2003 Order did not apply. Indeed, as she wrote on 15th November, with its '6-week maximum' from 9th October 2023 only a few days from expiring, Ms Hayes added this:

> "If [the Claimant] is unable to return to her tenancy within 6 weeks, we will strive to provide a self-contained accommodation where the availab[ility] of accommodation allows this…Unfortunately, none of our current contracted hotels/temporary accommodation providers allow [pets]. However, we recently tendered for new contracted accommodation that will include/consider the placement of pets…. This can also be considered when the new contracts come online…"

On 17th November, the Police released the Claimant's dogs to her and she briefly accommodated them at the Flat before arranging through the RSPCA to have them re-homed.

17. Following Ms Hayes' response on 15th November, the Claimant issued the present judicial review claim on 30th November 2023. I will consider the three grounds of challenge drafted by Mr Nabi in the Statement of Facts and Grounds ('SFG') below in more detail, but in short they are that the Defendant is in breach of three duties: (i) its duty to provide suitable interim accommodation under s.188 HA, primarily due to the 2003 Order; (ii) its duty to have due regard to its obligations under the Equality Act 2010 ('EqA') under s.149 EqA because of C's disability; and (iii) its duty to have due regard to its obligations under s.11 Children Act 2004 ('CA') by failing to safeguard and promote C's welfare. The Claimant also applied to the Court for interim relief and a mandatory order to provide her with suitable (i.e. non-B&B) accommodation.

18. On 18th December 2023, in accordance with HHJ Rawlings' direction, the Defendant filed its Summary Grounds of Defence ('SGD'). Ms Rowlands there set out the Defendant's response to the grounds of challenge, which I discuss below but which in essence were: (i) that B&B accommodation was suitable for the period the Claimant and C were likely to occupy it and in any event, was the only accommodation available; (ii) that it was not accepted C had a disability under the EqA and in any event there was no risk to him at the Hotel; (iii) s.11 CA did not render unsuitable what was suitable. On the first ground, whilst Ms Rowlands did raise the availability of suitable alternative accommodation with C's father as relevant to the suitability of B&B accommodation, she did not argue that it meant the 2003 Order did not apply. On the contrary, in making the point the Defendant had no alternative accommodation, Ms Rowlands contended 'Art.4(1)(a) of the 2003 Order applies' (i.e. that there was an *exception* to the 2003 Order, not that it *did not apply*). I note from Ms Rowlands' later Detailed Grounds of Defence ('DGD') and skeleton that in December 2023 and February 2024, the Defendant sent the Claimant letters (which I have not seen) that it was 'minded to find' that she was intentionally homeless, but that the Defendant considers it is not in a position to conclude its inquiries until the County Court possession proceedings are resolved. As I said, on 1st March 2024, they were adjourned pending resolution of the Claimant's unlawful eviction claim, but as Ms Rowlands says, in the meantime the Claimant has access to the Flat.

19. On 22nd December 2023, when the Claimant and C had been in the Hotel for 10 weeks, HHJ Williams granted permission on the claim for judicial review on all grounds, but refused interim relief as there was no medical evidence C's needs were not being met in the Hotel, that C had alternative accommodation if needs be, that a mandatory order would prejudice other families waiting for accommodation; and that a substantive hearing could be expedited, listed before me on 12th March 2024. I circulated my draft judgment on 19th March 2024 and handed down judgment on 12th April 2024, by which time as I said, the Defendant had finally made its s.184 HA final decision on 4th April.

Statutory Framework

20. In the course of preparing this judgment, it became apparent it would be helpful on several issues if I 'fleshed out' the statutory framework which Counsel took me through with some other well-known cases (in many of which either or both had appeared). So, I invited brief further submissions and I am extremely grateful for them. The statutory homelessness scheme is contained in Part VII HA as amended, most relevantly by the Homelessness Act 2002 ('the 2002 Act'), the Localism Act 2011 ('the 2011 Act') and the Homelessness Reduction Act 2017 ('the 2017 Act').

21. A person is 'homeless' if they have no accommodation in the UK or elsewhere which is available for their occupation with a legal right to occupy, under s.175 HA:

> "*175*(1) A person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere, which he— (a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court, (b) has an express or implied licence to occupy, or (c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession.
> (2) A person is also homeless if he has accommodation but— (a) he cannot secure entry to it…
> (3) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy.
> (4) A person is threatened with homelessness if it is likely that he will become homeless within 56 days.
> (5) A person is also threatened with homelessness if— (a) a valid notice has been given to the person under section 21 of the Housing Act 1988 (orders for possession on expiry or termination of assured shorthold tenancy) in respect of the only accommodation the person has that is available for the person's occupation, and (b) that notice will expire within 56 days."

Also relevant to 'reasonableness' in s.175(1) is s.177(2) HA:

> "*177*(2) In determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation, regard may be had to the general circumstances prevailing in relation to housing in the district of the local housing authority to whom he has applied for accommodation or for assistance in obtaining accommodation.

22. In *Ali v Birmingham CC* [2009] HLR 41 (HL) (in which both Counsel before me appeared), the Lords held that s.175(3) HA when read with s.177 HA meant that a person was 'homeless' if it would not be reasonable to expect them to continue to occupy their accommodation for so long as they would have to do until the authority could take action, even though it would be reasonable for them to continue to occupy it for a little while longer (and so, one could be 'homeless at home'). Lady Hale said at [10]-[12] what became s.175(3) HA was inserted into predecessor legislation by Parliament to respond to *R v Hillingdon LBC exp Puhlhofer* [1986] AC 484. In *Puhlhofer*, the House of Lords had held a local authority were rationally entitled to consider to be 'accommodation' a couple and two young children living in one room in a guest house in poor conditions without cooking or laundry facilities. Merely as shorthand, I refer to Parliament's concern about families in inadequate temporary accommodation etc as 'the *Puhlhofer* problem'. In *Ali*, Lady Hale elaborated at [37]:

> "The words defined in s.175 are 'homeless' and 'threatened with homelessness'. The aim is to provide help to people who have lost the homes to which they were entitled and where they could be expected to stay. Section 175(3) was introduced for a case like the Puhlhofers, who could no doubt have been expected to stay a little while longer in their cramped accommodation, but not for the length of time that they would have to stay there if the local authority did not intervene."

In *Safi v Sandwell MBC* [2019] HLR 16 (CA), David Richards LJ (as he then was) at [30] said an authority should consider whether it was reasonable to continue to occupy accommodation 'looking to the foreseeable future as well as the present'. However, this is not the same as 'indefinitely' as Newey LJ said in *Kyle v Coventry CC* [2024] HLR 7 (CA) (a case in which both Counsel before me also appeared).

23. However, other cases show limitations to the Parliamentary response to 'the *Puhlhofer* problem'. Parliament inserted what is now s.175(3) HA as noted in *Ali*, but it did not deem temporary accommodation not to be 'accommodation' at all under s.175(1) HA. That was confirmed by the House of Lords (under earlier legislation in force after *Puhlhofer*) in *R v Brent LBC exp Awua* (1995) 27 HLR 453. Indeed, Lord Hoffmann made a similar point at pg.460 as Lady Hale later made in *Ali*:

> "[T]he extent to which the accommodation is physically suitable, so that it would be reasonable for a person to continue to occupy it, must be related to the time for which he has been there and is expected to stay. A local housing authority could take the view that a family like the Puhlhofers, put into a single cramped and squalid bedroom, can be expected to make do for a temporary period. [But]….there will come a time at which it is no longer reasonable to expect them to continue to occupy such accommodation. At this point they come back within the definition of homeless….."

Whilst Lord Hoffmann in *Awua* agreed with *Puhlhofer* that whether provision amounted to 'accommodation' was a matter for the authority's judgment, he did stress some rational 'edges' to 'accommodation', deciding it could not rationally include a night shelter where a homeless person had to 'roam the streets by day'. Yet, in *Ali* at [56], Lady Hale was inclined to accept even a prison cell, hospital ward or women's refuge could be 'accommodation' under s.175(1) HA (the latter confirmed in *Hodge v Folkestone DC* [2023] HLR 46 (CA)) but the person would remain 'homeless' as it would not be 'reasonable to continue them to occupy it' under s.175(3) HA. But in *Kyle* a hostel placement was held on the particular facts to render a single person no longer 'homeless' as it *would* have been reasonable for him to continue to occupy it until he was re-housed.

24. Closely linked to s.175 HA, Mr Nabi also places some reliance on s.176 HA:

> "*176* Accommodation shall be regarded as available for a person's occupation only if it is available for occupation by him together with— (a) any other person who normally resides with him as a member of his family, or (b) any other person who might reasonably be expected to reside with him. References in this Part to securing that accommodation is available for a person's occupation shall be construed accordingly."

In *Sharif v Camden LBC* [2013] HLR 16, the majority of the Supreme Court (including Lady Hale), applying *Puhlhofer*, held that an authority placing a family (including a child) in two adjoining flats yards apart, each with bathroom and cooking facilities, was 'accommodation' within s.175 HA and did not violate s.176 HA (but that did not mean it was necessarily 'suitable'). Lord Carnwath explained at [17]:

> "The word 'accommodation'…is neutral. It is not in its ordinary sense to be equated with 'unit of accommodation'. It is no abuse of language to speak of a family being 'accommodated' in two adjoining flats…The...test will be satisfied by a single unit of accommodation in which a family can live together. But may also be…by two units of accommodation if they are so located that they enable the family to live 'together' in practical terms. It comes down to an issue of fact, or of factual judgement, for the authority. Short of irrationality it is unlikely to raise any issue of law for the Court."

25. On a related theme, Mr Nabi also relied on s.189 HA on 'priority need':

> "*189*(1) The following have a priority need for accommodation— (a) a pregnant woman or a person with whom she resides or might reasonably be expected to reside; (b) a person with whom dependent children reside or might reasonably be expected to reside; (c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside; (d) a person who is homeless or threatened with homelessness as a result of an emergency such as flood…(e) a person who is homeless as a result of that person being a victim of domestic abuse…."

There is plentiful case-law on 'vulnerability' under s.189(1)(c) HA (and its relationship to 'disability' under the EqA). The leading case is now *Hotak v Southwark LBC* [2015] HLR 23 (SC) at [78]-[79] (another case involving Mr Nabi and Ms Rowlands). There is rather less case-law on 'dependent children' under s.189(1)(b) HA, which as I shall explain is very relevant to the contested issue on Ground 1 in this case. The leading case on s.189(1)(b) HA remains *Holmes-Moorhouse* (very recently applied in *Querino v Cambridge CC* [2024] EWCA Civ 314). In *Holmes-Moorhouse*, a father left his partner and four children in the family home but then obtained by consent (as Lady Hale explained, in rather unclear and unsatisfactory circumstances) a 'shared residence order' in respect of the youngest three from the Family Court. The father had already applied to the housing authority as homeless and contended he was in 'priority need' under s.189(1)(b) HA as those three now 'could be reasonably expected to live with him'. The Lords held that whilst there were some errors in the authority's review about the Family Court order, those should not be read in a 'nit-picking way' (see paragraph 6 of this judgment above). But the authority was not bound by an order of the Family Court and were entitled to come to the conclusion that despite it, the children could not be *reasonably expected to reside* with him. Lord Hoffmann added at [11]-[12]:

> "11. The….words 'might reasonably be expected'… clearly refers to an impersonal objective standard. It is therefore unnecessary to ascribe the expectation to anyone in particular. That is the point of it being impersonal. The question is rather: what considerations does the Act require or allow to be taken into account in deciding whether one person ought reasonably to

be expected to live with another ? The phrase clearly appeals to an objective social norm. Might a boy of seven reasonably be expected to reside with his mother ? In 5th century BC Sparta, definitely not. In 21st century England, ordinarily yes. The social norms were different. The scheme of housing provision in Pt VII [HA], which dates back to the Housing (Homeless Persons) Act 1977, was intended to give effect to the contemporary social norm that a nuclear family should be able to live together. In *Din (Taj) v Wandsworth LBC* [1983] 1 A.C. 657 at 668 Lord Fraser of Tullybelton said:

> '…One of the main purposes of [the 1977] Act was to secure that, when accommodation is provided for homeless persons by the housing authority, it should be made available for all the members of his family together and to end the practice which had previously been common under which adult members of a homeless family were accommodated in hostels while children were taken into care…'

12 But the social norm must be applied in the context of a scheme for allocating scarce resources. It is impossible to consider only what would be desirable in the interests of the family if resources were unlimited. Part VII [HA] provides….a safety net, a last resort for people who would otherwise be homeless. As Lord Wilberforce said in *Din*'s case (at 664):

> ''The Act must be interpreted . . . with liberality having regard to its social purposes and also with recognition of the claims of others and the nature and scale of local authorities' responsibilities.''

However, in *Bull v Oxford CC* [2011] HLR 35 (CA), *Holmes-Moorhouse* was distinguished where a father of children separated from their mother, but the children actually came to live with him in his room in a shared house, as a consequence of which he and they were evicted. The father applied as homeless and was given interim accommodation under s.188 HA with the children, but they regularly stayed with their mother and eventually spent more time with her than him. The Court held he was in priority need as unlike in *Holmes-Moorhouse*, his dependent children were *actually* 'residing' with him, not just (reasonably or not) '*expected* to reside with him', but the father was found intentionally homeless for having his children stay with him in breach of licence. I return to both cases later.

26. Speaking of 'intentional homelessness', this is the other key concept relevant to what duty, if any, the authority owes under Part VII HA (and is obviously central to the Defendant's recent decision, although that issue is not live before me). s.191 HA states:

> "*191*(1) 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…..
> (2) For…(1) an act or omission in good faith on the part of a person who was unaware of any relevant fact shall not be treated as deliberate…."

In *Awua*, Lord Hoffmann explained at pg.461 that 'settled accommodation' was not a requirement of 'accommodation' in what is now s.175 HA, but a judicial gloss on what is now s.191(1) HA to show that 'homelessness' was still 'in consequence of' 'intentionality' even after intervening 'non-settled' accommodation elsewhere. So, in *Awua*, when a homeless mother with children unreasonably refused a long-term

flat, her homelessness remained 'intentional' even after she was evicted from temporary 'non-settled' accommodation. Likewise, in *Hodge* a room in a women's hostel which an applicant gave up was not only 'accommodation' under s.175(1), it was sufficiently 'settled' for her to be 'intentionally homeless' under s.191 HA (so was the hostel from which the applicant was evicted in *Kyle*). By contrast, if an applicant has made themselves intentionally homeless from either 'settled' or 'non-settled' accommodation, but a supervening event means that had they not done so, they would have been unintentionally homeless anyway, the causal link with the 'intentionality' is broken: *Haile v Waltham Forest LBC* [2015] HLR 24 (SC). It was uncertainty over 'intentionality' that delayed the Defendant's decision until 4th April 2024, when it decided the Claimant was intentionally homeless on grounds of her responsibility for the poor condition of the Flat and rent arrears.

27. Indeed, speaking of that decision, the Defendant's duties of investigation and decision are governed by s.184 HA:

> "(1) 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.
> (3) On completing their inquiries the authority shall notify the applicant of their decision and, so far as any issue is decided against his interests, inform him of the reasons for their decision.
> (5) A notice under subsection (3) or (4) shall also inform the applicant of his right to request a review of the decision and of the time within which such a request must be made (see section 202).
> (6) Notice required to be given to a person shall be given in writing…"

In *R(Ahamed) v Haringey LBC* [2023] HLR 43 (CA), Newey LJ said at [52]:

> "[s.184 HA does not] require a[n]..authority to make all possible inquiries, but only such inquiries as are necessary to satisfy itself as to whether an applicant is eligible for assistance and, if so, what duties are owed to him."

This is a long-standing approach to s.184 HA (and indeed its predecessor). So, in *Cramp v Hastings BC* [2005] HLR 48 (CA), Brooke LJ stressed that courts should be 'hesitant' in criticising an authority's failure to make inquiries about matters not raised by an applicant unless those matters were 'obvious', which still applies generally, including to s.202 reviews: see *Kyle* [48]-[49]. But Wilson LJ (as he then was) in *Pieretti v Enfield LBC* [2011] HLR 3 (CA), on the predecessor of s.149 EqA in the Disability Discrimination Act 1995, said at [32]:

> "[I]t would be wrong, in the light of [now s.149 EqA] to say that he should consider disability only if obvious. On the contrary. He needs to have due regard to the need for him to take steps to take account of it."

As already noted, in *Holmes-Moorhouse*, Lord Neuberger stressed at [50] that local authority decisions under s.184 HA and reviews under s.202 HA should not be read 'in a nit-picking way'. However, just as Lord Wilson qualified *Cramp* on inquiries in in *Pieretti*, Lord Neuberger qualified himself in *Holmes-Moorhouse* on decisions engaging s.149 EqA in *Hotak* at [78]-[79] suggesting reasoning would have to show 'due regard' for disability complaint with s.149 EqA. Similarly, in *Nzolameso v Westminster CC* [2015] HLR 22 (SC) at [31]-[32] Lady

Hale pointed to the obligation under s.182 HA on local authorities to take into account the statutory Homelessness Code of Guidance (to which I return):

> "…[L]ocal authorities…are required to take the Code and Supplementary Guidance into account. If they decide to depart from them they must have clear reasons for doing so….It must be clear from the decision that proper consideration has been given to the relevant matters required by the Act and the Code. While the court should not adopt an overly technical or 'nit-picking' approach to the reasons given in the decision, these do have to be adequate to fulfil their basic function. It has long been established that an obligation to give reasons for a decision is imposed so that the persons affected by the decision may know why they have won or lost and, in particular, may be able to judge whether the decision is valid…"

28. Turning from the statutory concepts the housing authority must evaluate to their actual duties under the HA, in *Ali* at [17], Lady Hale put the s.184 inquiry duty in the wider context of those duties to homeless applicants under Part VII HA:

> "Homelessness gives rise to a graduated series of duties on the local housing authority. If the authority have reason to believe that someone who applies to them for accommodation or help with accommodation may be homeless or threatened with homelessness, they must make inquiries in order to satisfy themselves whether he is eligible for their help and if so what duty, if any, they owe to him under Pt 7 (1996 Act s.184). Certain persons from abroad and asylum seekers are not eligible for help under Pt 7 (ss.185 and 186). If the authority have reason to believe that an applicant 'may be homeless, eligible for assistance and have a priority need', they must <u>secure</u> that accommodation is available for his occupation pending a decision as to what duty is owed (s.188(1)). Priority need is then defined and includes families with dependent children (s.189(1)(b)). If the local authority decide that the applicant is homeless, eligible for assistance and in priority need, but became homeless intentionally, they must <u>secure</u> that accommodation is available for him 'for such period as they consider will give him a reasonable opportunity' of finding his own accommodation and provide him with advice and assistance in doing so (s.190(1) and (2)). We are told that up to six weeks is usually thought enough for this although there is no statutory limit. If an intentionally homeless person does not have a priority need, the authority only have to provide him with advice and <u>help to find somewhere for himself</u> (s.190(3)). If the local authority are satisfied that an applicant is homeless and has a priority need, and are not satisfied that he became homeless intentionally, then they 'shall <u>secure</u> that accommodation is available for occupation by the applicant' (s.193, unless they are able to refer the applicant to another local authority under s.198)."

I have underlined 'secure', as 'securing accommodation' is the common feature of the s.188 'interim duty', s.190(2) 'intentionally homeless but priority need duty' and s.193 'full' duty (the looser s.190(3) duty has been repealed, as I discuss). As I return to the s.190(2) HA duty, I should add that a 'reasonable opportunity' is reasonable for the applicant, not for the authority having regard to their resources: *R(Conville) v Richmond LBC* [2006] HLR 45 (CA). However, under s.206 HA (see below), the authority may 'secure' accommodation for an applicant by provision themselves or by another person, or by such assistance as will secure it from another

person. In *Ali*, the authority lawfully temporarily 'secured accommodation' *from* the 'homeless at home' applicants themselves by leaving them in their homes, which were not 'reasonable for them to continue to occupy' for the foreseeable future, but that were still 'suitable' pending re-housing. (I should say the 'usual 6 weeks' Lady Hale referred to in *Ali* under s.190(1) HA, is different from the '6-week limit' in the 2003 Order)

29. However, since *Ali* in 2009, other duties have been inserted into Part VII HA, most recently by the 2017 Act. The first is a 'personalised housing plan' under s.189A HA. In *UO v Redbridge LBC* [2023] HLR 39 at [57]-[64], Lane J summarised s.198A as 'containing its own gradated series of duties', at [57] he observed:

> "s.189A(1) states the authority 'must make an assessment of the applicant's case' where an applicant is homeless or threatened with homelessness and eligible for assistance. This is the 'initial assessment duty'. It requires, amongst other things, an assessment of the circumstances that caused the applicant to become homeless or threatened with homelessness, as well as the housing needs of the applicant including, in particular, what accommodation would be suitable for the applicant and [their household]."

30. Another new duty introduced by the 2017 Act is of significance in this case: the 'homelessness relief duty' the Defendant here accepted on 16th October 2023. It arises under s.189B HA, which is headed 'initial duty' and provides as is relevant:

> "*189B*(1) <u>This section applies where the local housing authority are satisfied that an applicant is— (a) homeless, and (b) eligible for assistance</u>.
> (2) Unless the authority refer the application to another local housing authority in England…. <u>the authority must take reasonable steps to help the applicant to secure that suitable accommodation</u> becomes available for the applicant's occupation for at least: (a) 6 months….
> (4) Where the authority— (a) are satisfied that the applicant has a priority need, and (b) are not satisfied that the applicant became homeless intentionally, the duty under…(2) comes to an end at the end of the period of 56 days beginning with the day the authority are first satisfied as mentioned in subsection (1).
> (5) If any of the circumstances mentioned in…(7) apply, the authority may give notice to the applicant bringing the duty under…(2) to an end…
>
> (7) The circumstances are that the authority are satisfied that— (a) the applicant has— (i) suitable accommodation available for occupation, and (ii) a reasonable prospect of having suitable accommodation available for occupation for at least 6 months….from the date of the notice, (b) the authority have complied with the duty under… (2) and the period of 56 days beginning with the day that the authority are first satisfied as mentioned in (1) has ended (whether or not the applicant has secured accommodation)…"

As I have underlined, s.189B HA is different from the more extensive duties in the HA summarised by Lady Hale in *Ali*, including the interim duty to accommodate under s.188 HA. s.189B HA is merely an *initial* duty on the authority to applicants who are 'eligible' and 'homeless' under s.175 HA / s.177 HA as discussed, but not necessarily 'unintentionally' so or 'in priority need': or indeed pending the s.184 HA decision on those questions. According to the Explanatory Note of the 2017 Act (relevant to its interpretation, as I explain later), part of its purpose was to ensure

authorities did not just concentrate on homeless people in 'priority need'. Indeed, it replaced the s.190(3) HA duty to non-priority need intentionally homeless applicants, with a time-limited duty on an authority *to take reasonable steps to help an applicant secure* suitable accommodation. This is not a duty to 'secure accommodation' (unlike ss.188, 190 and 193 HA), but the line is quite blurred between it and 'giving such assistance as will secure accommodation' from a third party (which is 'securing accommodation' under s.206(1)(c) HA), especially where the 'assistance' actually 'secures' it. In *R(Ahamed)*, a homeless applicant who was single and disabled (but decided not to be 'vulnerable', so not 'priority need') was owed the 'relief duty' under s.189B(2) HA. The authority brokered her with its provider a licence at a hostel for 13 weeks, where it knew she could stay well over six months. The Court of Appeal held since requisite 'notifications' had been made, this technically short-term but realistically long-term hostel place could discharge the s.189B 'relief duty' under s.189B(7)(a) HA because there was a reasonable prospect that she could continue to stay in it for at least six months. Moreover, for the same reason, the hostel was 'accommodation' which it would be 'reasonable for her to continue to occupy' for the foreseeable future, so she was no longer 'homeless' under s.175(1) HA. Newey LJ said at [46] the factors making the hostel 'suitable' for 'at least six months' also made it 'reasonable for her to continue to occupy' it.

31. However, s.188 HA – the key duty in this case - is a different duty which works differently. It was amended in 2011 and even more extensively in 2017, so any pre-2017 case-law needs application with care. In its current form, it provides:

> "*188*(1) If the local housing authority have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need, they must secure accommodation is available for the applicant's occupation.
> (1ZA) In a case in which the local housing authority conclude their inquiries under s.184 and decide that the applicant does not have a priority need— (a) where the authority decide that they do not owe the applicant a duty under s.189B(2), the duty under subsection (1) comes to an end when the authority notify the applicant of that decision, or (b) otherwise, the duty under subsection (1) comes to an end upon the authority notifying the applicant of their decision that, upon the duty under s.189B(2) coming to an end, they do not owe the applicant any duty under ss. 190 or 193.
> (1ZB) In any other case, the duty under subsection (1) comes to an end upon the later of— (a) the duty owed to the applicant under s.189B(2) coming to an end or the authority notifying the applicant that they have decided that they do not owe the applicant a duty under that section, and (b) the authority notifying the applicant of their decision as to what other duty (if any) they owe to the applicant under the following provisions of this Part upon the duty under s.189B(2) coming to an end.
> (1A) But if the local housing authority have reason to believe that the duty under s.193(2) may apply in relation to an applicant in the circumstances referred to in s.195A(1), they shall secure that accommodation is available for the applicant's occupation until the later of paragraph (a) or (b) of subsection (1ZB) regardless of whether the applicant has a priority need.
> (2) The duty under this section arises irrespective of any possibility of the referral of the applicant's case to another local housing authority….

> (2A) For the purposes of this section, where the applicant requests a review under section 202(1)(h) of the authority's decision as to the suitability of accommodation offered to the applicant by way of a final accommodation offer or a final Part 6 offer…the authority's duty to the applicant under s.189B(2) is not to be taken to have come to an end under s.193A(2) until the decision on the review has been notified to the applicant.
> (3) Otherwise, the duty under this section comes to an end in accordance with subsections (1ZA) to (1A), regardless of any review requested by the applicant under s.202. But the authority may secure that accommodation is available for the applicant's occupation pending a decision on review."

32. The s.188(1) HA duty arises if the local housing authority has 'reason to believe' the applicant 'may be' eligible, homeless and in priority need. Lady Hale stressed in *R(M) v Hammersmith and Fulham LBC* [2008] 1 WLR 535 (HL) at [36] that:

> "The threshold in s.188 is designedly low. The…authority should provide the accommodation when it is needed and then make further inquiries."

In *R(Yabari) v Westminster CC* [2023] HLR 34 at [93]-[98] and [120]-[136], Ritchie J called the s.188 HA duty 'immediate and non-deferrable'. But its 'low threshold' did not prevent an authority from clarifying an applicant's current circumstances. Moreover, an authority could 'secure' suitable accommodation under s.188 HA by leaving the applicant at home temporarily, indeed Lady Hale had said in *Ali* at [40]:

> "While it is true that, if a family have no home and are on the streets, the authority's duty under s.188 to provide them with temporary accommodation immediately accords with practicality and no doubt with the family's wishes, the position will often be different in a case where the family have accommodation. They might well prefer to remain where they were while their application was being considered. As Collins J said at first instance, 'families may sometimes prefer to remain in unsuitable accommodation for a short time rather than move to temporary accommodation' and there should be 'discussion leading to agreement and no compulsion'. However, the combination of s.188(1) and s.206(1) means the council's interim duty under s.188 is to provide 'suitable' accommodation. If an applicant is occupying accommodation which it is unreasonable for him to continue occupying for even one night, it is hard to see how such accommodation could ever satisfy s.188(1)."

However, as is clear from s.188(1ZA) and s.188(1ZB) HA, *R(Yabari)* and also *R(Mitchell) v Islington LBC* [2021] HLR 5, an 'interim accommodation' duty under s.188 HA can co-exist with a 'homelessness relief duty' under s.198B HA, even though the end of the latter does not automatically end the former without requisite notification: *R(Mitchell)*. The upshot is explained in the Homelessness Code:

> "15.9 [s.188(1ZA): A]n applicant who the… authority has found to be not in priority need within the 56-day 'relief stage' will no longer be owed a s.188(1) interim duty to accommodate, but will continue to be owed a s.189B(2) relief duty until that duty ends or is found not to be owed
>
> 15.10 [s.188(1ZB)] For any other case (including for applicants who have a priority need..)…the s.188(1) interim duty will end at whichever is the later of: a. the housing authority notifies them of what duty (if any) they are owed under Part 7…once the s.189B(2) relief duty comes to an end; b.

the housing authority notifies them that they are not owed the s.189B(2) relief duty, or that this duty has come to an end; c. the housing authority notifies them of a decision following their request for a review as to the suitability of a final accommodation offer…within the s.189B relief stage.

33. Indeed, *the same* 'accommodation' 'secured' under s.188 HA can 'switch' to being 'secured' under s.193 HA once that duty is owed, as Ms Rowlands observed (although I take responsibility for the inelegant word 'switch'). That happened in the linked case to *Ali: Aweys*. An applicant and family had overcrowded accommodation which it was not reasonable for them to continue to occupy, so they were 'homeless'. However, whilst the lawfulness of the actual periods were not tested, the Lords held in principle it was lawful for the authority to 'secure suitable accommodation' by leaving them in their homes, initially under s.188 HA (in fact for a year) and then under s.193 HA (in fact for another 16 months), before they were finally re-housed. In *Kyle,* it was similarly lawful for the same hostel first to be the 'suitable accommodation' 'secured' under s.188 HA, then 'secured' under s.193 HA pending re-housing (although he lost it through his conduct). In argument, I asked Ms Rowlands whether it was being suggested here that the Hotel had 'switched' from being 'secured' under s.188 HA from 9th October 2023 to s.198B from 16th October 2023 (which would mean it then fell outside of the 2003 Order, as I shall explain). Ms Rowlands confirmed the Defendant was not arguing such a 'switch', which was both fair and in my judgement entirely correct for three reasons:

    a. Firstly, such an 'switch' of accommodation being provided under s.188 HA to being provided under s.189B HA (even by notification) is inconsistent with s.188 HA as amended (after *Ali/Aweys*) in 2017. That is not one of the ways which s.188 HA now provides for its duty to secure interim accommodate under s.188(1) to end under s.188(1ZA), s.188(1ZB) or s.188(1A) HA, which are helpfully further analysed in detail in *R(Mitchell)*.

    b. Secondly, such an 'switch' would also be inconsistent with s.189B HA. As already discussed, s.189B(2) HA is not a duty to 'secure' accommodation. If the authority is already 'securing' accommodation under s.188 HA, by continuing to provide the same accommodation when s.189B HA arises, it is not suddenly under s.189B(2) 'taking reasonable steps to help the applicant secure that suitable accommodation becomes available for at least 6 months', especially if the authority has not even yet made a s.184 HA decision. Moreover, such a 'switch' would wrongly allow an authority to 'side-step' its *duty* under s.188 HA by 're-labelling' accommodation as being under s.189B HA: *R(M)* at [42]; and *R(G) v Southwark LBC* [2009] 1 WLR 1299. That is completely different than the situation in *R(Ahamed)*.

    c. Thirdly, such 'switching' of accommodation from being 'secured' under s.188 HA to being 'facilitated' under s.189B HA could risk as in *R(Ahamed)* rendering the applicant no longer 'homeless'. That would conflict with the long-standing policy of s.188 HA that 'interim accommodation' does not render applicants 'not homeless', which Newey LJ stressed in *Kyle* at [43]:

        "…[A] person remains 'homeless' when in accommodation secured under section 188 of the 1996 Act. …This…is because to hold otherwise 'would defeat the whole scheme of the Act' rather than as

> a matter of interpretation of the words 'reasonable…to continue to occupy': see Baroness Hale's judgment [in *Ali*] at [54]….."

34. However, Ms Rowlands also suggested if an authority arranged for the same accommodation as currently 'secured' under s.188 HA to be definitely available for at least six months, that could comply with s.189B(2) HA and could discharge the duty under s.188 HA as well. I have three observations on that scenario as well:

    a. Firstly, as I have said, as explained in *R(Mitchell)*, the s.188 HA duty would not end simply by the s.189B(2) HA duty being discharged, it would also require notification under s.188(1ZA) or (1ZB) as the case may be, which as discussed would also entail the authority giving its s.184 HA decision.

    b. Secondly, that course was legitimate in *R(Ahamed)* because the applicant was *not* in priority need. In my judgement, if an authority took the same course where an applicant *was* in priority need (e.g. had dependent children), it may well be unlawfully 'side-stepping' its duties under s.190 or s.193 HA depending on whether 'intentionally homeless': *R(M)/R(G)*, certainly if it would have the effect of 'side-stepping' the 2003 Order.

    c. Thirdly, even if an authority could lawfully take that approach with an applicant in priority need, given their needs, it is much less likely it would render them no longer 'homeless' under s.175 HA as in *R(Ahamed)*.

    Ultimately, when authorities leave families in temporary accommodation for more than a short time, they should bear in mind what Lady Hale said in *Ali* at [50]-[51]:

    > "[T]here is the approach to be adopted by a court, when considering the question whether a local housing authority have left an applicant who occupies 'accommodation which it would [not] be reasonable for him to continue to occupy' in that accommodation for too long a period. The question is of course primarily one for the authority, and a court should normally be slow to accept that the authority have left an applicant in his unsatisfactory accommodation too long. In a place such as Birmingham, there are many families in unsatisfactory accommodation, severe constraints on budgets and personnel, and a very limited number of satisfactory properties for large families and those with disabilities. It would be wrong to ignore those pressures when deciding whether, in a particular case, an authority had left an applicant in her present accommodation for an unacceptably long period. Nonetheless, there will be cases where the court ought to step in and require an authority to offer alternative accommodation, or at least to declare that they are in breach of their duty so long as they fail to do so. While one must take into account the practical realities of the situation in which authorities find themselves, one cannot overlook the fact that Parliament has imposed on them clear duties to the homeless, including those occupying unsuitable accommodation. In some cases, the situation of a particular applicant in her present accommodation may be so bad, or her occupation may have continued for so long, that the court will conclude that enough is enough."

    Whilst Lady Hale there was talking about leaving families in *their own pre-existing* accommodation for long periods of time and whether that was lawful under the 'full duty' under s.193 HA, the same basic point applies with suitable alteration (*'mutatis*

mutandis') to authorities leaving families in temporary accommodation for long periods under s.188 HA. After all, as Lady Hale also said in *Ali* at [18]:

> "Whether the authority are securing interim accommodation under s.188(1) pending a decision, or securing accommodation after the decision has been made under s.190(2) or 193(2), they may provide the accommodation themselves or secure that it is provided by someone else. However, the accommodation secured has to be 'suitable' (1996 Act s.206(1))….Clearly, however, what is regarded as suitable for discharging the interim duty may be rather different from what is regarded as suitable for discharging the more open-ended duty in s.193(2); but what is suitable for discharging the 'full' duty in s.193(2) does not have to be long life accommodation with security of tenure such as would arise if the family were allocated the tenancy of a council house under the allocation policy [under Part VI HA]."

35. That brings me to 'suitability': the last topic in the statutory framework of the HA (I deal with s.149 EqA and s.11 CA briefly when considering the grounds of challenge). One of the key provisions on suitability is s.206(1) HA, which provides:

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

'Suitability' is undefined in the legislation itself, although s.210(1) HA provides:

> "In determining for the purposes of this Part whether accommodation is suitable for a person, the local housing authority shall have regard to Parts 9 and 10 of the Housing Act 1985 (slum clearance and overcrowding) and Parts 1 to 4 of the Housing Act 2004 [housing conditions and HMOs etc]."

As Mr Nabi pointed out, this provision goes back to the previous legislation, which was considered in *Awua*, where Lord Hoffmann said at pgs.463-4,

> "[T]he accommodation must be 'suitable', but this does not import any requirement of permanence. In determining whether accommodation is 'suitable' the council is instructed to 'have regard to…slum clearance… overcrowding..houses in multiple occupation…This points to suitability being primarily a matter of space and arrangement, though no doubt other matters (such as whether the occupant can afford the rent) may also be material. But there is no reason why temporary accommodation should *ipso facto* be unsuitable. If the tenure is so precarious that the person ….remains threatened with homelessness and the council has not discharged its duty. Otherwise, it seems to me the term for which the accommodation is provided is a matter for the council to decide."

Indeed, in *Ali* at [42], Lady Hale echoed Lord Hoffmann's analysis in *Awua* (albeit in the context of 'reasonableness of occupation', but it applies to 'suitability' too):

> "[A]ccommodation which may be unreasonable for a person to occupy for a long period may be reasonable for him to occupy for a short period. Accordingly, there will be cases where an applicant occupies accommodation which (a) it would not be reasonable for him to continue to

> occupy on a relatively long term basis, which he would have to do if the authority did not accept him as homeless, but (b) it would not be unreasonable to expect him to continue to occupy for a short period while the authority investigate his application and rights, and even thereafter while they look for accommodation to satisfy their continuing s.193 duty."

Indeed, in *R(Ahamad)* at [45], Newey LJ having quoted *Ali* also noted that more recently in *Rowe v Haringey LBC* [2023] HLR 5 (CA) Stuart-Smith LJ described 'suitability' and 'reasonableness of occupation', though arising in different contexts as being 'conceptually similar', as 'related concepts' and that 'factors that may go to whether continued occupation is 'reasonable' may, depending on the factor and all relevant circumstances, be capable of going to 'suitability' and vice versa'.

36. However, whilst the foreseeable duration of residence in particular accommodation is one dimension of its 'suitability' under s.206/210 HA, the key to 'suitability' was encapsulated by Lady Hale in *Nzolameso* at [13]:

> "The accommodation offered has to be suitable to the needs of the particular homeless person and each member of her household…."

As Dyson J (as he was) said in *R v Newham BC exp Sacupima* [2001] 33 HLR 1, what is 'suitable' for an individual applicant 'ranges from their dream house to something only just adequate to meet their needs' and provided the accommodation is within that range, its 'suitability' is a matter for the authority's judgement (just like its status as 'accommodation' in *Awua*). Yet 'needs' include health needs not just 'disabilities', as Briggs LJ (as he was) explained in *Hackney LBC v Haque* [2017] HLR 14 (CA) by reference to authority even pre-dating the initial prohibition of disability discrimination in the Disability Discrimination Act 1995:

> "29 The Government's Homelessness Code of Guidance for Local Authorities (July 2006 edn) to which HA s.182 requires them to have regard, provides further assistance in Ch.17, headed Suitability of Accommodation. Paragraph 17.4 provides: 'Space and arrangement will be key factors in determining the suitability of accommodation. However, considerations of whether accommodation is suitable will require an assessment of all aspects of the accommodation in the light of the relevant needs, requirements and circumstances of the homeless person and his or her family'. Paragraphs 17.5 and 17.6 emphasise the need for housing authorities to consider carefully the suitability of accommodation by reference to the applicant's particular medical and or physical needs and to any social considerations relating to the applicant and his or her household.
>
> 30 Reported decisions stretching back well before the introduction of the PSED have emphasised the importance of appraising the suitability of accommodation not merely by reference to its characteristics of space, amenities and location, but also by reference to the particular medical and social needs of the applicant, including particular kinds of disability. Thus in *R. v Brent LBC Ex p. Omar* (1991) 23 H.L.R. 446, Henry J said…
>
> > "The question of statutory construction raises the question, suitable to whom or for what? On a reading of the Act, it seems to me that this can only mean suitable as accommodation for the person or persons to whom the duty is owed: here Mr and Mrs Omar and, additionally, their two children. Therefore, under the statute as presently construed,

> in determining whether the accommodation is suitable the local housing authority must clearly have regard to the circumstances of the applicant and his or her family, in so far as those circumstances are relevant to the suitability of the accommodation, as well as having regard to the matters to which their attention is specifically directed by the statutes; that is to say, provisions relating to overcrowding [etc] …[W]hat the local authority must do to discharge their duty…. is to make available accommodation that is suitable for the applicant….What the local housing authority had to ask itself on that basis was whether this accommodation was suitable for this family in the light of the medical evidence ? Clearly, the local housing authority were entitled to have regard to the realities giving the practical constraints imposed, both by the numbers of competing applicants for a housing stock limited in quantity and quality by financial constraints. A high quality of suitability clearly cannot be obtained."

….Examples of more recent cases which turned on specific focus upon particular aspects of an applicant's disability include *Boreh v Ealing LBC* [2008] EWCA Civ 1176, which concern the suitability of a house for a wheelchair-bound applicant, and *El-Dinnaoui v Westminster City Council* [2013] EWCA Civ 231, where the relevant disability was that of the applicant's wife, whose fear of heights made accommodation on the sixteenth floor of a tower block unsuitable for her particular needs."

37. In addition to period of accommodation and the individuals' health and needs, another key factor for 'suitability' of relevance to homeless families is the *location* of accommodation. Indeed, one clear pointer on suitability in the HA is s.208:

> "So far as reasonably practicable a local housing authority…in discharging their housing functions under this Part [shall] secure that accommodation is available for the occupation of the applicant in their district."

In *R v Newham LBC exp Sacupima* [2001] 33 HLR 2 (CA), the Court of Appeal agreed with Dyson J that whilst Lord Hoffmann in *Awua* had suggested 'suitability was primarily a matter of space and arrangement', s.208 HA also suggested location could also be relevant. Parliament confirmed this in the Homelessness (Suitability of Accommodation) Order 2012, requiring an authority to take into account location of accommodation offered, the proximity and accessibility to local services and support and the significance of any disruption caused to employment, caring responsibilities or education. *Sacupima* was endorsed in *Nzolameso* where Ms Nzolameso had a disability and five children in London and was owed the full duty, but offered accommodation near Milton Keynes which she declined because of such disruption. The Supreme Court quashed the offer, as Lady Hale explained at [36]:

> "The review decision is based on the premise that, because of the general shortage of available housing in the borough, the authority could offer accommodation anywhere else, unless the applicant could show that it was necessary for her and her family to remain in Westminster. There was no indication of the accommodation available [there] and why that had not been offered to her. There was no indication of the accommodation available…in the whole of…London, and why that had not been offered to her. There was, indeed, no indication that the reviewing officer had

> recognised that, if it was not reasonably practicable to offer accommodation in Westminster, there was an obligation to offer it as close by as possible."

38. The 2012 Order (like the 2003 Order in this case) was made under s.210(1) HA:

> "The Secretary of State may by order specify— (a) circumstances in which accommodation is or is not to be regarded as suitable for a person, and (b) matters to be taken into account or disregarded in determining whether accommodation is suitable for a person."

The Homelessness Code at paras.17.01-17.68 offers extensive guidance on 'suitability' and summarises a number of provisions of secondary legislation under s.210 HA all entitled 'Homelessness (Suitability of Accommodation) Orders', including on important topics such as affordability (in the 1996 Order, as discussed in *Samuels v Birmingham CC* [2019] HLR 32 (SC)) and accommodation in the private sector (also the 2012 Order). The Code paras.17.7-10 are generally relevant:

> "17.7 Accommodation that is suitable for a short period, for example accommodation used to discharge an interim duty pending inquiries under section 188, may not necessarily be suitable for a longer period, for example to discharge a duty under section 193(2).
> 17.8 Housing authorities have a continuing obligation to keep the suitability of accommodation under review, and to respond to any relevant change in circumstances which may affect suitability, until such time as the accommodation duty is brought to an end.
> 17.9 Housing authorities are required to assess whether accommodation is suitable for each household individually, and case records should demonstrate that they have taken the statutory requirements into account in securing the accommodation."

39. However, central here is the provision of B&B accommodation in the 2003 Order (as amended in 2022 and 2023 I leave in square brackets). For now, I just set it out:

> "*1. Citation, commencement and application*
> …(2) This Order applies in relation to the duties of local housing authorities in England to make accommodation available for occupation by applicants under Part 7 of the Housing Act 1996.
>
> *2. Interpretation*
> In this Order– *'applicant with family commitments'* means an applicant–
> (a) who is pregnant; (b) with whom a pregnant woman resides or might reasonably be expected to reside; or (c) with whom dependent children reside or might reasonably be expected to reside;
> *'B&B accommodation'* means accommodation (whether or not breakfast is included)– (a) which is not separate and self-contained premises; and (b) in which [cooking facilities are not provided or] any one of the following amenities is shared by more than one household– (i) a toilet; (ii) personal washing facilities; (iii) cooking facilities, but does not include accommodation which is owned or managed by a local housing authority, a non-profit registered provider of social housing or a voluntary organisation as defined in section 180(3) of the Housing Act 1996, [or accommodation that is provided in a private dwelling];

> and any reference to a numbered section is a reference to a section of the Housing Act 1996.
>
> *3. Accommodation unsuitable where there is a family commitment*
> Subject to the exceptions contained in article 4, B&B accommodation is not to be regarded as suitable for an applicant with family commitments where accommodation is made available for occupation—(a) under s.188(1), 190(2), 193(2) or 200(1); or (b) under s. 195(2), where the accommodation is other than that occupied by the applicant [when] making his application.
>
> *4.— Exceptions*
> (1) Article 3 does not apply (a) where no accommodation other than B&B accommodation is available for occupation by an applicant with family commitments; and (b) [except where the applicant is a person falling within paragraph (3)] the applicant occupies B&B accommodation for a period, or a total of periods, which does not exceed 6 weeks.
> (2) In calculating the period, or total period, of an applicant's occupation of B&B accommodation for the purposes of paragraph (1)(b), there shall be disregarded– (a) any period before 1st April 2004; and (b) where a local housing authority is subject to the duty under s.193 by virtue of s.200(4), any period before that authority became subject to that duty.
> [(3) A person falls within this paragraph if they— (a) make an application to a local housing authority for assistance under Part 7 of the Housing Act 1996 on or after 1st June 2022, (b) make that application within 2 years beginning with the date on which they arrive in the United Kingdom, (c) are eligible for assistance under Part 7 of the Housing Act 1996, and (d) did not have a right to occupy accommodation in the United Kingdom for an uninterrupted period of 6 months or more in the 3 years prior to the date on which they arrived in the United Kingdom."

Art.4(3) was a temporary measure introduced in 2022, due to expire in June 2024.

Alternative Remedy

40. It is axiomatic that judicial review is a remedy of last resort that should not be used where there is an alternative remedy. The leading modern analysis on the principle was by Sales LJ (as he then was) in *R(Glencore) v HMRC* [2017] 4 WLR 213 (CA):

> "54. The question is whether the court should exercise its discretion to refuse to proceed to judicial review or to grant relief under judicial review at a substantive hearing according to the established principle governing the exercise of its discretion where there is a suitable alternative remedy.
>
> 55 In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and

> remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor.
>
> 56 Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the e ort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required."

I was not referred to *R(Glencore),* which may not be familiar to housing lawyers as it concerned the very different context of tax. However, the analysis of Lord Sales (as he now is) in *R(Glencore)* is of general application to alternative remedy points.

41. In the context of Part VII HA and homelessness, the usual context for 'alternative remedy' arguments is that a claimant should pursue a review and a statutory appeal to the County Court under s.204 HA rather than judicial review. The principle in this context was discussed by Newey LJ in *R(Ahamad)* at [37] and [66]-[68]:

> "37. By section 204 of the 1996 Act, a person dissatisfied with a review decision may appeal to the County Court on 'any point of law arising from the decision or, as the case may be, the original decision'. 'Although the county court's jurisdiction is appellate, it is in substance the same as that of the High Court in judicial review': (*Runa Begum v Tower Hamlets LBC* [2003] 2 A.C. 430, at paragraph 7, per Lord Bingham). The grounds of challenge can include 'procedural error, the extent of legal powers (vires), irrationality and inadequacy of reasons…
>
> 66. The procedures for review and appeal to the County Court for which sections 202 and 204 of the 1996 Act provide were an innovation. Commenting on the change in *Nipa Begum v Tower Hamlets LBC* (2000) 32 H.L.R. 445, Auld LJ said at 314: 'the introduction by section 204 of the Act of 1996 of the new right of appeal to the County Court in homelessness cases was intended to transfer from the High Court to the county court the main strain of the High Court's otherwise onerous task of judicial review of those decisions for which section 202 provides. I say 'transfer …the main strain' of such jurisdiction to the County Court, because the Act does not deprive the High Court of its traditional jurisdiction in such matters. Such jurisdiction simply becomes residual; that is, it has become normally

> inappropriate to grant judicial review in them because there is now another, and generally more appropriate, avenue of challenge …."
> 67 In a similar vein, *De Smith's Judicial Review*, 9th ed., states in paragraph 17-036: "By the mid-1990s, a third of all judicial review applications to the High Court concerned homelessness decisions; often the dispute was essentially one of fact and primary judgment (was the person intentionally homeless ? was the accommodation offered suitable ?) rather than of law. … In Access to Justice, Lord Woolf recommended that the supervisory jurisdiction over the lawfulness of homelessness decision-making should be transferred to the County Courts and this was swiftly implemented by Pt 7 of the Housing Act 1996. … The right of appeal does not extend to decisions about the provision of temporary accommodation pending final determination by the local authority or review by the County Court; here judicial review continues to be an important method of challenge. The courts have, however, indicated that they will intervene in challenges relating to temporary accommodation only in exceptional circumstances. The existence of a review procedure in the County Courts has not taken away the Administrative Court's jurisdiction to exercise its judicial review jurisdiction in the context of decisions relating to homelessness, but that jurisdiction will now be used only in exceptional circumstances."
> 68 For my part, I would stress that, given the existence of sections 202 and 204 of the 1996 Act, challenges to decisions of local housing authorities relating to homelessness should generally be pursued under those provisions and not by way of judicial review…."

For example, recently in *R(AB) v Westminster CC* [2024] EWHC 266 (Admin), on a judicial review challenge to the suitability of accommodation, Mr Squires KC sitting as a DHCJ, declined to determine a suitability challenge to accommodation offered during the course of the judicial review proceedings. There had been no amendment to the SFG, so it was unclear what the challenge was on 'suitability' and the claimants had an alternative remedy to judicial review by seeking a review of suitability under s.202 HA, which could then be appealed under s.204 HA.

42. However, Ms Rowlands' argument in this case is not that a s.202 HA review is an alternative remedy. As noted in *De Smith* quoted by Newey LJ in *R(Ahamad)*, review and appeal under the HA is not available in cases such as this about 'the provision of temporary accommodation pending final determination by the local authority or review by the County Court, [w]here judicial review continues to be an important method of challenge'. I should add *De Smith*'s comment that 'Courts have indicated they will intervene in challenges relating to temporary accommodation only in exceptional circumstances' appears to be rather an over- (or at least, out of date) statement. Even back in 2000 in *Sacupima*, Latham LJ simply said at [17]:

> "[A]pplicants must always remember that relief in judicial review proceedings is discretionary. Where the effects of a decision are of short duration, the Court will be likely to require compelling evidence of a significant breach of the duty owed to the applicant before it will grant relief. In this way the Court can hold a proper balance between the need to provide a remedy for unlawful action and the need to interfere as little as possible in the day-to-day decisions of a hard-pressed public authority."

In any event, the concept of 'exceptional circumstances' is conspicuous by its absence in recent authorities and seems more apposite to pure rationality challenges to 'suitability', rather than hard-edged legal challenges like Ground 1 in this case.

43. In my draft judgment, I stated that the Defendant could not argue that a s.202 HA review and s.204 HA appeal are an alternative remedy in this case, as it had not yet made a s.184 HA decision triggering the Claimant's right to either of them. Whilst my observations appear to have prompted the Defendant to make that decision after my draft judgment, with minor grammatical adjustments, I retain them in my final judgment for context. Ms Rowlands accepted this situation was unusual - but whilst subject of complaint in the pre-action protocol letter in November 2023, this is not pursued as a challenge. I accept unlike the time limits for reviews under s.202 HA (Reg.9 Homelessness (Review Procedure) Regulations 2018), there is no time-limit for a s.184 HA decision, irrespective of the 56-day 'relief period' under s.198B HA. Whilst para.13.10 of the Homelessness Code advises against authorities accepting a full s.193 duty within that period, it does not say they should wait 56 days in every case (which is why s.198B HA has other provisions terminating it). Nevertheless, a decision cannot lawfully be postponed to avoid a Part VII duty arising e.g. waiting for a 17 year old in priority need to turn 18 as in *Robinson v Hammersmith & Fulham LBC* [2007] HLR 7 (CA) at [36]. Mr Nabi in argument came close to asserting that, but it is not a challenge before me and in any event, it conflicts with the Defendant's 'minded to find' letters. I accept that its reason for the delay is that in Ms Rowlands' skeleton: it considered it could not conclude its inquiries until conclusion of the ongoing County Court possession claim. However, despite discussion of that in argument, I indicated in my draft judgment that I was not clear why.

    a. Firstly, the Defendant had *already* decided that it is 'satisfied' the Claimant was 'eligible for assistance' under s.184-5 HA and 'homeless' under s.185 HA in accepting the relief duty under s.198B HA on 16th October 2023. Otherwise, it could not have concluded that the s.198B HA duty arose. This was *after* the Claimant had secured entry to the Flat under the injunction and nothing has changed since in that respect – there is no evidence the Flat is habitable – indeed, I accept it is still not. So, even if the Flat is theoretically 'available' to the Claimant under s.175(1) HA, the Defendant must have accepted it is not reasonable for her to *continue* to occupy it under s.175(3) (*Awua/Ali*). Moreover, provision of temporary accommodation under s.188 HA – i.e. the Hotel - does not mean the Claimant and C are no longer 'homeless': *Kyle*.

    b. Secondly, in accepting its duty under s.188 HA on 9th October 2023, the Defendant must have accepted there was 'reason to believe' the Claimant was in 'priority need' due to C (and since my draft judgment has concluded that the Claimant was actually 'in priority need'). Indeed, as I shall discuss, Ms Rowlands' submissions on 'family commitments' under the 2003 Order seem to me to be overlap with the issue of 'priority need'. I could not see how the end of possession proceedings would tell the Defendant anything about 'priority need' it does not already know and indeed had argued before me.

    c. Thirdly, whilst I had not been shown the Defendant's 'minded to find' letters, my understanding from Ms Rowlands was that until my draft

judgment, the Defendant had considered the 'sticking point' in making a s.184 decision pending the result of the possession claim in the County Court is whether the Claimant's 'homelessness' from the Flat was 'intentional' under s.191 HA. I said if the issue on 'intentionality' under s.191 HA was whether the Claimant was responsible for the uninhabitable state of the Flat, I said I could see no reason why the Defendant needed to await the outcome of the County Court possession proceedings. That Court will decide whether there is a mandatory ground or discretionary ground of possession under the Housing Act 1988. By contrast, the Defendant would be making (and has now made) a decision about 'intentionality' under s.191 HA 1996, which is a matter for it not the County Court, just as 'priority need' under s.189(1)(b) HA, is a matter for it not the Family Court: *Holmes-Moorhouse*. Indeed, now that the Defendant has decided the Claimant was responsible for the condition of the Flat, if the County Court took a different view prior to the Defendant's review decision, it could take that different view into account on any s.202 review, which is assessed on the circumstances at the time the review, provided the initial decision was not unlawfully postponed – *Robinson*. I should add now that I have seen the Defendant's decision letter, it has now decided the Claimant was intentionally homeless on grounds of being responsible for the condition of the Flat *and* on grounds of rent arrears, which was not an issue I mentioned in this part of my draft judgment. In any event, I say no more about the intentionality decision as it is under review and both of those issues will also be adjudicated by the County Court.

Nevertheless, as Ms Rowlands submitted, the Defendant delayed its decision because it was trying to be fair to the Claimant and thought it should await the County Court's decision. Therefore, I accept there is a good reason for its delay in decision under s.184 HA, which in turn justifies the absence of an alternative remedy by means of a s.202 review. Of course, there is now such a remedy in relation to the 'intentional homelessness' decision, but not in relation to the Claimant's protracted stay in 'B&B accommodation'. The Defendant's delay has had three practical consequences for itself. Firstly, has had to contest the Claimant's argument on the 2003 Order, which I am told has not been decided before as (unlike the Defendant here), authorities have avoided it by making a decision (or moving the family out of 'B&B accommodation') before the case got to a hearing. Secondly, I said in my draft judgment that the absence of an end in sight for the Defendant's decision was relevant to whether there should be a mandatory order, although Ms Rowlands submits there has now been a decision. Thirdly, as I have said, it also means the Defendant cannot argue that the Claimant has alternative remedies by means of its s.184 decision or s.202 review as argued in *R(Ahamad)* and *R(AB)*.

44. Instead, Ms Rowlands made a different 'alternative remedy' argument on three bases, which I can address very briefly:

    a. Firstly, Ms Rowlands argued the Claimant had an alternative remedy under s.189B HA, namely that with the Defendant's 'help' the Claimant could find herself suitable accommodation. However, in Ms Hayes' response of 15th November to the Claimant's pre-action protocol letter of 8th November requesting alternative accommodation, she accepted the 'relief duty' and said if the Claimant were unable to return to her tenancy within six weeks,

the Defendant would 'strive to provide self-contained accommodation where the availability of accommodation allows this'. Yet the Defendant's own case was that there has been no such accommodation available. So, the Claimant asked for 'help' and on the Defendant's case, it could not 'help'. Moreover, the Claimant could not realistically have afforded an alternative property herself when she already had an extant tenancy at the Flat. In any event, the Defendant has now notified the Claimant on 4th April 2024 that the s.189B HA duty is at an end.

b. Secondly, Ms Rowlands argued the Claimant could request her landlord either to repair the Flat or to provide an alternative property. However, the landlord is hardly likely to do the latter when it blames the Claimant for the need for the former. A County Court injunction is different. If, for example, the landlord had locked the Claimant out the Flat which was in habitable condition, I would accept an injunction for the Flat would be an alternative remedy to judicially reviewing accommodation in the Hotel. However, the Claimant already has her injunction and can access the Flat, but this is of no use to her as she and C cannot practically live in it. Whilst she could seek a mandatory injunction from the County Court to repair the Flat under s.11 Landlord and Tenant Act 1985, that will take a long time and the Claimant's case is that she and C need accommodation immediately.

c. Thirdly, Ms Rowlands argued the Claimant could place C with his father or grandfather to address the 'unsuitability' of the Hotel, since she does not suggest it is 'unsuitable' for her living alone (or that a hostel would be). However, as discussed in *R(Glencore)*, an alternative remedy is typically a *legal* remedy, otherwise in law it is not a 'remedy' at all. Asking third parties for assistance is not an '*remedy*' in the legal sense, even if it can be a *solution*. However, whilst this third point is clearly not 'an alternative remedy point', it is highly relevant to Ground 1 on unsuitability of the Hotel under the 2003 Order (see below).

Indeed, whilst I reject the alternative remedy argument on all three points, they are all relevant to whether to make a mandatory order which I address below.

Grounds of Challenge

45. As I said at the start of the hearing, the real core to this case is the Claimant's 'Ground 1': that the Defendant is in breach of its duty to provide suitable interim accommodation. However, despite the width of the heading of the formulated ground, Mr Nabi's argument (in writing and orally) really stands or falls with the applicability of the 2003 Order. Indeed, he contends that Ms Rowlands' arguments in the DGD about 'suitability' of the Hotel more generally are 'misconceived'. In fact, I will examine that contention under Ground 1 as a lead-in to Mr Nabi and Ms Rowlands' arguments on the 2003 Order. However, before that, I will deal briefly with Grounds 2 (s.149 EqA) and 3 (s.11 CA) that in my judgement do not succeed.

46. Ground 2 contends that the Defendant when accommodating the Claimant and C in the Hotel both initially and an on ongoing basis have failed to have 'due regard' under s.149 EqA to C's 'disability' (and the need to eliminate discrimination, advance equality of opportunity and foster good relations between people with and without a disability). It is uncontentious that this 'Public Sector Equality Duty'

('PSED') owed under s.149 EqA could apply to the Defendant's provision under s.188 HA of accommodation in the Hotel (*Pieretti*) and if it did apply, required the Defendant to consider the suitability of the Hotel for C with an open mind and rigorous consideration of the PSED (*Hotak*). In the specific context of suitability of temporary accommodation under Part VII HA, as analysed by Lord Briggs (as he now is) in *Haque* at [43], the PSED would require from the Defendant:

(i) recognition that C suffered from a physical or mental impairment having a substantial and long-term adverse effect on his ability to carry out normal day to day activities; i.e. that he was disabled within the meaning of EA s.6, and therefore had a protected characteristic;

(ii) focus upon the specific aspects of C's impairments, to the extent relevant to the suitability of the Hotel as accommodation for him;

(iii) focus upon the consequences of C's impairments, both in terms of the disadvantages which he might suffer in using the Hotel as his accommodation, by comparison with persons without those impairments;

(iv) focus on C's particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons without such impairments, and the extent to which the Hotel met those particular needs;

(v) recognition that C's particular needs arising from those impairments might require him to be treated more favourably in terms of the provision of accommodation than other persons not suffering from disability;

(vi) review of the suitability of the Hotel as accommodation for C which paid due regard to those matters.

47. However, as is clear from (i) of *Haque* (which cites the definition of 'disability' under s.6 EqA as clarified by Ch.1 EqA), Ground 2 begs a significant question: whether C was (and is) 'disabled' under s.6 EqA at all. This raised an interesting and brief point on the relationship between two important authorities on s.149 EqA. Ms Rowlands relies on *Swan Housing v Gill* [2014] HLR 18 (CA), whilst Mr Nabi relies on *Pieretti*. As Lewison LJ summarised in *Gill*, what Lord Wilson (as he became) decided in *Pieretti* at [35] was that s.184 HA decision-makers and s.220 HA reviewers would be in breach of the PSED if 'they failed to make further inquiries in relation to some feature of the evidence presented to them as raised a real possibility that the applicant was disabled in a sense relevant to the decision' – not only if disability was asserted or 'obvious' on the *Cramp* test. However, as Lewison LJ also said in *Gill* at [41]-[42], in *Pieretti* there was *in fact* a disability. As the onus is on the party asserting a disability to prove it, where that was not done, there could be no *breach* of the PSED on the basis of an asserted but unproven disability. However, *Pieretti* and *Gill* must not be misunderstood. The net result of the two cases is that housing authorities exercising functions under Part VII who are faced with evidence of a 'real possibility of disability' (which may not be the same as a 'reason to believe vulnerability' – see *Hotak*) should investigate it. If the applicant turns out not to be disabled, the authority could not breach the PSED on that ground (*Gill*). If she does, *Haque* gives a template. But if the authority fails to investigate possible disability and the applicant turns out to be disabled, it may be in breach (*Pieretti*).

48. Having said all that, in my judgement, Ground 2 cannot avail the Claimant here:

a. Firstly, whilst it is not disputed that C suffers from eczema and food allergies to nuts, bananas and tomatoes and has an 'epi-pen', that is really the extent

of the information we have about C's health conditions. Those *may* potentially be 'impairments' and have a 'substantial' (in the sense of 'more than trivial') and long term 'adverse effect' on C's ability to carry out 'normal day-to-day activities' like eating and sleeping, especially ignoring the effect of medical treatment such as the 'epi-pen' (see para.5 Sch.1 EqA - so-called 'deduced effects'). However, in the absence of direct evidence, (which would not necessarily require Part 35 CPR expert medical evidence) either from the Claimant herself or C's medical notes, it is not possible to be satisfied that C was and is 'disabled' under the EqA. That is asserted – and has an evidential base – but it is not proved, just as in *Gill*. Therefore, the PSED could not have been breached by the Defendant in respect of C's health conditions.

b. Secondly, even if one adopts the approach of Coleridge J in *Gill* of assuming that the PSED is engaged on C's medical conditions and then seeing whether there was an arguable breach (albeit then applying the principles in *Haque*), again I am satisfied there was no breach. The Defendant accepted C's health conditions (even if it did not find he was strictly 'disabled' under s.6 EqA). Indeed, that was the reason for the placement at the Hotel because there were cooking facilities (albeit communal) which the Defendant considered were preferable for the Claimant to prepare C's meals, rather than direct catering. Whilst the Claimant considers the communal facilities are unsafe for C, she can use a microwave in the room. Although less than ideal, it has not resulted in any health problem for C (or at least, there is no evidence that it has). Whilst the Claimant contracted chicken pox, its source is entirely unclear.

c. Thirdly, the only issue over which I have paused was whether the Defendant gave 'due regard' under the PSED to whether the communal cooking facilities were appropriate for C if I am wrong and C was 'disabled' under s.6 EqA. It knew that C's allergies were 'impairments' which put him at a disadvantage and gave rise to particular needs by comparison to non-disabled residents and this might require him to be treated more favourably than them (*Haque*). However, C and the Claimant had access to a microwave which went a considerable way to alleviating this disadvantage to the extent that in my judgement, no duty to make 'reasonable adjustments' fell to be made under s.20 EqA (assuming that it arose in the context of Part VII under s.29 EqA). I return to that point below. Whilst it was not ideal, alternative accommodation outside the Hotel was not available and so cannot have been a 'reasonable' adjustment.

Therefore, the PSED did not arise in the first place and even if it did, I find there was no breach of it. Ground 2 is accordingly dismissed.

49. I turn to Ground 3 – that the Defendant failed to have due regard to its obligations under s.11(2) CA 2004, requiring a local authority to make arrangements to ensure:

> “"(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and (b) any services provided by another person pursuant to arrangements made by the personal body in the discharge of their functions are provided having regard to that need.”

The effect of s.11(2) after *Nzolameso* was explained by Lane J in *Redbridge*:

> "78 As was pointed out in [23] of *Nzolameso*, the expression 'welfare' is to be given a 'broad meaning', so as to encompass the physical, psychological, social, educational and economic welfare" of the child. s.11 entails a 'process duty', which applies not only to the formulation of policy but also to individual decisions: *Nzolameso* [24]. The local authority must identify the needs of the children and evaluate the likely impact of its decision on the welfare of the children concerned: *Nzolameso* [27]. In addition, the authority must 'actively promote' the welfare of children in its decision-making process: *R(HC) v DWP* [2019] A.C. 845 [46].
>
> 79 In determining whether accommodation is suitable, the local authority must have regard to the need to safeguard and promote the welfare of any children in the household: *Nzolameso* [27]. As Lady Hale observed:-
>
> > "It is not enough for the decision maker simply to ask whether any of the children are approaching externally assessed examinations. Disruption to their education and other support networks may be actively harmful to their social and educational development".
>
> 80 When contemplating the transfer of school-age homeless children into temporary accommodation, the local authority must make appropriate inquiries as to the impact of such a transfer on education of the children…"

However, as Lane J added at [115] of *Redbridge*, an authority's statutory obligations under s.11(2) CA or indeed Part VII HA are not determined by a parent's subjective views of the best interests of their children. Indeed, as Lady Hale made clear in *Nzolameso* at [28], s.11 CA 2004, unlike s.1 Children Act 1989 in the Family Court and other provisions does not require children's welfare to be the paramount or even a primary consideration in public functions. s.11 CA is satisfied where an authority had regard to childrens' welfare, even if its decision only referred to the HA 1996 and did not mention s.11: *Safi* at [34].

50. Mr Nabi accepted Ground 3 could not succeed on its own and I agree. I did not (until after my draft judgment) have a 'decision' to scrutinise by reference to *Nzolameso* on decisions engaging s.11(2) CA 2004 (rather than generally in *Holmes-Moorhouse*: see paragraph 27 above). However, it is entirely plain from the evidence of Ms Hayes that the Defendant was not in breach of s.11(2) CA in C's case, either on a 'micro' or a 'macro' level:

    a. The Defendant complied with s.11(2) CA as a 'process duty' in individual decision-making (*Nzolameso*), for similar reasons as it complied with similar the 'process duty' under s.149 EqA (although unlike 'disability', C is obviously a 'child'). Ms Hayes confirmed when placing C with his mother the Claimant, they considered his health conditions (which may not have been a 'disability' but were relevant to his 'welfare' in the broadest sense (*Nzolameso*) in deciding to place them in the Hotel. They kept that under review but had received no reports of flare-ups. Moreover, when the Claimant raised concerns and asked whether C could stay with his father, the Defendant agreed and whilst it initially took the view the Claimant would have to go into hostel accommodation, it agreed she could stay in the hotel with C staying with family two nights a week. Whilst I accept that C found it 'difficult to cope' with the *eviction* and its aftermath and it affected his behaviour, there is no evidence he remains seriously affected by being

in the Hotel; and in any event, he can stay two nights a week with family. It would not be 'splitting the family up', still less 'discriminating' against C.

b. The Defendant has also complied with s.11(2) CA as a 'strategic duty'. As I summarised at the start of this judgment but repeat as it is relevant here, Ms Hayes confirmed that as at December 2023, the Defendant had 179 families being provided with temporary accommodation (up from 117 families in April 2023). Indeed, as at 11th March 2024, the Defendant had 206 families in temporary accommodation, of whom 125 families are in B&B accommodation, of whom 12 have been even longer than the Claimant (and all have more children). Yet Ms Hayes also said whilst the Defendant experienced a 55% increase in demand for accommodation since 2021 and has 60 more households in temporary accommodation, over 2023 the Defendant mobilised an additional 40 units and plans now another 35 units for April 2024, by moving current occupants into other accommodation it sourced. I am told the first 10 units of temporary family accommodation will become available on 15th April 2024, with a further 10 each week allocated on the basis of waiting time and need. As I discuss below, were it not for its recent 'intentionality decision', the Defendant would have offered the Claimant and C such accommodation from 22nd April 2024.

However, whilst the Defendant is plainly taking active steps to expand its accommodation offering to families, in part to comply with its strategic duties under s.11 CA 2004, I accept Ms Hayes' evidence that it offered and has kept the Claimant and C in the Hotel since 9th October 2023 because demand is so high that it has no available alternative accommodation suitable for them. This point directly leads into the crucial issue - Ground 1, to which I now turn.

Suitability and the 2003 Order (Ground 1)

51. Ground 1 contends that the Defendant was and remains in breach of its duty to provide suitable interim accommodation but is squarely focussed on the 2003 Order. As discussed at the start of the judgment, this is an important issue much more widely than the Claimant or even the Defendant and yet is effectively without binding authority. I propose to examine this crucial issue in detail and in five stages: (i) whether the Hotel was 'suitable' for the Claimant and C if the 2003 Order did not apply; (ii) the effect in principle on 'suitability' where the 2003 Order applies; (iii) the 'accommodation' to which the 2003 Order applies; (iv) the meaning of 'family commitments' in the 2003 Order; and (v) a summary of my conclusions on the 2003 Order generally and indeed on Ground 1 in this case.

Suitability without the 2003 Order

52. I have discussed the general approach to 'suitability' of accommodation at paragraphs 35-38 above in my analysis of the HA's framework. As discussed, whilst 'suitability' is generally undefined, it applies to short-term as well as long-term accommodation (including under s.188 HA), but as Lord Hoffmann said in *Awua* 'there is no requirement of permanence'; and as Lady Hale said in *Ali* 'what is regarded as suitable for discharging the interim [s.188] duty may be rather different from what is regarded as suitable for discharging the more open-ended [s.193] duty'. Naturally, Ms Rowlands relies on this to suggest there is a very good reason why Mr Nabi has not attempted to argue the Hotel is unsuitable accommodation

under s.206 HA itself (as opposed to s.149 EqA or s.11 CA) even if the 2003 Order does not apply. She submits that is because if the 2003 Order does not apply, the Hotel is plainly 'suitable' in the short-term for the Claimant and C.

53. Mr Nabi suggests Ms Rowlands' submission is 'misconceived' and places emphasis on certain provisions of the 2018 Homelessness Code. Some are not restricted to the 2003 Order. For example, para.17.31 of the Code explains that B&B accommodation caters for very short-term term stays only and affords residents only limited privacy. It may also lack or require sharing of important amenities, such as cooking and laundry facilities. Para.17.32 of the Code states 'living in B&B accommodation can be particularly detrimental to the health and development of children'. Para.17.42 provides 'the Secretary of State considers that the limited circumstances in which B&B accommodation may provide suitable accommodation could include those where: a. emergency accommodation is required at very short notice (for example to discharge an interim duty to accommodate); or b. there is simply no better alternative accommodation available and the use of B&B accommodation is necessary as a last resort'. Para.17.41 provides that it is not suitable for 16 and 17 year olds even on (such) an emergency basis. Para.17.43 provides where authorities are unable to avoid using B&B accommodation, they should ensure that such accommodation is of a good standard and is used for the shortest period possible'.

54. I would also re-quote Lady Hale in *Nzolameso* (that Mr Nabi also relies on) at [13]:

> "The accommodation offered has to be suitable to the needs of the particular homeless person and each member of her household…"

Bearing fully in mind those strong observations in the Homelessness Code, it is helpful to analyse the Hotel's 'suitability' by reference to some key parameters:

(i) *Health and Welfare Needs*: I start with this heading as it flows on from Grounds 2 and 3 which I have just discussed, most obviously s.11(2) CA which applies to C (even if s.149 EqA does not) as discussed in *Nzolameso,* even though I found it had not been breached. Indeed, irrespective of those duties, s.188 read with s.206 HA requires even interim accommodation to be 'suitable' for the particular family's particular needs and circumstances. That has been the law since *Omar* over 30 years ago (predating 'disability discrimination' and s.11 CA 2004) - and encompassing health needs whether or not 'disabilities', such as those suggested by Lord Briggs (as he now is) in *Haque*. Nevertheless, what I have said above under Grounds 2 and 3 would equally apply to this more open-textured general factor - these factors alone do not make the Hotel not 'suitable' for the Claimant and C.

(ii) *Space and arrangement*: This is one of the core aspects of 'suitability', in keeping with the limited 'steer' in s.210 HA as Lord Hoffmann noted in *Awua*. Indeed, the Puhlhofers themselves were not just in a guest house, they were a family of four in one room which Lady Hale in *Ali* referred to as 'cramped' and Lord Hoffmann in *Awua* called 'squalid'. However, the Claimant and C are a long way from that description in the Hotel (even if the photographs suggest that description would be more apposite to the Flat – but I make no finding on that as I said). They are a family of two in their own room, with their own bathroom (as is conceded by Ms Rowlands in relation to the 2003 Order). Whilst as she also accepts for that purpose, they

lack their own kitchen (and as discussed, they cannot use the communal kitchen), they do have a microwave. In the terms of para.17.43 of the Code, the Hotel may be 'B&B accommodation' but it is also 'of a good standard'.

(iii) *Affordability:* If the relevant 'homelessness' for 'intentionality' is the possession order as the Defendant says, the affordability of *the Flat* is crucial. But it is not suggested to be with the suitability of *the Hotel*.

(iv) *Location*: This is a plainly relevant factor, although most powerfully outside the authority's district given s.208 HA (*Nzolameso, Sacupima, Redbridge*). Here, whilst the Claimant and C are located 45 minutes from his school, which is less than ideal, it is a far cry from being placed in a completely different part of the country like those cases (in *Sacupima*, only temporarily) Whilst location is not only relevant to C's 'school run', but also to his and the Claimants' support networks, those are still available to her, because she discussed with the Defendant that C may stay with his father or grandfather.

(v) *Local Context:* However, 'location' has another dimension. In the context of 'homelessness' under s.175 HA, s.177(2) HA makes it clear that general housing circumstances in the authority's district are relevant. Given the degree of 'overlap' between 'reasonableness of occupation' and 'suitability' discussed in *Awua* and *Ali*, it must also be relevant to 'suitability', just as it is to 'priority need': *Holmes-Moorhouse* at [13]. As Ms Hayes observes, Sandwell is one of the most deprived areas in the country – and alongside its larger surrounding metropolitan authorities (Birmingham City Council on one side and Wolverhampton and Dudley on the other), it is competing for accommodation with London and South-Eastern authorities (and the Home Office) looking for cheaper accommodation in the Midlands. All the while, as summarised under Ground 3 above, the Defendant is trying to keep pace with rising demand from its own residents for emergency housing in a 'cost of living crisis'. This – not an affluent 'Shire' - is the local context in which the 'suitability' of the Hotel for the Claimant and C must be assessed.

On the other hand, I have considered carefully the general disadvantages of B&B accommodation, particularly for children in the Code at para.17.31-32. Whilst the Hotel started as 'emergency accommodation at very short notice' as the Code puts it at para.17.42, it can no longer be called that for the Claimant and C. Their stay has hardly been for 'the shortest time possible' (para.17.43). Five months is a very long time in a 'B&B', although as Ms Hayes says, sadly 64 families have stayed longer. This led an engaging debate between Mr Nabi and Ms Rowlands about 'Schrödinger's Flat' – whether the same accommodation can be 'suitable' and 'unsuitable' at the same time (I cannot resist adding, especially if it is not big enough to 'swing his cat'). In my judgement, as 'suitability' relates to an individual occupant, the same room can be 'suitable' for one but not another; or be 'suitable' for an occupant but then become 'unsuitable' for them (see *Ali*). Nevertheless, as Ms Hayes says:

> "The Defendant does not have accommodation available to offer the Claimant at present. The demands on the Defendant's resources far outweigh what is available and this applicant does not come near the top of the list for the kind of assistance she is seeking. there is simply no other accommodation available for the Claimant…..There is no self-contained accommodation that Sandwell can source to offer her."

I accept Ms Hayes' evidence on this (that the Claimant cannot gainsay) as consistent with her November email, and nationally in the 2023 House of Commons Report, which suggests in June 2022, over 1,000 families out of 2,320 nationally in B&B accommodation had been there for over six weeks, over double the previous year.

55. Therefore, I find the Claimant and C have stayed in the Hotel since October as the Defendant has nowhere else to put them – at least until late-April as noted above. Their predicament falls into the second exception in the Code at 17.42, 'there is simply no better alternative accommodation available and the use of B&B accommodation is necessary as a last resort'. Moreover, there is no evidence of ongoing welfare impact for C – or indeed the Claimant – and the end is now in sight with alternative accommodation available in late April (if she is still at that time owed an interim duty under s.188 HA). Therefore, bearing in mind Lady Hale's 'enough is enough' point in *Ali* at [50]-[51] quoted above, adjusted for B&B accommodation but also the s.188 HA context, had 'general suitability' been challenged, I would have found *if the 2003 Order does not apply to the Claimant*, the Hotel not only was 'suitable' under ss.188/206 HA in October-December 2023 when this claim was issued, but I would have (just) been persuaded the Defendant can rationally consider that it remains so in March-April 2024. However, it is approaching the rational limits of 'suitability', by reference to Dyson J's spectrum on suitability in *Sacupima,* which involved a London council providing s.188 temporary B&B accommodation elsewhere. As Latham LJ said on appeal at [27]:

> "There was also an issue as to whether or not bed and breakfast accommodation could be used to discharge obligations under s.188….This is no longer in contention. The respondents accept that Dyson J. was correct to conclude, as he did, that there was nothing in the Act which expressly or impliedly prohibited the provision of such accommodation. Furthermore, the Code of Guidance expressly sanctions provision of bed and breakfast as suitable in certain circumstances. In…1998, the Secretary of State expanded the guidance on bed and breakfast accommodation in the Code and stated [it] may be suitable accommodation, particularly as a last resort, where there was simply no better alternative accommodation available, and where emergency accommodation was required at very short notice."

Indeed, the *Sacupima* judgments in 2000 lead me on to the 2003 Order itself.

'Suitability' under the 2003 Order and the '6-week limit'

56. Whilst the duration of the Claimant and C's stay in B&B accommodation and the fact her Flat lies empty and unrepaired are unusual – and explain why this issue is being litigated - the other circumstances of this case are commonplace. This is not a complex or exceptional case factually, e.g. involving severe disabilities or unusual need. Just like the Claimant was, many families are struggling to pay their rent at the moment. Many have children like C with significant but not uncommon health conditions. Many have lived for months in 'temporary' accommodation, as the House of Commons 2023 report quoted at the start of this judgment illustrates. As the Claimant is typical, whether or not the 2003 Order applies to her may indicate whether or not it would apply to many typical families up and down the country. The question in each case is whether those particular families each fall in its scope.

57. That brings me to the statutory interpretation of the provisions of the 2003 Order (as amended), linked to authorities' duties to provide homelessness accommodation under Part VII HA, by Art.1 2003 Order (bringing it into force on 1st April 2004). In the absence of case-law on it, I approach it as a question of statutory interpretation In argument I referred to the new leading case: *R(O) v SSHD* [2023] AC 255 (SC), where Lord Hodge explained the modern interpretative approach at [29]-[31]:

> "29 The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson Ltd v Papierwerke AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context'. (*R v DETR Ex p Spath Holme Ltd* [2001] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme* p397 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament'….
>
> 30 External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty…But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity….
>
> 31 Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls in *Spath Holme*….stated: "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor

> is it the subjective intention of the draftsman, or individual members or even of a majority of individual members of either House…Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only the words under consideration cannot reasonably be taken as used by Parliament with that meaning."

Indeed, *R(O)* itself was a case involving the relationship between secondary and primary legislation, in particular the interpretation of an enabling power in the latter.

58. With that guidance well in mind, I turn to the interpretation of the 2003 Order. Given its significance for so many families (and authorities) and the dearth of case-law on it after 20 years in force, I propose to consider it in detail, even on the aspects which are not contested before me, since as I shall explain, they feed into the aspect which is. After all, as Lord Hodge said in *R(O)* at [29], a contested provision must be interpreted in its context, that itself must be considered. So too, as in *R(O)*, words of the enabling power and other provisions of primary legislation referred to in the secondary legislation throw light on its meaning. Therefore, I repeat s.210(2) HA:

> "The Secretary of State may by order specify— (a) circumstances in which accommodation is or is not to be regarded as suitable for a person, and (b) matters to be taken into account or disregarded in determining whether accommodation is suitable for a person."

Whilst the 2003 Order should be construed as a whole in its context, it is helpful to look at different parts of it in stages before pulling back to cross-check its overall interpretation. As I say, Art.1 of the 2003 Order quoted above simply applies the Order to Part VII HA and s.210 HA on 'suitability' (indeed it is obvious, not least from the title of the 2003 Order including 'Suitability of Accommodation'). I propose to start with Arts.3-4(1) of the 2003 Order, which so far as material, state:

> "3. Subject to the exceptions contained in article 4, B&B accommodation is not to be regarded as suitable for an applicant with family commitments where accommodation is made available for occupation (a) under s.188(1), 190(2), 193(2) or 200(1); or (b) under s. 195(2), where the accommodation is other than that occupied by the applicant [when] making his application.
>
> 4(1) Article 3 does not apply (a) where no accommodation other than B&B accommodation is available for occupation by an applicant with family commitments; and (b) [except where the applicant is a person falling within paragraph (3)] the applicant occupies B&B accommodation for a period, or a total of periods, which does not exceed 6 weeks."

59. Focusing purely on the statutory language (which has primacy as explained in *R(O)* at [29]) the meaning of Art.3 of the 2003 Order seems clear. It does not list 'matters to be taken into account on suitability' under s.210(2)(b) HA (as with 'location' under the 2012 Order considered in *Nzolameso*, for example). Instead, Art.3 of the 2003 Order is a 'circumstance in which accommodation is or is not to be regarded as suitable for a person' under s.210(2)(a) HA. Art.3 *deems* (as I explain below) 'B&B accommodation' (as defined in Art.2, discussed below) as *'not to be regarded as suitable'* for an applicant 'with family commitments' (again, defined in Art.2), but only for 'accommodation made available for occupation under' the listed HA duties, including the interim accommodation duty s.188(1) here, but also to 'intentionally homeless applicants' under 190(2) HA, the 'full duty' to

unintentionally homeless applicants in priority need' under s.193(2) HA or on referral elsewhere under s.200(1) HA; or to those threatened with homelessness under s.195(2) HA (but only accommodation *provided to them*). Conspicuous by its absence is s.198B HA, which is why I spent some time at paragraphs 33-34 above discussing it. However, it is accepted s.188 HA applies here. As I discussed there, whilst *R(Ahamed)* held that accommodation could be provided under s.198B HA, the duty is to '*help* the applicant to secure it', so it makes sense the 2003 Order does not impose the same restriction as it does for 'securing accommodation'.

60. As I have just said, Art.3 of the 2003 Order is a traditional 'deeming provision', as explained in *Bennion on Statutory Interpretation* (7th Ed 1st Supp 2019) at 17.8:

> "Acts often deem things to be what they are not or deem something to be the case when it may or may not be the case…The traditional form of words 'shall be deemed' has generally given way to expressions such as 'treated as', 'regarded as' or 'taken to be'. Whatever form is used the effect is the same."

s.210(2)(a) HA empowers the Secretary of State to make 'Orders' 'specifying' to authorities 'circumstances in which accommodation is or is not '*to be regarded'* as suitable for a person' – modern 'deeming' language. Art.3 of the 2003 Order uses that same language: *'…B&B accommodation is not to be regarded as suitable for an applicant..'* As I explained above, if the 2003 Order does not apply to the Claimant and C, the Defendant would be entitled to consider the Hotel was and (just) remains 'suitable' for them. However, if the 2003 Order does apply, its effect is that 'B&B accommodation is not to be regarded as suitable' subject to the narrow exceptions in Art.4. In effect, Art.3 deems it 'unsuitable' - as Mr Nabi submitted, it removes that specific question of suitability from the authority's judgement. The statutory language of Art.3 of the 2003 Order is strikingly more 'hard-edged' than the 'blurry-edged' statutory homelessness concepts typical of Part VII HA, like 'suitability', 'reasonableness of occupation', 'accommodation' and 'reasonably expected to reside', all of which involve questions of fact and judgement for an authority, as confirmed for 'accommodation' back in *Puhlhofer*, but reiterated for those different expressions over the last 30 years in *Awua, Ali*, *Holmes-Moorhouse* (to which I return later), *Sharif*, *Nzolameso* and many Court of Appeal authorities.

61. Therefore, unlike those 'blurry-edged' statutory concepts in the HA itself, the 'hard-edged' language of Art.3 of the 2003 Order also has an exception, in the equally 'hard-edged' Art.4 which is *conjunctive* ('and'): 'Article 3 does not apply (a) where no accommodation other than B&B accommodation is available for occupation by an applicant with family commitments; **and** (b)….the applicant occupies B&B accommodation for a period, or a total of periods, which does not exceed 6 weeks'.

    a. In fact (a) is again more typically 'blurry-edged' like Part VII HA concepts, 'where no accommodation other than B&B accommodation is *available for occupation* by an applicant with family commitments'. This begs the question what 'available' means – and as it is undefined, once again that is as usual a matter for the authority's factual judgement subject to rationality.

    b. However, (b) is conjunctive: it limits (a) rather than acting as an alternative. Save the (temporary) wider exception of recent arrivals to the UK in Art.4(3) (typically of modern welfare legislation, immigration is a special case), Art.4(1)(b) of the 2003 Order limits the exception to the strict deeming

> provision in Art.3 to cases of applicants who occupy B&B accommodation for a period, or a total of periods, *which does not exceed 6 weeks*.

In short, where the 2003 Order applies, Arts.3-4 'cap' the 'suitability' of 'B&B accommodation' for applicants 'with family commitments' to *6 weeks maximum*.

62. This interpretation of the ordinary meaning of the statutory language of Arts.3 and 4 of the 2003 Order and its 'internal aids' (to paraphrase Lord Hodge in *R(O)* at [29]) is consistent with its 'external aids' (which he referred to at [30]), most particularly, the Explanatory Note of the 2003 Order, which provides on this point:

> "When discharging a housing function to secure that accommodation is available for an applicant who is homeless, or threatened with homelessness, under Part 7 of the Housing Act 1996, a local housing authority must ensure that the accommodation is suitable (section 206(1)). …This Order specifies the circumstances in which accommodation will not be regarded as suitable….Article 3 provides that, where accommodation is provided under a duty under Part 7 to an applicant with family commitments, B&B accommodation is not to be regarded as suitable, subject to the exceptions contained in Article 4. Article 4 provides that if there is no accommodation, other than B&B accommodation, available for their occupation, the local housing authority may house such an applicant in B&B accommodation, but only for a period or total of periods not exceeding six weeks." (my underline)

Therefore, as confirmed by the Explanatory Note, the 2003 Order operates under s.210 HA and qualifies 'suitability' in s.206 HA by 'specifying the circumstances in which accommodation will not be regarded as suitable', the main provision being Art.3, but subject to the exceptions in Art.4. However, the latter makes clear it operates as one exception if 'non-B&B accommodation' is not 'available for their occupation' but '**only**' for a period or total of periods not exceeding six weeks'

63. Again, this 'hard-edged' reading of Art.3 of the 2003 Order as deeming 'B&B accommodation' as 'not suitable' with a time-limited 'no alternative' exception itself limited 'only' to 6 weeks in Art.4, is consistent with other 'external aids', such as the Secretary of State's Homelessness Code, which authorities must 'take into account' under s.182 HA: *Nzolameso* at [31]-[32] (quoted above). Of course, later Executive guidance cannot change the meaning of the Legislature's earlier statutory language, but here both are in harmony (unsurprisingly as the 2003 Order was made by the Secretary of State who issues the Code). The 2018 Code states at para 16.30:

> "Housing authorities must not use B&B to accommodate families with children or pregnant women except where there is no alternative available, and then for a maximum period not exceeding 6 weeks… B&B type accommodation is never suitable for 16-17 year olds."

Indeed, the point that 'availability' of 'alternatives' to 'B&B accommodation' is a matter for the authority's judgement is supported by para.17.38 of the Code, which suggests authorities should consider cost, location and affordability of alternative accommodation (but if it is to be allocated under Part VI HA). Para.17.39 also states the '6-week limit' only starts once the applicant falls within the 2003 Order, not when first placed in B&B accommodation if earlier. Yet, as pointed out by Mr Nabi, whilst it goes beyond the 2003 Order's terms, para 17.36 of the Code states:

> "Where B&B accommodation is secured for an applicant with family commitments, the Secretary of State considers that the authority should notify the applicant of the effect of the 2003 Order and in particular, that the authority will be unable to continue to secure B&B accommodation for such applicants any longer than 6 weeks, after which the authority must secure alternative, suitable accommodation."

If Mr Nabi is right that this is 'honoured in the breach' by local housing authorities, then they risk challenges for failing to take it into account under s.182 / *Nzolameso* (although that is very different from the present challenge for breach of legislation).

64. This interpretation of Arts.3-4 of the 2003 Order is also reinforced by other 'external aids', not specifically referenced by Lord Hodge in *R(O)* at [30], but long used by Courts as throwing light on legislation's 'mischief' or in modern language, '*purpose*' (as Lord Hodge said in *R(O)* at [30]). In the case of the 2003 Order – and indeed what is now s.175(3) HA on 'homelessness', the mischief was what I have called for shorthand 'the *Puhlhofer* problem' of families accommodated for long periods in inadequate temporary accommodation. Indeed, in interpreting s.175(3) HA in *Ali*, Lady Hale drew on not only *Puhlhofer*, but legislative history. Likewise here, whilst I was not referred to it, it is helpful to cross-check this interpretation of Art.3-4 with the legislative history of the 2003 Order, including the Homelessness Act 2002. According to the summary of the 2002 Act in its own Explanatory Note:

> "[It] improves the protection available to people who are homeless through no fault of their own. It achieves this by strengthening the duties owed to homeless people [for the full s.193 duty by abolishing its 2-year limit and requirement to consider whether other suitable accommodation is available], by removing certain limitations on how authorities can assist homeless people [by removing restrictions on discharge by assured tenancies] and by giving authorities additional powers to assist homeless people who do not have priority need [with a new power to do so]."

Seen in the context of the 2002 Act, Arts.3-4 of the 2003 Order are part and parcel of those protective reforms – by deeming B&B accommodation falling within the definition (which I consider next) as 'unsuitable' after 6 weeks for homeless applicants with 'family commitments' (as defined - begging the disputed statutory question I must resolve after that). Whilst the 2003 Order extends to those who are 'intentionally homeless' owed a duty under s.190 HA, it only protects families with children, who themselves are not at fault. In the same way, this 'protective' purpose of the 2003 Order makes sense as another Parliamentary response to the '*Puhlhofer* problem'. Speaking of prior case-law, the 2003 Order can also be seen as a response to Dyson J deciding in *Sacupima* (noted above at paragraph 55 of this judgment) in 2000 that 'B&B accommodation' could be rationally considered as 'suitable' for families under s.206 HA. Finally, whilst not an 'interpretative aid' to Arts.3-4 of the 2003 Order, this interpretation is confirmed by the similar (if *obiter* and in passing) summary by the closest thing the 2003 Order has had to a relevant case: *Redbridge* (though completely different on the facts, concerning a main duty with the offer of a house out of district). In *Redbridge*, Lane J said at [69]:

> "Article 3 of the [2003 Order] provides that "the B&B accommodation is not to be regarded as suitable for an applicant with family commitments" when provided under, amongst other provisions, section 188(1). Article 4,

> however, creates an exception "where no accommodation other than B&B is available for occupation"; but this exception applies only where the applicant is in B&B accommodation for six weeks or less." (my underline)

65. In short, Arts.3-4 of the 2003 Order uncompromisingly and without loopholes limit the suitability of B&B accommodation for families within its scope to six weeks, even if other accommodation is still 'not available for their occupation'. What I shall call this '6-week limit' creates a huge challenge for hard-pressed local housing authorities. So, Ms Rowlands submits the 2003 Order must be strictly construed. Lord Hodge in *R(O)* at [41] discussed interpretative 'presumptions'. One was discussed in *R(PACCAR) v CAT* [2023] 1 WLR 2594 (SC) by Lord Sales at [43]:

> "The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used….See now *Bennion, Bailey and Norbury* on Statutory Interpretation, 8th ed (2020), section 13.1(1): 'The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature'. As the authors of *Bennion, Bailey and Norbury* say, the courts give a wide meaning to absurdity in this context, 'using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief'. The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as they point out…'The strength of the presumption….depends on the degree to which a particular construction produces an unreasonable result'. I would add that the courts have to be careful to ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation. The constitutional position that legislative choice is for Parliament cannot be undermined under the guise of the presumption against absurdity."

I leave aside the charged word 'absurd' and focus on *Bennion*'s synonyms of 'unworkability' or 'impracticability'. Ms Rowlands did not refer to *R(PACCAR)* but argued for a statutory interpretative analogy to the contractual principle of *'contra proferentem',* which in many ways is the same point. Her submission was the 2003 Order must not be interpreted so as to be unworkable or impractical, albeit she directed that to the definitions in Art.2. My response to her submission is this:

a. Firstly, what risks 'unworkability' in the 2003 Order is not the definitions of 'family commitments' (or indeed 'B&B accommodation') in Art.2, but the unflinching '6-week limit' on the exception to Art.3 in Art.4(1)(b). Yet, as an interpretative tool, the 'presumption against (here) unworkability' is rebutted by clear statutory language and the Court must construe the language (*R(O)* at [41]-[43]). This is really the main reason I have spent time analysing the interpretation of Arts.3-4 which are not in issue before me. However, as I have said, not only is the statutory language uncompromisingly unambiguous, it is supported by all relevant external aids – all point unhesitatingly to a conscious 'legislative intention' (cf. *R(O)* at [31]) of the Secretary of State by Order, (rather than Parliament but authorised by it under s.210 HA) to limit 'B&B accommodation' for families within the 2003 Order to *six weeks maximum*.

b. Secondly, I am conscious that local authorities may consider that the '6-week limit' on B&B accommodation may have been 'workable' in 2003 but no longer is 20 years later. Ms Rowlands referred me to the 2023 House of Commons report, which explains from 2002 there had been a Housing Benefit Subsidy to encourage less use of 'B&Bs', but that was eventually replaced by grants from 2017, leaving shortfalls. Indeed, from June 2022, in Amendment Order 2022/521, the Secretary of State removed the '6-week limit' for applicants from abroad falling within the new Art.4(3) (extended in 2023 to June 2024). That legislative history and amendment is relevant interpretative context (c.f. *R(O)* at [40]). But here, it confirms that the Secretary in 2022-23 of State sought to alleviate any 'unworkability' and pressure on authorities by removing some applicants from the 6-week limit, but it left it for others.

c. In any event, there was unquestionably a deliberate legislative decision – both in 2003 and as adjusted in 2022-23 - to set a '6-week limit'. In my judgment, just as Lord Sales found in *R(PACCAR)* at [84]-[86], this is not in fact 'unworkable' in the strict sense entailed in the interpretative presumption, even if (as I accept) it requires very tough choices by housing authorities. Here, Lord Sales helps again in *R(Imam) v Croydon LBC* [2024] HLR 6 (SC). I discuss *R(Imam)* later, but as presently relevant, Lord Sales said at [40]:

> "The starting point is that Croydon is subject to a public law duty imposed by Parliament by statute which is not qualified in any relevant way by reference to the resources available to Croydon. In principle, if resources are inadequate to comply with a statutory duty it is for the authority to use whatever powers it has to raise money or for central government to adjust the grant given to the authority to furnish it with the necessary resources, or for Parliament to legislate to remove the duty or to qualify it by reference to the resources available. Ward LJ observed in *Aweys*, at para 52, that if local authorities are finding that fulfilment of their duties to accommodate the homeless is providing impossible, 'it is for the legislature to consider whether their position can be ameliorated'.

Whilst Lord Sales was in *R(Imam)* discussing the full duty in s.193(2) HA, the interim duty to accommodate under s.188(1) HA is not qualified by reference to resources either (although, as discussed, aside from the 2003 Order, what is 'suitable' under s.206 may differ between the contexts: *Ali*). In any event, as Mr Nabi submitted in relation to mandatory orders, lack of resources cannot excuse compliance with a statutory duty, not least because local authorities can be expected to plan so that they comply with their duties. As Lady Hale said in *Nzolameso* at [39] in relation to the location of housing:

> "Ideally, each local authority should have, and keep up to date, a policy for procuring sufficient units of temporary accommodation to meet the anticipated demand during the coming year. That policy should, of course, reflect the authority's statutory obligations under both the 1996 Act and the Children Act 2004. It should be approved by the democratically accountable members of the council and, ideally, it should be made publicly available. Secondly, each local authority should have, and keep up to date, a policy for allocating those units to individual homeless households. Where there was an

> anticipated shortfall of "in borough" units, that policy would explain the factors which would be taken into account in offering households those units, the factors which would be taken into account in offering units close to home, and if there was a shortage of such units, the factors which would make it suitable to accommodate a household further away. That policy too should be made publicly available."

This is not at all to trespass on the proper function of local authorities to make budgetary choices, which must be respected by Courts, as Lord Sales said in *R(Imam)* at [61]-[63]. It is simply to point out that the 'workability' of the '6-week limit' depends on the budgetary choices the authority itself chooses to make. Whilst I do not envy those having to make such tough budgetary (and individual housing) decisions, I am afraid the 2003 Order means what it says.

'B&B Accommodation'

66. I can deal with this subject more briefly, especially as it is conceded, although given the absence of case-law on the 2003 Order, it is worth 'unpacking' the definition (as amended immaterially in 2008 and then by Amendment Order 2022/521 from 1st June 2022 and 2023/509 from May 2023 in square brackets, as I will explain):

> *"'B&B accommodation' means accommodation (whether or not breakfast is included)–(a) which is not separate and self-contained premises; and (b) in which* **[***cooking facilities are not provided or***]** *any one of the following amenities is shared by more than one household–(i) a toilet; (ii) personal washing facilities; (iii) cooking facilities*, but does not include accommodation which is owned or managed by a local housing authority, a non-profit registered provider of social housing or a voluntary organisation as defined in section 180(3) of the Housing Act 1996……… **[**or accommodation that is provided in a private dwelling**]**…"

Before turning to the definition I have italicised, the unitalicised words do not apply to this case but are relevant to the interpretative exercise – and indeed the 'workability' point just discussed. As Mr Nabi explained, many authorities avoid the '6-week limit' by providing what would otherwise be 'B&B accommodation' either themselves or through one of the other providers listed in Art.2. Again, the 'workability' of that was made a little easier still for authorities from June 2022, with the addition of the concluding words which exclude accommodation in a private dwelling from the scope of the 2003 Order. This new 'private dwelling' proviso is in more 'blurry-edged' language more typical of the HA, suggesting a legislative intention (c.f. *R(O)* at [31]) to give authorities another option to avoid the '6-week limit' with domestic accommodation to which it was never intended to apply. As such, it should not be interpreted too strictly. One obvious example may be the public-spirited 'hosting' of refugees and others that has flourished recently since the influx of Ukrainian refugees (which may explain the timing in June 2022). Nevertheless, none of that proviso applies to accommodation at the Hotel here.

67. I will therefore turn to the 'unpacking' of the definition I have italicised. Here, the presumption against 'unworkability' discussed above does not seem to me to have any purchase at all: there is nothing 'unworkable' about any aspect of the definition. However, another interpretative principle relevant to definitions entitled 'potency of the term defined' was also discussed in *R(PACCAR)* by Lord Sales at [48]-[49]:

> "[W]hen the definition is read as a whole the ordinary meaning of the word or phrase being defined forms part of the material which might potentially be used to throw light on the meaning of the definition. Whether and to what extent it does so depends on the circumstances and in particular on the terms of the legislation and the nature of the concept referred to by the word or phrase being defined….[However]…[w]here an express definition of a term is given in statute then even if there is consensus as to its core content, in the absence of general consensus as to the limits of the term no significant potency can be attached to the term so as to colour or qualify the meaning of the definition… Still less will the term defined have potency to colour the meaning of the definition if there is no general consensus as to the core meaning of the term…"

Bearing that in mind, I start with the statutory language itself (c.f. *R(O)* at [29]):

> "'B&B accommodation' means accommodation (whether or not breakfast is included)–(a) which is not separate and self-contained premises; and (b) in which [cooking facilities are not provided or] any one of the following amenities is shared by more than one household–(i) a toilet; (ii) personal washing facilities; (iii) cooking facilities.."

The first point to note is that the actual statutory term defined is 'B&B accommodation', rather than 'Bed and Breakfast Accommodation'. Indeed, the definition immediately goes on to state 'whether or not breakfast is included'. This may explain why the statutory expression is 'B&B accommodation', perhaps in the informal sense of the location of the accommodation, as many would say, being in 'a B&B'. As such, not only does the expression 'B&B' in 'the term defined' have no 'potency', it is used for something far removed from its ordinary meaning (as indeed 'B&B accommodation' is actually being used for something far removed from its ordinary use). So, 'B&B' is unlikely to 'colour or qualify the meaning of the definition' (*R(PACCAR)*). I turn to its individual constituents:

a. The central term is 'accommodation', which forms part of both the term defined and its definition. However, rather than any 'consensus as to its core meaning' or indeed dictionary definition of 'accommodation', as Art.1 of the 2003 Order links to Part 7 HA, the word 'accommodation' obviously means the same as it does in the Act itself e.g. in s.175(1) HA. As Lord Sales also said in *R(PACCAR)* at [44], both subordinate and primary enabling legislation can influence each other's meaning. The meaning of 'accommodation' was discussed at paragraphs 23-24 above of this judgment, referring to *Awua*, *Ali*, *Sharif* and *Hodge*. Indeed, in *Hodge*, 'accommodation' was even held to include a refuge, so even without 'estate-agent spin', it is likely most buildings in which a family would be staying would be 'accommodation'. (Whilst those cases were applicants' attempts to narrow the meaning of s.175 HA 'accommodation', they also militate against any similarly-ingenious attempts to do so with Art.2 by authorities).

b. The next aspect is that 'accommodation' is excluded from the scope of the 2003 Order if it is in 'separate and self-contained premises'. The key word is 'premises' rather than 'dwellings'. As discussed in *Sharif* at [20]-[22], 'separate and self-contained' but proximate dwellings in the same 'premises' e.g. different flats in the same block, may constitute under s.176 HA 'accommodation available for occupation by an applicant together with

any other person that normally resides with him as a member of his family'. But 'separate and self-contained premises' in Art.2 of the 2003 Order *may* connote a separate building. This is best left to a case where it arises (but statutory uses of 'premises' in different contexts may not assist: see *Sharif*).

c. If the 'accommodation' is not 'separate and self-contained premises', the next question is '*any one* of the following amenities is *shared*'. I will address 'cooking facilities' in a moment; and 'household' later, but the question whether either 'cooking facilities', 'personal washing facilities' or 'a toilet' are 'shared' by more than one household should be relatively simple. They are broad factual questions for the judgement of the authority (*Awua*). But whilst there may be debate in another case whether 'personal washing facilities' requires a shower, or whether a sink is enough, where the room has a bathroom with both and a toilet – as here - this is not an issue.

68. Finally on 'B&B accommodation', I turn to 'cooking facilities'. That is the key expression, rather than 'dining facilities' – the absence of a communal dining area or living space is immaterial (c.f. *Sharif* at [30]). This is rather more complex, both generally and in this case. The original text of Art.2 in 2003 can be contrasted with the amended text from May 2023 under Order 2023/509, I will italicise in brackets:

> "'B&B accommodation' means accommodation (whether or not breakfast is included)–(a) which is not separate and self-contained premises; and (b) in which **[***cooking facilities are not provided or***]** any one of the following amenities is shared by more than one household–(i) a toilet; (ii) personal washing facilities; (iii) cooking facilities."

Therefore, the original 2003 Order might have excluded 'accommodation' in which 'cooking facilities' were not provided at all rather than simply being 'shared'. That interpretation would have made little rational sense and encouraged provision of accommodation without cooking facilities to avoid the scope of the 2003 Order. It is likely that before the amendment, the 'presumption against absurdity' discussed in *R(PACCAR)* would have 'read in' the words now explicitly inserted. In any event, this reading is now confirmed in Art.2 of the 2003 Order and the Code at para.17.34.

69. However, the Homelessness Code also provides at para.17.44-45 that 'B&B accommodation' could be treated as a 'House of Multiple Occupation' ('HMO'). The HMO provisions (if they apply) are listed in a different part of the same chapter of the Code at paras.17.28-17.30 and stated to include health and safety standards themselves set out at paras.17.24-25 of the Code. The latter was invoked in the case of *Escott v Chichester DC* [2021] HLR 4, where Martin Spencer J said at [50]:

> "I was surprised by, and I reject, the suggestion that a microwave oven is not capable of cooking food only heating it, as it seems to me to be wholly self-evident that a microwave is capable of cooking food and a microwave oven is an appropriately-useful piece of equipment for basic food preparation. The claimant has been provided with that and it is unarguable, in my view, that the local authority acted unlawfully in failing to provide a cooker as opposed to a microwave oven."

Ms Rowlands referred me to *Escott* when I asked whether the provision of a microwave to the Claimant and C (whether or not because of his allergies and the need to avoid using the communal cooking facilities) could amount to non-shared

'cooking facilities' and so with the 'non-shared' bathroom and toilet, take the Hotel outside scope of the 2003 Order. Read in isolation, Martin Spencer J's observation in *Escott* might suggest that. However, just like a statutory provision, an observation by a Judge in a case needs to be read in its context. In *Escott* the context was nothing whatsoever to do with the 2003 Order, or any statutory expression of 'cooking facilities'. It was an application for interim relief in early May 2020 - in the very peak of the first COVID 'lockdown' – from an applicant with serious underlying health conditions who needed to self-isolate. Despite their own personal challenges in lockdown, the authority managed to find him (despite him refusing others) an unfurnished flat. However, despite one of the housing officers offering his own mattress and also finding a fridge, the applicant then claimed the flat was 'unsuitable' as it was not furnished, including the absence of a cooker, despite having a microwave. Hardly surprisingly, Martin Spencer J found it was indisputably 'suitable' in all the circumstances, not least given the lockdown itself.

70. Therefore, whilst I do not doubt that provision of a microwave assists, as it did in *Escott*, the authority to argue the accommodation was 'suitable' generally, I would have taken some persuasion that in and of itself, a microwave could remove a room in 'B&B-type accommodation' (if I can put it like that) with a private bathroom from the scope of the 2003 Order. That point is best left to be decided in a case where it is argued. In any event, as I said at paragraph 48(c) above, in this case the provision of a microwave can also be seen as an 'adjustment' (in order to comply with a duty under the EqA if C were disabled, or indeed to 'safeguard his welfare' under s.11 CA if he is strictly-speaking not as I find) for C's allergies and the risks from a communal kitchen. It would be strange if such an 'adjustment' would remove him and his mother from the protection they had under the 2003 Order. Therefore, I consider the Defendant's concession the Hotel was 'B&B accommodation' within the 2003 Order was correct – had it not been made, I would have found it to be such.

'Family Commitments'

71. However, no such concession is made about 'family commitments' under Art.2. This is where the other uncontested aspects of the 2003 Order I have discussed feed into the contested aspect. So, pulling all those threads together, subject to the limited exceptions in Art.4 (e.g. 'non-availability' for up to 6 weeks and cases caught by Art.4(3), which do not apply here,) Arts.3 and 4 set a '6-week limit', on 'B&B accommodation' (defined in Art.2 and applying here) 'made available for occupation' under the listed provisions (including s.188 HA, as here) which 'is not to be regarded as suitable' (a deeming provision, despite the Hotel otherwise being 'suitable' here) 'for an applicant with family commitments' defined in Art.2:

> "applicant with family commitments' means an applicant – (a) who is pregnant; (b) with whom a pregnant woman resides or might reasonably be expected to reside; or (c) with whom dependent children reside or might reasonably be expected to reside."

72. To start with, the resemblance of this definition to two categories of 'priority need' under s.189(1) HA is striking, so I repeat that provision and italicise the almost identical expressions in it:

> "*189*(1) The following have a priority need for accommodation— *(a) a pregnant woman or a person with whom she resides or might reasonably*

> *be expected to reside; (b) a person with whom dependent children reside or might reasonably be expected to reside*; (c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside; (d) a person who is homeless or threatened with homelessness as a result of an emergency such as flood…(e) a person who is homeless as a result of that person being a victim of domestic abuse….”

The definitions in Art.2 of the 2003 Order correlate exactly to ss.189(1)(a) and (b) HA. Therefore, just as an ‘applicant who is pregnant’ under Art.2 will be ‘a pregnant woman’ under s.189(1)(a) HA; an ‘an applicant with whom a pregnant woman resides or might be reasonably be expected to reside’ will be ‘a person with whom she [i.e. the pregnant woman’] resides or might reasonably be expected to reside’. Likewise, ‘an applicant with whom dependent children reside or might reasonably be expected to reside’ in Art.2 will be ‘a person with whom dependent children reside or might reasonably be expected to reside’ in s.189(1)(b) HA.

73. For that reason, the authorities on s.189(1)(b) HA ‘priority need’ are highly relevant to the meaning of ‘family commitments’ in Art.2 of the 2003 Order – namely *Holmes-Moorhouse* (which Ms Rowlands raised on ‘might reasonably be expected to reside’, very recently followed on similar facts in *Querino*) and *Bull* (to which I referred the parties as one of the very few cases on the other ‘limb’ - ‘to reside’, indeed as interpreted in the light of *Holmes-Moorhouse*). Ms Rowlands also relied on Lane J’s analysis in *Redbridge* at [115]:

> “[T]he defendant's statutory obligations are not to be determined by reference to what the claimant subjectively considers would be in the best interests of her and her family…. Challenging though it may often be, it is the job of the defendant to decide whether a person's subjective views might have something relevant to say about what type of accommodation is needed in order to discharge the defendant's statutory responsibilities.”

In *Holmes-Moorhouse*, as noted, a father left the family home where the children were with their mother and applied to the housing authority as homeless. He obtained a shared residence order of the children from the Family Court, but the authority nevertheless found the children could not ‘reasonably be expected to reside with him’ as because it was not ‘reasonable’ to use public resources to provide them with a second home. Lord Hoffmann observed that:

> “14 The question which the authority therefore had to ask itself was whether it was reasonably to be expected, in the context of a scheme for housing the homeless, that children who already had a home with their mother should be able also to reside with the father. In answering this question, it would no doubt have to take into account the wishes of both parents and the children themselves… But it would nevertheless be entitled to decide that it was not reasonable to expect children who were not in any sense homeless to be able to live with both mother and father in separate accommodation.
> 16….There [is] no reason in logic why the fact that Parliament has made the question of priority need turn upon whether a dependent child might reasonably be expected to reside with the applicant should require that question to be answered without regard to the purpose for which it is being asked, namely, to determine priority in the allocation of a scarce resource.

> To ignore that purpose would not be a rational social policy. It does not mean that a housing authority can say that it does not have the resources to comply with its obligations under the Act. Parliament has placed upon it the duty to house the homeless and has specified the priorities it should apply. But so far as the criteria for those priorities involve questions of judgement, it must surely take into account the overall purpose of the scheme….
> 20…If the parents are living together, then of course the children will be residing with both of them. Mr Luba [for the father] in fact submitted an alternative argument that this was enough in itself to establish his priority need under s.189(1)(b) because, at the time when he made his application, he was still in the family home and the children were residing with him… [H]owever, when an application is made on the basis that someone is threatened with homelessness, the question is whether the children will be residing or might reasonably be expected to reside with him when he becomes homeless. In the absence of accommodation provided by the housing authority, the children would not be residing with him when he became homeless. So, the only question is whether they might reasonably be expected to reside with him."

74. By contrast, in *Bull*, the father also left the family home but this time the children moved out with him into his bedroom in an HMO, which led to their eviction (and hence him being 'intentionally homeless', which does not arise here). The housing authority then provided interim accommodation under s.188 HA to the father and the children, but they also stayed with their mother. Jackson LJ said in *Bull* at [41]:

> "...[s.]189(1)(b) [HA] has two limbs, namely 'reside' and 'might reasonably be expected to reside'. The second limb was in issue in *Holmes-Moorhouse*. With the benefit of Lord Hoffmann's speech in that case, it seems obvious that questions of resources must be relevant in determining what might reasonably be expected under the second limb. In the present case, however, the first limb is in issue. The question is where, as a matter of fact, the children resided [at the date of the review]. In answering that question the scarcity of the council's resources cannot be a relevant consideration."

In *Bull*, the children staying in interim accommodation provided by the authority under s.188 HA established they were as a matter of fact actually residing with the father at the date of the authority's decisions, so whether 'they might be reasonably expected to live with him' was immaterial. I was conscious the present case was not on all fours with *Holmes-Moorhouse* or *Bull*, so I invited submissions on both.

75. Ms Rowlands focussed not just on the wording of the definitions in Art.2 of the 2003 Order (particularly 'reside' in the light of *Bull* and *Holmes-Moorhouse*), but also placed emphasis on the phrase 'family commitments'. Whilst she did not refer me to *R(PACCAR),* as I said it permits weight to be placed in interpretation of an expression on 'the potency of the term defined' as well as its definition. Ms Rowlands pointed out 'commitments' is an ordinary English word which the Oxford English Dictionary defines as 'an engagement or obligation that restricts freedom of action'. She submitted that a purposive interpretation should be taken to the 2003 Order – which was to ensure that (only) those with an *obligation* to have children with them should only be in 'B&B accommodation' (as defined) for six weeks at most. She submitted that by contrast, the Claimant was not 'obliged' to have C with

her at the Hotel as he could have stayed with his father – as indeed had been her own plan until the Defendant that if C did so, she would move into a hostel. Ms Rowlands submitted the Claimant's decision to change her mind and keep C with her was not a 'commitment', but an 'option', indeed was her choice. In reality, the Claimant was really trying to *rely* on her own decision to keep C with her, when he could have gone somewhere safer and more appropriate, to try and compel the Defendant to provide herself with different accommodation. Ms Rowlands also submitted that in those circumstances, C did not 'reside' with the Claimant at the Hotel, because unlike the children in *Bull*, not only could C have stayed with his father had the Claimant not decided to keep him with her, but also because their place of 'residence' remains the Flat rather than the Hotel. In short, Ms Rowlands submitted that the Claimant and C are 'staying' at the Hotel not 'residing' there (indeed, as one would expect of a hotel). In any event, to the extent C is staying some nights with his father, he cannot be said to be 'residing' at the Hotel anyway. Moreover, Ms Rowlands submitted following *Holmes-Moorhouse*, C cannot 'be reasonably expected to reside with' the Claimant in the Hotel when he could stay more comfortably (and on her own case, more safely) with his father. That would be a perfectly lawful and indeed better way of the Defendant 'securing accommodation' for C, leaving it to 'secure accommodation' elsewhere for the Claimant but still maintaining C's 'family life' under Art.8 ECHR and otherwise.

76. Mr Nabi responded that in Art.2 of the 2003 Order, 'family commitments' is defined to include an applicant 'with whom dependent children reside **or** might reasonably be expected to reside'. This was the same language as 'priority need' in s.189(1)(b) HA so *Holmes-Moorhouse* and *Bull* were relevant. He pointed out *Holmes-Moorhouse* was a case where the father did not have the children actually 'residing' with him (at least after he left the family home when 'threatened with homelessness' as Lord Hoffmann observed). Mr Nabi submitted the present case was more like *Bull*, as 'it was a matter of undisputed fact' that C was a dependant child actually residing with the Claimant. Indeed, it was a clearer case than *Bull*, because rather than the children moving in with the applicant parent just before the homelessness application as in *Bull,* here C lived with the Claimant in the Flat for a long time prior to the 'homelessness'. Moreover, when the Defendant had secured 'B&B accommodation' for the Claimant and C in performance of its s.188 HA duty, it was not open to it to try and avoid the application of the 2003 Order by requiring them to separate, especially as no enquiries had been made of the father in any event. In short, Mr Nabi submitted that even if the Hotel were 'suitable' generally, the 2003 Order deemed it as 'unsuitable' in law, so the Defendant was in breach of duty, unquestionably after the Claimant and C had been there for 6 weeks, if not earlier.

77. I agree with Mr Nabi that the Claimant has 'family commitments' under the 2003 Order, in the sense that C is actually 'residing with her', even if (which I question below) the Defendant is entitled to its view that in the circumstances C might be reasonably expected to live with his father. As observed in *Bull*, the first 'limb' of the definition in s.189(1)(b) HA and Art.2 2003 Order asks a simple question of fact – is the dependant child in fact residing with the applicant at the time of the decision ? As Jackson LJ said in *Bull*, in *Holmes-Moorhouse*, the children were *not* living with the applicant father, so the question was different – whether they could 'reasonably be expected with reside with him'. Despite Ms Rowlands' ingenious attempts to argue that C is not 'residing with the Claimant' at the Hotel, he plainly

is - whether or not he is staying with the father (which as Ms Rowlands admitted, is not clear), just as the children were 'residing' in the temporary accommodation with their father in *Bull*. This is true whether or not C's long-term residence was and is planned to remain the Flat, since he is in fact not 'residing' there (even if the Claimant's dogs were for a while) because it is unfit for habitation. Moreover, C's 'residence' at the Hotel has solidified over time – whatever the original plan, he has not gone to stay full-time with his father and the Hotel has not proven to be a short-term 'transient place to stay' as Ms Rowlands puts it. C has now been there over 5 months – 'staying' has become 'residing'. Indeed, as Mr Nabi pointed out, in *Bull*, 'residence' in s.188 HA accommodation was held enough for s.189(1)(b) HA; and indeed, unlike in *Bull*, the child here prior to homelessness also 'resided' with the applicant parent.

78. However, in fairness to Ms Rowlands' interpretative argument – and as other cases on different facts may combine a child 'residing' in 'B&B accommodation' with the applicant parent, but another parent having 'suitable accommodation' for them, I will also address this by statutory interpretation following *R(O)* and *R(PACCAR)*:

    a. Whilst the statutory expression is 'family commitments', it is inapt to seek to define that with a dictionary when the legislation itself defines it. In some cases, the expression defined may have 'potency', but only where there is some 'consensus' (*R(PACCAR)*). 'Family commitments' is ambiguous – if undefined it may give rise to as many definitions as there are families.

    b. In any event, 'family commitments' is defined; and that phrase is plainly not intended to cut down that definition, but to encapsulate it for the purposes of the rest of the 2003 Order. This is for drafting convenience and comprehension, which is usually the function of legislative defined terms. After all, 'family commitments' is more limited than 'priority need' under s.189(1) HA. It excludes 'vulnerable' applicants under s.189(1)(c) HA, or those made homeless by an emergency such as a flood under s.189(1)(d) HA. If C had been living with his father when the Claimant was excluded due to the flood, she would have been in 'priority need' but not had 'family commitments'. Similarly, victims – or indeed survivors - of domestic abuse would be in 'priority need' under s.189(1)(e) HA (added in 2021) but not have 'family commitments', unless of course they were *also* '(a) pregnant; (b) resided or might reasonably be expected to reside with a pregnant woman or (c) resided or might reasonably be expected to reside with dependent children'. Those narrower sub-categories of 'priority need' in s.189(1)(a) and (b) HA explain the fairly 'blurry-edged' 'catch-all' expression 'family commitments' in Art.2. It is intended to encapsulate those sub-categories of 'priority need', not in turn narrow them down to some narrower still 'sub-sub-category' of only those applicants in 'priority need' under ss.189(1)(a) or (b) HA who also have 'family commitments' in the sense of 'obligations'. After all, if that was the legislative intention (c.f. *R(O)* at [31]) different and narrower words would have been used than effectively the same expressions as in s.189(1)(a)-(b) HA. Albeit with a slight differences in syntax, their use is plainly intended to correlate exactly with the sub-categories of priority need within ss.189(1)(a)-(b) HA only, since *all* applicants within those sub-categories, 'by definition' will have 'family commitments' on any ordinary meaning of that expression,

including under Art.2 of the 2003 Order. In other words a dependent child residing with an adult carer is in itself (or certainly should always be) a 'family commitment'. Indeed, even if (which I do not accept but the Defendant implies) the Claimant here was being selfish in keeping C with her rather than giving him a more comfortable time with his father, she still 'committed herself' to C – to parent him, feed him (carefully given his allergies), get him to and from school, support him and all the other myriad things which good parents try to do for their children – wherever they are in the world and however difficult their circumstances may be.

c. Therefore, I move in Art.2 from the ambiguous drafting convenience 'family commitments' to the clear and simple statutory language of the definition itself. As Mr Nabi said and I emphasise, it states: "'applicant with family commitments' means an applicant…(c) with whom dependent children reside **or** might reasonably be expected to reside." However, the Defendant's position in Ms Hayes' statement appears to read that provision as if it had said: "applicant with family commitments' means an applicant…(c) with whom dependent children reside **and** might reasonably be expected to reside." The Defendant's position is in reality that it is *not enough* if a dependant child actually 'resides' with the applicant parent, unless that child *also* 'might reasonably be expected to reside' with that applicant parent rather than with their other parent (or wider family). However, that is not what Art.2 says. As Lord Hodge said in *R(O)* at [29], the best evidence of statutory purpose is the language chosen to express it.

d. In any event, as Lord Hodge also said in *R(O)* at [29], 'words and passages in a statute derive their meaning from their context and should be read in the context of the section as a whole' and indeed in the wider context of the legislation as a whole. Here, as discussed, the wording of Art.2 on 'family commitments' with 'dependent children' essentially maps the wording of s.189(1)(b) HA on 'priority need'. As Jackson LJ explained in *Bull* at [41], unlike 'reasonably expected to reside' in *Holmes-Moorhouse*, 'resides' is a question of fact, not evaluative judgment (still less, resources). This reading of the same words in Art.2 of the 2003 is also supported by its neighbouring definition of 'B&B accommodation' as entailing 'households' sharing amenities. A 'household' according to the Oxford English Dictionary, is 'a group of people (esp. a family) living together as a unit'. (Indeed, in *R(Ariemuguvbe) v Islington LBC* [2010] HLR 14 (CA) at [25], Sullivan LJ was prepared to assume that the word 'household' in an allocations policy could include even adult children living with a parent, although held that unlike 'dependent children', (non-disabled) adult children did not 'need' to be accommodated with their parent, even though they were ineligible for housing due to being subject to immigration control). The use of the word 'household' in Art.2 of the 2003 Order connotes not that individuals within a family are residing in a *house* (by definition, they are in 'B&B accommodation') but rather that they *are residing* in such accommodation *together*. As noted at paragraph 24 above, s.176 HA says:

> "Accommodation shall be regarded as available for a person's occupation only if it is available for occupation by him *together with*— (a) *any other person who normally resides with him as a*

> *member of his family,* **or** (b) *any other person who might reasonably be expected to reside with him.*" (my emphasis)

These aspects of Part VII HA and Art.2 2003 Order that forms part of it all point in the same direction: the significance of actual residence together, *or alternatively not cumulatively*, reasonable expectation of residence together.

e. Furthermore, this interpretation is supported by what Lord Hodge in *R(O)* at [30] called 'external aids': the legislative history and policy of 'priority need' Lord Hoffmann discussed in *Holmes-Moorhouse* at [11]:

> "The scheme of housing provision in Pt VII [HA], which dates back to the Housing (Homeless Persons) Act 1977, was intended to give effect to the contemporary social norm that a nuclear family should be able to live together. In *Din (Taj) v Wandsworth LBC* [1983] 1 A.C. 657 at 668 Lord Fraser of Tullybelton said: '…One of the main purposes of [the 1977] Act was to secure that, when accommodation is provided for homeless persons by the housing authority, it should be made available for all the members of his family together and to end the practice which had previously been common under which adult members of a homeless family were accommodated in hostels while children were taken into care…"

Whilst Lord Hoffmann went onto say at [12] in *Holmes-Moorhouse* this had to be applied in a scheme for allocating scarce resources, as Jackson LJ said in *Bull* at [41], that does not apply to the factual first limb 'resides'. Indeed, that it is suffices for a child actually to 'reside' together with the applicant parent serves the policy Lord Fraser recognised 40 years ago (even if the 'social norm' has changed from the traditional 'nuclear family' – as 'shared care arrangements' exemplify). Indeed, as Lady Hale said in *Holmes-Moorhouse* at [41], a child may well be 'reasonably be expected to reside with' a homeless parent as well as an accommodated parent if this was a long-settled arrangement after separation which breaks down through homelessness. Here, it is even clearer as unlike in Lady Hale's example, here C has always 'resided with' the Claimant in the Flat.

79. Indeed, the corollary of this last point is that if the Defendant 's apparent reading of Art.2 of the 2003 Order were right – and that a housing authority could effectively prompt a change in child residence between parents by deciding they would be 'better off with the other parent' - it would be startling. Indeed, it would engage the presumption against absurdity in *R(PACCAR)* as 'anomalous and productive of a disproportionate counter-mischief', i.e. 'throwing the baby out with the bathwater'. When I raised *R(G) v Southwark LBC* [2009] 1 WLR 1299 (HL) with Counsel (simply on the point that accommodation 'secured' under s.188 HA should not then 'switch' to being 'secured' under s.189B HA), Ms Rowlands not only confirmed she was not arguing that it 'switched', she also correctly pointed out that unlike in *R(G)*, here C is not a 'child in need' under Part III of the 1989 Act because there is no other children's authority concern about him and he can live with his father or mother. However, the Defendant's position (from which Ms Rowlands carefully and sensibly rowed back) comes close to saying 'C need not live with his mother, because he can live with his father', *despite* C not even being a 'child in need' under Part III of the 1989 Act, let alone at risk of 'significant harm' under Part IV of it

justifying care proceedings or similar action by the Defendant's own children's authority. In Family cases, it is common enough for social workers in children's authorities if concerned about the care of one parent to broker for the child to live with the other parent (or often, grandparents). But if the parent with current care of the child does not agree, then the children's authority cannot force that to happen without applying to the Family Court for an order under Part IV with its strict 'threshold criteria' of (usually) 'significant harm'. In the homelessness context, clearly if the homeless parent agrees to the child moving, there is no problem. But if they disagree, it would be astonishing if the housing authority could do what the children's authority cannot and effectively force the separation of the child from the parent by refusing them joint accommodation. After all, the Lords in *Holmes-Moorhouse* were concerned about the homelessness legislation requiring provision of a *second* home for children. Here, the Defendant's preferred interpretation would require a child to have a *different* home. If the 2003 Order were ambiguous, the presumption would point strongly against the Defendant's interpretation. But in any event, I reach the conclusion it is unambiguously inconsistent with the Order.

80. Indeed, these last two policy points actually lead me to doubt whether the Defendant is any event entitled to form the view that C 'could reasonably be expected to reside with' his father in the circumstances. In *Holmes-Moorhouse* itself, the housing authority had reached that view – contrary to the Family Court Order – in a detailed decision upheld on a detailed review (even if it was flawed) which the Lords accepted. (In *Querino*, the Court of Appeal upheld the reviewer's decision following *Holmes-Moorhouse* that it was not 'reasonable to expect children to reside with' both parents separately even before the Family Court had decided the children's residence and that the reviewer was right not to take account of a CAFCASS Report the Family Court had not authorised to be disclosed). Here by contrast, the Defendant puts forward the same sort of argument through Ms Hayes' evidence and the submissions of Ms Rowlands (in fairness, on those instructions), but it has not actually decided that is the position. Indeed, if that was its considered position, the Defendant should have decided the Claimant had no priority need some time ago. As I have said, the sticking point in making a decision (until after my draft judgment finally made on 4th April 2024) was not 'priority need' but 'intentionality' (as indeed it was in *Bull*). If anything, Ms Hayes' email of 15th November 2023 simply records that the Claimant initially proposed C live with his father or grandparents but then changed her mind when she was told she would go into a hostel. Ms Hayes did not say therefore C could reasonably be expected to live with his father, still less address the impact on C of being required to move homes etc. So, even had I accepted Ms Rowlands' interpretation of Art.2, I would still have found it applied to the Claimant and C. I should add from the Claimant's review request that she says C's father is living with his parents in crowded accommodation anyway.

Conclusion on the application of the 2003 Order

81. It may be a helpful 'cross-check' to stand back and contextualise the 2003 Order. 'Family commitments' encapsulates the two sub-categories of 'priority need' in s.189(a)-(b) HA which relate to *children*: pregnancy and either actually residing with dependent children (as was found in *Bull*) or being reasonably expected to reside with them (as was not found in *Holmes-Moorhouse*). As such, the 2003 Order

acts in some ways like a highly-focused form of 'super-priority need' offering children and parents additional protection in the 'suitability' of accommodation. This reflects a long-standing legislative policy not only to keep families together (in what is now s.189 HA and s.176 HA), but also to promote children's welfare. This long pre-dates even Parliament's reaction to 'the *Puhlhofer* problem' in the 1980s, but is now enshrined in the Children Act 1989 and indeed now also s.11(2) Children Act 2004. Therefore, Art.3 of the 2003 Order is limited to: the interim duty under s.188 HA to secure accommodation where there is reason to believe homelessness, eligibility *and priority need* (as here), but also the final duties to the intentionally homeless *in priority need* under s.190 HA and unintentionally homeless *in priority need* under s.193 HA; (whilst also it is owed to those 'threatened with homelessness' under s.195 HA, and referred to another authority under s.200 HA, neither one of which requires 'priority need', the 2003 Order requires 'family commitments' anyway). By contrast, the 2003 Order does not apply to the s.198B HA 'relief duty' to homeless and eligible applicants *whether or not there is priority need* to 'take reasonable steps to help them secure 'suitable accommodation' So, if a 'relief duty' applicant can only find 'B&B accommodation', even with the authority's 'help' as in *R(Ahamed)*, the 2003 Order does not apply to it.

82. The legislative policy is reflected by the 2003 Order not covering all 'temporary accommodation' but only 'B&B accommodation'. Whilst 'accommodation' under ss.175-176 HA is extremely broadly defined (*Puhlhofer, Awua, Ali, Sharif*), 'B&B accommodation' is defined by Art.2 much more tightly as 'accommodation' which is not in 'separate and self-contained premises' *and* in which 'cooking facilities' are either not provided or are shared by 'households', or in which either a toilet or washing facilities are shared by them. Yet even such 'accommodation' is not covered by the 2003 Order if it is owned or managed by the authority or other 'public sector' providers; or now private dwellings. The Code says at para.16.29:

> "Bed and breakfast (B&B) is defined in [2003 Order] as a form of privately owned accommodation in which residents share facilities such as kitchens, bathrooms and/or toilets, and is usually paid for on a nightly basis."

The 2023 House of Commons Report generalised (I accept the Hotel itself is not): that 'B&B accommodation is expensive, inadequate and has unacceptable long-term effects on homeless people'. It cited a Childrens' Commissioner report in 2020 during the Pandemic: No way out | Children's Commissioner for England (childrenscommissioner.gov.uk) More generally, the Commissioner said:

> "Temporary accommodation comes in many forms, but unfortunately it is often very poor quality. My team spoke to families living in homes that were cramped, noisy and sometimes unsafe. Children told us they lacked space to play or do homework, and some spoke of their fears when forced to share kitchens or bathrooms with adults engaged in crime, anti-social behaviour or with substance abuse issues."

83. All this explains why Arts.3 and 4 of the 2003 Order depart from the typical approach in Part VII HA of 'blurry-edged' concepts like 'suitability' leaving much to the judgement of the housing authority. By contrast, Art.3 of the 2003 Order deems 'B&B accommodation for applicants with 'family commitments' as 'to be regarded as unsuitable' (even if, as here, an authority could otherwise rationally consider it 'suitable'). This is subject to narrow exception in Art.4, permitting 'B&B

accommodation' to be 'suitable' for applicants with 'family commitments' for up to six weeks if no other accommodation is 'available for occupation'. Yet even this initial 6-week period is subject to guidance in the Homelessness Code at para.17.42:

> "The Secretary of State considers that the limited circumstances in which B&B accommodation may provide suitable accommodation could include those where: a. emergency accommodation is required at very short notice (for example to discharge an interim duty to accommodate); or, b. there is simply no better alternative accommodation available and the use of B&B accommodation is necessary as a last resort."

These examples reflect long-standing Government policy even before the 2003 Order and are similar to the 1998 Code noted in *Sacupima* in 2000 where it was still held 'B&B accommodation would be 'suitable'. Shortly afterwards, the 2003 Order imposed the '6-week limit', which the Homelessness Code summarises at para.16.30:

> "Housing authorities must not use B&B to accommodate families with children or pregnant women except where there is no alternative available, and then for a maximum period not exceeding 6 weeks….."

Whilst this '6-week limit' presents a huge challenge for hard pressed housing authorities, it has been a 'fixed point' in their obligations now for 20 years around which they would be expected to budget (*R(Imam)*) and form policies (*Nzolameso*), reflecting their obligations to safeguard and promote children's welfare under s.11(2) CA 2004, which is the legislative objective of the 2003 Order itself. In my opinion, this 'birds' eye view' of the 2003 Order affirms the interpretation I have set out.

84. In this case, I have found that the 2003 Order applied to the Claimant and C, who was her 'dependant child' 'residing' together both at the Flat before the 'homelessness'; and as a result of it, 'residing' together at the Hotel since 9th October 2023. I have found that the Claimant's initial plan for C to stay with his father, about which she changed her mind, did not prevent C continuing to 'reside' with her for the purposes of Art.2 of the 2003 Order (and so also s.189(1)(b) HA). In any event, the Defendant has never investigated or decided that C 'could reasonably be expected to reside with' his father and not the Claimant. That is Ms Hayes' opinion to which she is entitled but is not a statutory 'decision' under s.184 HA, nor was it expressed in her 15th November 2023 email that was not a 'decision' either. (I should add that understandably, the Defendant's s.184 HA decision of 4th April 2024 understandably simply focusses on intentionality as I had obviously already reached this decision in my draft judgment).

85. By contrast, I accept Ms Hayes' evidence and judgement that there has been no alternative accommodation to the Hotel 'available' for both the Claimant and C and that in all the circumstances, the Defendant rationally considered the Hotel 'suitable' for them. Nevertheless, once the Claimant and C had been 'residing' in the Hotel for six weeks (i.e. on 20th November 2023), from then on, the Hotel has been deemed by Art.3 to be unsuitable for them. Accordingly, the Defendant has been in breach of statutory duty under s.188 HA to secure 'suitable accommodation' for them since 20th November 2023. Therefore, Ground 1 succeeds.

Should there be a mandatory order ?

86. As I said at the start of this judgment, the fact that the Defendant has since my draft judgment made a decision on 4th April 2024 under s.184 HA that the Claimant was 'intentionally homeless' raises the question whether I should now make a mandatory order. However, in my judgment that does not mean that the issue of relief is now academic. On the contrary, there is a difference between (i) making a mandatory order; (ii) not making a mandatory order which I would have otherwise made but for the Defendant's 4th April decision; and (iii) not making a mandatory order in any event. For the reasons Peter Jackson LJ gave in *R (L, M and N)* at [67]-[73], choosing between those outcomes is not *obiter* but part of the *ratio* of my decision. For those reasons and because it goes to the rights and obligations of the parties, in my judgment relief is not academic. Even if I am wrong about that, there is a good reason in the public interest to determine the issue of relief even though it is no longer an issue of statutory interpretation, because the issue of whether to grant interim mandatory relief under s.188 HA is a relatively common issue where there has not yet been a decision applying *R(Imam)* to s.188 HA at all, still less in the context of 'B&B accommodation'. Therefore, I will first set out what I consider to be the appropriate approach to that issue, then what my decision would have been (and was in my draft judgment) but for the intervening 4th April decision by the Defendant and then finally whether that decision changes my own decision on whether to make a mandatory order. It is helpful to consider first whether I should make a mandatory order, before if I do so to consider its particular terms.

87. On mandatory orders in this context, there is no real need (save with a couple of recent examples of its application) to go beyond Lord Sales' recent guidance in *R(Imam)*. Naturally, Mr Nabi and Ms Rowlands referred me to different aspects of it, but before quoting it, it is important to explain the context. In *R(Imam)* the Claimant not only had three young children but was herself a wheelchair user. In 2014, she applied to Croydon LBC as homeless and was accepted as owed the full duty under s.193 HA and offered a three-bedroomed property. She accepted the accommodation but reviewed it because it did not have an accessible toilet on the same floor as her bedroom, which caused her distressing and humiliating accidents due to her incontinence. Croydon accepted the property was unsuitable in 2015 but did nothing about it for five years until the Claimant, just before the Pandemic, sought a mandatory order to require suitable accommodation. Croydon accepted it had been in breach of s.193 HA but put in evidence that it was in budgetary crisis; demand for housing far outstripped supply; it apportioned its stock between Part VI allocation and Part VII homelessness provision but kept that under review; and Ms Imam was 16th on a waiting list of 29 for a wheelchair-accessible property and it did not consider it could adapt her current property, or buy her an adapted property without buying everyone else one.

88. In *R(Imam)*, Lord Sales made the following observations on mandatory orders:

> "38 The duty under section 193(2) is to 'secure' that accommodation is available for occupation by the applicant. Section 206(1) provides that this may be done by "securing" that suitable accommodation provided by the authority is available or that the applicant obtains suitable accommodation from some other person, or by giving the applicant advice and assistance such as will secure that suitable accommodation is available from some

other person. All three processes, and choosing between them, may involve a period of time to allow consideration of how the "securing" of suitable accommodation may be achieved and then carrying that project into effect (for example, by giving an applicant the means or advice to secure accommodation in the private rental market).

41 When…. there has been a breach of such a duty, it is not for a court to modify or moderate its substance by routinely declining to grant relief to compel performance of it on the grounds of absence of sufficient resources. That would involve a violation of the principle of the rule of law and an improper undermining of Parliament's legislative instruction.

42 However, remedies in public law are discretionary [which] allows a court which finds that there has been a breach of a public law duty to decide, in the light of all the circumstances as appear…at the time…how individual rights and any countervailing public interests should be reconciled….

44 Where a remedy is discretionary, it is incumbent on a court to exercise its discretion in accordance with principle and to avoid arbitrariness. Otherwise, the rule of law would be undermined to an unacceptable degree. Where a breach of the law is established, the ordinary position is that a remedy should be granted. A court should proceed cautiously in exercising its discretion to refuse to make an order and should take care to ensure that it does so only where that course is clearly justified. But different types of order are available, and it may be that due enforcement of the law can be sufficiently vindicated by some order other than a mandatory order….

49 The constraint that a court should not make a mandatory order to require compliance with a statutory duty where that is impossible has been recognised in judicial dicta in a number of cases in the context of the duty to secure accommodation for the homeless: *R. v Newham LBC, Ex p. Begum (Mashuda)* [2000] 2 All E.R. 72…see also *Slattery v Basildon BC* [2014] H.L.R. 16, in which Briggs LJ stated (para 32) that if no accommodation is immediately available which is suitable, 'the court will give the housing authority a reasonable period of time in which to find it, by acquisition, conversion, repair or in any other suitable manner'. So, for example, in the *Mashuda Begum* case Collins J said that a court cannot order a local housing authority 'to do the impossible', and this may mean that some delay in the provision of suitable accommodation may be tolerated while the authority makes arrangements which will put itself in a position to carry out its duty; but the court will not be persuaded that it is impossible to secure suitable accommodation 'unless satisfied that all reasonable steps have been taken'. This was the approach adopted by the Court of Appeal in the present case..

54 It is appropriate to start with the requirements that effect be given to the will of Parliament and that the law be enforced in an appropriate manner. The Court of Appeal was right to hold that where the housing authority is in breach of its duty under section 193(2) the onus is on the authority to explain to the court why a mandatory order should not be made to ensure that it complies with its duty. In order to provide the court with reasons to justify the exercise of its discretion not to make such an order, the authority has to provide a detailed explanation of the situation in which it finds itself and why this would make it impossible to comply with an order.

55 As the Court of Appeal said, the authority has to show that it has taken all reasonable steps to perform its duty. Since it is the court which has to be satisfied that it is not appropriate to grant a mandatory order, the question whether the authority has taken all reasonable steps is an objective one for the court to determine, not…..the test of reasonableness or rationality in the *Wednesbury* sense from the perspective of the authority itself.

57 A public authority which has limited resources available for use to meet its statutory duties and to fulfil functions which are merely discretionary is obliged to give priority to using them to meet its duties…..

60 For constitutional reasons to do with the authority of Parliament, the general position, as set out in *Aweys* and *Tandy*, is that where Parliament imposes a statutory duty on a public authority to provide a specific benefit or service, it does so on the footing that the authority must be taken to have the resources available to comply with that duty….

It is not for the court to examine the position with a view to possibly arriving at a contrary conclusion. Nor is a court entitled to dilute a clear statutory duty by reference to its own view of the resources available; nor may it absolve an authority in any general way from complying with such a duty by reason of the insufficiency (in the court's opinion) of the resources…

61 Ms Imam submits that [a] mandatory order should be made against Croydon whether or not it transpires it has a suitable property currently available for use…. In my view, however, this would be to go further than is justified, bearing in mind the appropriate balance between the role of the court and the role of a local authority….

63…[I]f a court makes a mandatory order which has the practical effect of requiring an authority to divert funding from allocations already made in its annual budget, it would unduly disrupt that balancing exercise carried out by the local authority as regards the funding for due performance of its different functions…in circumstances where the authority might be struggling to accommodate and perform properly a range of statutory duties, this may have an unduly distorting effect upon the overall balance already struck by the authority in its previous budgeting process in an attempt to reconcile all the demands upon it.….A court should be careful not to exceed its own proper role by disrupting without good justification the authority's own attempt to reconcile those claims in a fair way through its ordinary budgeting process, once that has been finalised….

66 [O]rdinarily, when judging whether particular conduct is possible or impossible for an authority for the purposes of deciding how the court's remedial discretion should be exercised, the court should refer to the authority's position as it exists at the time of the proceedings. However, this is not an absolute rule and its application may have to be qualified…

67 Five comments should be made which are relevant to the exercise of the court's discretion as to remedy in the present case. First, it may be that in setting its budget for the year Croydon has included a general contingency fund to deal with unexpected calls for expenditure. If so, consideration should be given to whether Ms Imam's need to be provided with suitable accommodation could be met out of that fund. This may be a way in which

Croydon could meet its legal obligation to Ms Imam with minimal risk of disruption to the proper carrying out of its general functions. If there is such a contingency fund, Croydon should explain why it cannot be used.

68 Second, it is a factor relevant to the exercise of the court's discretion if it emerges that the authority was on notice in the past of a problem in relation to the non-performance of its duty but failed to take the opportunity to react to that in good time. The court cannot provide encouragement for what would amount to a settled position of the authority to act in disregard of the duty imposed on it by Parliament. The longer an authority with notice of the problem has sat on its hands, the more important it may be for the court to enforce the law by making a mandatory order rather than marking the unlawfulness of the authority's conduct by making a quashing order or declaration…[A]n inquiry may be required to examine when the authority became aware of the problem at [council] level and, if they remained unaware of it at that level, why that happened.

69 Third, another relevant factor is the extent of the impact on the individual to whom the duty is owed. It is the vindication of their right which is being denied, and if the impact on them of the failure to comply with it is very serious and their need is very pressing, this may justify the court in issuing a mandatory order despite the wider potentially disruptive effects it may have. The courts below were right to consider this issue and in doing so were right to point to the fact that the degree of unsuitability of the Property was comparatively limited, though not to be disparaged. The less the impact on the individual, the less compelling will be the grounds for making an immediate mandatory order with potentially disruptive effect. Instead, it may be more appropriate to make a mandatory order which is suspended for a period or a quashing order, to allow the authority time to consider its position and reflect on how best to order its affairs going forward. In cases of this nature a claimant should ordinarily adduce evidence about the impact on them, of which they have better knowledge than the authority. They have a responsibility to provide the court with relevant information to assist it in the exercise of its discretion.

70 Fourth, if there is no sign as things stand at the time the matter is before the court that the authority is moving to rectify the situation and satisfy the individual's rights, that is a factor pointing in favour of the making of a mandatory order. In such a case, the imperative to galvanise the authority into taking effective steps to meet its obligations more promptly will be stronger.

71 Fifth, in deciding whether to make a mandatory order, a court should take care not to create a situation which is unfair to others, by giving a claimant undue priority over others who are also dependent on a local housing authority for provision of suitable accommodation and who may have an equal or better claim as compared to the claimant. In my view, the Court of Appeal was properly alert to this point. It rightly accepted that, in terms of provision of permanent council housing, Ms Imam could not be promoted above others higher up the queue for such accommodation according to the Part 6 scheme: see section 166A(14). But it also correctly relied on the distinction between the duty to provide suitable temporary

> accommodation to Ms Imam under section 193(2) and a mere discretion to make properties available to be used for the purposes of its Part 6 scheme. If it transpires on further investigation that Ms Imam's needs are in competition with those of others with disabilities who are also owed a duty to be accommodated in suitably adapted accommodation pursuant to section 193(2), Croydon should put proposals to the court as to how it ought to proceed and it will be for the court to decide what is the appropriate order in those circumstances.
>
> 73 [The Council] complains that the Court of Appeal intruded in an inappropriate way into an area of economic and political decision-making for which Croydon, as the local housing authority, is democratically accountable. This complaint cannot be sustained. Croydon admits that it was in breach of its statutory duty under section 193(2), so the onus was on it to explain why a mandatory order should not be made. At this point, decision-making has passed from Croydon to the court. It is for the court to decide how its discretion regarding remedy should be exercised."

89. In the wake of a new leading case on an area as complex as mandatory orders in the context of provision of accommodation, it is natural to look for 'worked examples' as to how the principles are applied. This was not done in *R(Imam)* itself, as the Supreme Court dismissed the appeal from the Court of Appeal remitting the case to the High Court to determine what order to make. Counsels' understanding is that *R(Imam)* itself following remission to the High Court has now been stayed. As I said at the start of this judgment, *Westlaw* suggests *R(Imam)* has been cited so far in five cases. Having considered them all, the only ones of relevance are *R(SK) v Windsor RLBC* [2024] EWHC 158 (Admin) and (to a lesser extent) *R(AB) v Westminster CC* [2024] EWHC 266 (Admin). *R(AB)* is helpful on alternative remedy and I referred to it above as the case where the authority made arrangements for a couple with disabilities and dogs to stay long-term in a hotel during the proceedings and whilst declaring a breach of duty prior to that, DHCJ Squires KC held that any objection to the offered property should be pursued by review. Therefore, unsurprisingly he declined to make mandatory orders about a breach in respect of the position before that property was offered. In *R(SK)*, a potentially suitable property was belatedly offered to a mother with two profoundly disabled children, one of whom was still with her, after the other and two other non-disabled children were in local authority care pending a Family Court hearing. Lang J held that there had been a breach of s.193 HA and that a mandatory order might be appropriate on the principles of *R(Imam)*, but further information was required first: on the offered property and resolution of the Family Court proceedings (which would decide how many children lived with her). Ms Rowlands rightly pointed out that Lang J's approach in *R(SK)* illustrates that the Court should take a realistic approach to the grant of relief, which should be flexible enough to meet changes of circumstances. However, before turning to the facts of this case as its own 'worked example' (another reason why I should do so even if academic), it may be helpful to consider how to apply *R(Imam)* to a case of a challenge to interim provision under s.188 HA of 'B&B accommodation' - which I consider generally first before turning to the impact of the 2003 Order.

90. The first point to note is that *R(Imam)* itself was of course a case of a full duty under s.193 HA; where the breach was clear (admitted breach over five years); and where

the solution was clear (a wheelchair-adapted home with an accessible toilet). Therefore, Lord Sales did not discuss the duty at length, but did at [37]-[39] confirm the s.193 HA duty was owed personally to the particular applicant and was enforceable by judicial review. Lord Sales also endorsed the Court of Appeal's view that the s.193 HA duty was 'immediate, non-deferable and unqualified'. However, since 'securing accommodation' by direct provision, third party provision or giving the applicant assistance to secure it under s.206 HA could take time, Lord Sales did not necessarily agree that accommodation had to be available from the time the duty was owed but said it would need to be available within a reasonable time, which was likely to be short given the need. Whilst of course s.188 HA is very different, it is still a duty and works in the same way, as Lady Hale said in *Ali* at [40]:

> "[T]he combination of s.188(1) and s.206(1) means the council's interim duty under s.188 is to provide 'suitable' accommodation. If an applicant is occupying accommodation…unreasonable for him to continue occupying for even one night, it is hard to see how [it]… could ever satisfy s.188(1)."

In that way, the s.188 HA duty is also immediate and non-deferable and must not be delayed or frustrated: *R(Yabari)* at [93]-[96]. Therefore, I consider the principles in *R(Imam)* also apply to s.188 HA, but the Court may be (even) more cautious:

a. Firstly, whilst the s.188 HA duty is to provide 'suitable accommodation' just like the s.193 HA duty, as Lady Hale also said in *Ali* at [18]:

   > "[W]hat is regarded as suitable for discharging the interim duty [under s.188 HA] may be rather different from what is regarded as suitable for discharging the more open-ended duty in s.193(2) [HA]."

   As a consequence, outside the context of the 2003 Order, a s.188 HA challenge to the 'suitability' of accommodation may be more of an uphill struggle for a claimant than a challenge to a s.193 HA 'suitability' challenge. Of course, the accommodation must still be 'suitable' for the applicant and their and their household's 'particular needs'. But generally, these decisions are for the authority, subject to rationality challenge (*Nzolameso* at [13] and see paragraphs 35-38 above), which is a more difficult challenge with a temporary duty.

b. Secondly, with a s.188 HA 'interim accommodation suitability challenge' there may well not yet have been an authority s.184 HA decision on the claimant's application. So, the Court may be cautious of prejudging factual issues properly a matter for the authority, especially in an application for interim relief. Whilst the 'strong *prima facie* case' test for interim relief has been questioned (as noted in *R(Nolson) v Stevenage BC* [2021] HLR 2 (CA) by Hickinbottom LJ at [8]/[20]), in my own judgement it is particularly apt in this context where the Court will need to tread with great care, not least as a mandatory order to provide scarce housing may prejudice other applicants' rights to the same 'pool' of housing, as Lord Sales said in *R(Imam)* at [71]. That is also obviously relevant to the 'balance of convenience' test (see the *Administrative Court Guide* (2023) para.16.6.1) Of course, the present case is no longer one of interim relief, but as I will explain, I respectfully agree with HHJ Williams' refusal of it in this case on 22nd December 2023.

c. Thirdly, even after a substantive hearing and finding of breach of s.188 HA (as here), one reason for the Court's caution is that the s.188(1) HA duty only continues until a s.184 HA decision on the application is 'notified' as provided for by s.188 HA itself as amended in 2017 (see paragraphs 31-32 above and *R(Mitchell)*). Therefore, even on a successful s.188 HA suitability challenge, the Court will not know whether or when the authority will accept an ongoing duty to the applicant. If the authority's decision turns out to be adverse to the applicant, they may well have the right to review the decision under s.202 HA, but if so there is no *duty* to accommodate under s.188(1) HA, only a *power* to accommodate pending review under s.188(3) HA: which is a 'balancing exercise': *Francis v KCLBC* [2003] HLR 50 (CA). Therefore, a mandatory order under s.188(1) HA prior to a decision must not after the decision then convert a *power* under s.188(3) HA into a *duty*. That has now become a potential issue in this case.

d. Fourthly, therefore, if a s.184 HA decision is made shortly before the hearing of a s.188 HA challenge (which is not uncommon in this field) a Court may well take the view that the s.188 HA challenge is academic (see *R(Nolson)/ R (L, M and P)*) or there is an alternative remedy in the form of a s.202 review of that s.184 HA decision (see paragraphs 40-43 above and *R(Ahamed)*). A s.202 HA review will be much more appropriate if an offer of accommodation has been made, rather than 'rolling judicial review' which can undermine the 'procedural rigour' required in judicial review proceedings: see *R(AB)* [36]-[43].

e. Finally, given all that, with s.188 HA 'interim accommodation suitability challenges', even if a breach is established and the onus is on the authority to justify why a mandatory order should not be made (*R(Imam)* at [54]), claimants should expect to address these sorts of concerns. There should ideally be evidence from the claimant themselves which does so and detailing the impact of the accommodation on them and their family: see *R(Imam)* at [69]. However, in my own view, such evidence is more likely to have weight if it calmly details the impact on the applicant and explains why a mandatory order is justified notwithstanding the undoubted pressures on authorities, rather than just making a series of bald assertions and shrill complaints (but happily Ms Maher's statement is not guilty of that failing).

I emphasise of course that those are just some thoughts on 'interim accommodation suitability challenges' in the light of *R(Imam)* which are common – especially for interim relief. They are intended as a 'quick reality check' for advisers to claimants as these cases are urgent and must be rushed. They must obviously not be seen as determinative.

91. Nevertheless, especially given the dearth of prior case-law on the 2003 Order, I believe those general points can be crystallised into slightly firmer observations on the distinction between cases either side of the '6-week limit' (see para.61 above):

a. For 'suitability' challenges to s.188 HA 'B&B accommodation' prior to 6 weeks' occupation by applicants with dependant children falling within the 2003 Order, 'the ordinary run' of such cases may face an uphill struggle. Prior to 6 weeks' occupation, Art.4(1)(a) creates an exception to 'deemed non-suitability' under Art.3 of 'B&B accommodation' where alternatives

are not 'available' - a question of judgement for the authority. If that exception applies, the same is true (prior to the '6-week limit') of suitability under s.206 HA (and Lady Hale's comments in *Ali* at [18] on 'short-term suitability' will doubtless feature in every defendant skeleton argument). All the reasons for caution listed in the previous paragraph may therefore apply. Naturally, the court will scrutinise the authority's evidence to see whether it has 'taken into account' under s.182 HA the Homelessness Code at para.17.42 that 'B&B accommodation' should be a 'last resort'. However, the demands on local authority resources at present are well-known and the court may well be concerned that those resources (and its own) are not expended on in a 'problem of short duration' (c.f. *Sacupima* at [17]) pending a s.184 HA decision. To use Latham LJ's phrase in *Sacupima*, the court will look not for 'exceptional circumstances' but rather 'compelling evidence of significant breach'. However, of course I emphasise that if this can be shown, doubtless courts will not hesitate to act prior to 6 weeks, including by interim relief (for example, while not involving a child, the significantly-disabled applicant placed in wholly unsuitable 'B&B' accommodation in *R(Lindsay) v Watford BC* [2017] EWHC 3820).

b. However, for suitability challenges to s.188 HA 'B&B accommodation' after 'the 6-week limit' (at least where breach is established), the balance will be different, including on interim relief. Given the 'hard-edged' nature of Arts.3-4, it may be easier to establish a 'strong *prima facie* case' (or even to prove a breach itself), especially if there is over 6 weeks' actual residence of a child with the applicant parent in what is clearly 'B&B accommodation', as here. However, even with a breach, a mandatory order will not follow as a matter of course, for the reasons I will now explain.

92. I turn back to *R(Imam)* to apply it to the context of the 2003 Order. As Lord Sales said in *R(Imam)* at [49], [54] and [55] quoted above, the court's approach to mandatory orders to enforce breach of statutory duty in judicial review places an 'onus on the authority to explain to the court why a mandatory order should not be made to ensure that it complies with its duty'. So, 'the authority has to provide a detailed explanation of the situation in which it finds itself and why this would make it impossible to comply with an order'. However, 'impossibility' must not be misunderstood: Lord Sales endorsed Collins J in *Mashuda Begum* and the Court of Appeal in *R(Imam)* itself that 'the court will not be persuaded that it is impossible to secure suitable accommodation unless satisfied that all reasonable steps have been taken'. Therefore, 'the authority has to show that it has taken all reasonable steps to perform its duty' but 'the question whether the authority has taken all reasonable steps is an objective one for the court to determine, not the test of reasonableness or rationality in the *Wednesbury* sense'. Applied to the 2003 Order, the 'non-availability' of 'non-B&B accommodation' after 'the 6-week limit' is no longer any sort of 'defence' (for want of a better word) to breach of statutory duty for failing to provide 'suitable accommodation' under s.188 HA (indeed, as I have said, 'B&B accommodation' is then deemed to be 'non-suitable' accommodation). However, such 'non-availability' is highly relevant to whether the authority can prove to the court's satisfaction that it has taken 'all reasonable steps' to comply with its statutory duty. Nevertheless, to do so it seems to me the authority is likely to need to prove to the court not only that 'non-B&B accommodation' is 'not available', but also that it is 'not available' despite the authority 'taking all

reasonable steps' to try to make it 'available', having regard to its statutory duty. After all, as Lord Sales also said in *R(Imam)* at [57] and [60], the authority must be taken to have sufficient resources to comply with its statutory duties, even if it has to give priority to them over other expenditure on the authority's statutory powers and discretions. Indeed, as Mr Nabi said and as shown by *R(Imam)* itself at [56] and [71], this may include using available properties earmarked for allocation under Part VI HA rather than homelessness provision under Part VII HA (as opposed to changing the applicant's priority for allocation and 'queue-jumping' her). Nevertheless, as Ms Rowlands also pointed out, Lord Sales also made very clear in *R(Imam)* at [61]-[65], the court should not make a mandatory order the effect of which would be to disrupt the authority's current annual budget, like buying a new property: such a submission was rejected in *R(Imam)*.

93. In the light of that, whilst Lord Sales' analysis in [67]-[71] of *R(Imam)* was directed towards s.193 HA (indeed that particular case) it was also plainly expressed to be of wider application. It can be adapted into some 'headings' which a court might expect to see in an authority's evidence resisting a mandatory order (not there in *R(Imam)* itself – [56]) in the context of 'B&B accommodation' in breach of s.188 HA and the 2003 Order:

    a. Firstly, by reference to *R(Imam)* at [67], it may be helpful for an authority's evidence to detail its budgetary position and relevant aspects of its current budget, e.g. whether there is a 'contingency fund'. This is not because the court is entitled to start telling the authority how to spend its budget (*R(Imam)* at [61]-[65]), rather it simply contextualises whether the authority has taken 'all reasonable steps'.

    b. Secondly, in the present context, given Art.4 of the 2003 Order, it may be helpful for an authority's evidence to detail the 'availability' of its own and other local housing resources (including properties earmarked for Part VII allocation) and the pressures between 'supply' and 'demand' for them.

    c. Thirdly, against that context, by reference to *Nzolameso* at [38]-[41] it may be helpful for the authority's evidence to explain any relevant policies it has adopted so as to comply with the 2003 Order (including under s.11(2) CA 2004) and indeed, current progress on efforts to expand 'availability'. As Lord Sales emphasised in *R(Imam)* at [68] and [70], the authority should also deal with *when* it was 'on notice' of the problem and *what* it is actively doing about it. Authorities should note the 'onus' is on them to persuade the court and it will expect *evidence* of 'all reasonable steps', not just *assertion* of it.

    d. Fourthly, it may help to contextualise the claimant's position and help the court understand the potential impact on others in a similar position (*R(Imam)* at [71]) for the authority to provide current homelessness statistics tailored to the case – e.g. how many families are in the same position as the claimant's family (and where the claimant is in any relevant 'waiting list').

    e. Finally, by reference to *R(Imam)* at [69], it may be helpful for the authority to address in evidence the specific impact of breach on the individual claimant and their family (and for the claimant to prepare a *short* statement in response – see paragraph 90(e) of this judgment above). This is the real relevance of the extent to which a child can and does in fact stay at the 'B&B

accommodation' given alternative accommodation within the family. Indeed, it seems to me that the authority should detail not just the 'strategic steps' which it is taking to 'increase availability' generally (which the Defendant has plainly done here), but the specific steps taken *in the claimant's case* to secure alternative accommodation in the three different ways described in s.206 HA (see *R(Imam)* at [38]). After all, as Lord Sales said at *R(Imam)* at [37], the duty is owed to the individual applicant to secure accommodation in one of those three ways under s.206 HA. Of course, it may be the authority can show that it took all reasonable steps, but none were effective given lack of availability of accommodation, in which case a mandatory order may very well not be made. However, it should still *evidence* that it took all reasonable steps to comply with that duty.

94. Finally, whilst I do not for a moment suggest this is anything like a requirement (not least as it was only mentioned in passing by Lord Sales in *R(Imam)* in the concluding sentence of [71] as 'Croydon putting proposals to the court'), it may be helpful for a court to be presented with different 'realistic options' (including the status quo) and evidence of their advantages and disadvantages and for the claimant to comment on that (whether in evidence or submissions). After all, the court's discretion to make a mandatory order to enforce statutory duties in the context of children and families is not so dissimilar to courts' evaluative decisions concerning children or vulnerable parties in the Family Court and the Court of Protection where such a 'balance sheet' or 'pros and cons' analysis is now commonplace. This is unequivocally <u>not</u> because the court is making a decision on the basis that the children's welfare is paramount or even the primary consideration even under s.11(2) CA 2004 – *Nzolameso* at [28]. It is simply a forensically helpful way of presenting evidence to assist the court to make its decision, in the same sort of way as a 'Scott Schedule' is. Of course, since the onus is on the authority and the information is more likely to be in the knowledge of the authority, one would expect that 'realistic options' evidence to come primarily from the authority, but it also assists the court to understand how those different options are challenged by the claimant. Indeed, it may even be a helpful discipline for the authority to think laterally about a solution, rather than baldly asserting that 'there is no alternative'.

95. Against that context, I turn to whether I would make a mandatory order in the present case, leaving to one side for the moment the s.184 HA decision since my draft judgment. There was much debate between Mr Nabi and Ms Rowlands as to whether or not the Defendant could run or was running a 'resources defence'. But, the simple point is *whether* and if so *why* alternatives to 'B&B accommodation' are not practically available to the Defendant to accommodate the Claimant and C are directly relevant to whether it has taken 'all reasonable steps' to comply with its duty to her: *R(Imam)* at [49]/[55], especially as it cannot be expected to provide a property it does not have: *R(Imam)* at [62]-[63]. Whilst Ms Hayes' email of 15th November 2023 pre-dated *R(Imam)* on 28th November 2023; and her statement was only prepared a fortnight later on 15th December 2023, Ms Hayes' evidence addresses many of the points I have listed as relevant: its budgetary position, the availability of its housing resources, its plans to expand its resources by new accommodation being made available in April 2024, its current homeless statistics and the Claimant's 'relative position' by comparison to other applicants and the Defendant's views of the impact on the Claimant and C of her stay in the Hotel.

However, Mr Nabi submitted the Defendant cannot avoid a mandatory order when it has contested breach because it did not recognise that it was in breach. Whilst I accept that may be relevant, it cannot be decisive, otherwise a mandatory order would inevitably follow a contested hearing, irrespective of whether the authority has taken 'all reasonable steps' - indeed even if it did so thinking it was complying with its duty to 'having regard to the need to safeguard and promote children's welfare' under s.11(2) CA 2004 rather than its duty in s.188 HA and the 2003 Order.

96. I consider it helpful to look at the position as it stood before HHJ Williams just before Christmas 2023 by comparison to how it stands before myself 3 months later:

    a. On 22nd December 2023 just before Christmas when HHJ Williams considered the application for interim relief, the Claimant and C had been in the Hotel for just short of 11 weeks – not quite double the '6-week limit'. At that stage, for the reasons I gave at paragraphs 52-55 above, I consider but for the 'deeming' of unsuitability by Art.3, the Hotel was then still 'suitable' for them. Moreover, whilst their solicitors' letter on 8th November 2023 had complained about the absence of a decision, that complaint had been answered swiftly by Ms Hayes on 15th November 2023. She had also explained that no 'non-B&B accommodation' was available (which I accept), but that if the Claimant was unable to return to her tenancy within the 6 weeks (which in context plainly meant 'the 6-week limit' not 6 weeks from when Ms Hayes happened to email), then the Defendant would 'strive to provide self-contained accommodation where availability allowed it', but pointed out that was more difficult because of the dogs. However, Ms Hayes had also pointed out that 34 further units of accommodation should be available from April 2024. In the SGD dated 18th December before HHJ Williams, Ms Rowlands disputed Grounds 2 and 3 of the claim and contended that but for the 2003 Order the Hotel would have been suitable (I have now held, correctly), but whilst the 2003 Order applied C had alternative accommodation with his father and the Claimant was only temporarily homeless from the Flat and the Defendant was 'putting pressure on the landlord to do the repairs'. At that stage, not only would I have refused interim relief as HHJ Williams did, even had breach been admitted, as 'suitability' was demonstrated and showed every indication of being temporary, even with the then brand-new *R(Imam)* decision, I would have refused a final mandatory order.

    b. However, as things stood at Easter at the end of March 2024, the Claimant and C still found themselves at the Hotel. They have now been at the Hotel for 26 weeks – over 4 times the '6 week limit'. The prospect of a return to the repaired Flat has diminished as the landlord is now seeking possession. Meanwhile, the Defendant's position had changed even before its belated s.184 HA decision. After interim relief was refused, it began to dispute the 2003 Order applied to the Claimant at all and therefore there was any limit on the duration of their stay at the Hotel. Until the hearing when the Defendant was pressed about the new accommodation coming on stream, there was no end in sight to the Hotel for the Claimant. Whilst I am (just) persuaded that but for the 2003 Order, the Hotel would remain 'suitable' at this point, as I also said at paragraph 55 above, it was 'approaching the rational limits of suitability'. Now, the Defendant having been found in

breach, it contended the Claimant would have to wait longer still for its compliance.

97. Applying the approach which I extrapolated from *R(Imam)* at paragraphs 92-94, the onus is on the Defendant to show that it has taken 'all reasonable steps'. Whilst I accept the Defendant has taken all reasonable 'strategic' steps to *expand* its available accommodation (in particular with the new accommodation coming on stream first in 2023 and then from April 2024) what the Defendant has not done in Ms Hayes' evidence is to explain what steps it has taken *for the Claimant* under s.206 HA to:

    a. Secure 'non-B&B accommodation' for her and C from its own stock. Indeed, as Mr Nabi points out, despite being flagged up in *R(Imam)* at [71], Ms Hayes does not discuss the 'availability' of accommodation earmarked for 'Part VI HA allocation'. Ms Hayes' email refers to an allocations process and the panel but does not address whether accommodation earmarked for allocation under Part VI HA could have been practically reassigned for use under Part VII HA to avoid a breach of duty under it to the Claimant, rather than being used to facilitate performance of a power under Part VI HA. That is not the same as *allocating* under Part VI HA the Claimant a property when she has a tenancy, which may well be inconsistent with its allocation policy and/or Part VI HA.

    b. Secure 'non-B&B accommodation' from some other person'. Ms Hayes' evidence proves that such accommodation is not 'available' to the Defendant (which is not an exception after 'the 6-week limit' in Art.4 2003 Order) but does not evidence specific *inquiries* made as to local accommodation which it could 'secure' for the Claimant from other landlords which was not 'B&B accommodation' like the Hotel.

    c. Give the Claimant advice and assistance such as will secure 'non-B&B accommodation'. Such efforts may have proved futile, but there is very little detail in Ms Hayes' statement about what advice and assistance has actually been given to the Claimant, even if the letter accepting the relief duty under s.189B HA (which is a lesser duty than under s.188 / 206 HA, as I have explained at paragraph 30 above) suggested the Defendant could help with a deposit if the Claimant identified a private-sector rental property.

    The question is not whether any such steps would have in the end made a difference (this is not a claim in tort), but whether the Defendant has taken 'all reasonable steps'. For those reasons, I concluded in my draft judgment that the Defendant could not show that it had done so. Therefore, I considered as Lady Hale put it in *Ali* at [51], 'enough is enough' and I said I would grant a mandatory order.

98. However, since the Defendant has now made that s.184 HA decision, as Ms Rowlands submits, the Defendant has now ceased to owe the Claimant the duty under s.188 HA, so the draft order the parties had agreed after my draft judgment which provided for that duty to continue until its s.188 HA duty ended cannot be made. However, even though the Defendant has decided that the Claimant is intentionally homeless under s.191 HA, it accepts that it still owes her the duty under s.190(2) HA to 'secure that accommodation is available for their occupation for such period as they consider will give him a reasonable opportunity of securing accommodation for his occupation' (as well as providing advice and assistance to

that effect). I understand the Defendant has indicated it will accommodate the Claimant and C until 2nd May 2024, which from 4th April 2024 is just over four weeks, which Mr Nabi accepts is a typical period. He initially submitted that as the s.190(2) HA duty is also covered by the 2003 Order, I should make a mandatory order at least until 2nd May 2024. In my judgment, that would have been the correct way to proceed in the circumstances. However, in the end, it was agreed that if the Defendant agreed to accommodate the Claimant on that basis she will be moved to non 'B&B accommodation' on 22nd April 2024 and that was recorded as a recital in my order, there would be no need for a mandatory order. But for that agreement, I would have made one until 2nd May 2024.

What Mandatory Order would have been appropriate ?

99. This final issue now is genuinely academic and *obiter*, but it was originally fully argued, so I will offer these short observations as to the conclusions I came to in my draft judgment prior to the decision letter which has prompted the change. Originally, Mr Nabi sought a mandatory order within 7 days. Ms Rowlands having taken instructions confirmed that alternative accommodation would be available for the Claimant and C from 22nd April 2024 if no s.184 HA decision had been made by then that no further duty under the HA was owed to them. Mr Nabi was concerned that period would amount to the same as the '6-week limit' dated from the hearing on 12th March 2024. Following a finding of breach of the '6-week limit' under the 2003 Order, deferring it by six weeks would be giving a defendant the same legal limit of time to act that it has breached many times over. Indeed, deferring a mandatory order for more than six weeks leaving the claimant unlawfully in B&B accommodation for all or part of it might be thought to be making an unlawful order, but I need not resolve that. Nevertheless, in my draft judgment dated 19th March 2024, I was persuaded to defer the effect of the mandatory order by five weeks so as to require the Defendant to provide the Claimant and C with 'suitable non-B&B accommodation' on or before 12 noon on 22nd April 2024 for the following reasons:

    a. Firstly, the Defendant had failed to show that it has taken 'all reasonable steps' to comply with its duty *to the Claimant* to secure her and C suitable accommodation under s.188 HA in any one of the ways under s.206 HA. However, I accepted Ms Hayes' evidence that the Defendant has and is taking 'all reasonable steps' to increase the 'availability' of such accommodation generally to families in the position of the Claimant and C.

    b. Secondly, deferral until 22nd April 2024 would be entirely 'possible' for the Defendant to comply with – indeed, it is its own suggestion for the use of its newly-available accommodation. Moreover, it would give the Claimant and C 'an end in sight' for their residence in B&B accommodation.

    c. Thirdly, as discussed, I was just persuaded that but for the '6-week limit' the Claimant and C's accommodation of the Hotel would have been 'suitable'. There is no evidence of specific harm to C's welfare even given his allergies. Moreover, he is able to stay with relatives two nights a week.

    d. Fourthly, I was the Defendant will before 22nd April 2024 might make a s.184 HA decision (as they then in fact did). Therefore, there was a risk that a mandatory order before 22nd April would be more disruptive for C (if the decision is adverse) than staying in the Hotel which is familiar.

e. Finally, I accept that this is an unusual case where the Claimant has not been able to reside at the Flat since October 2023, but it has been available to her e.g. for storage since at least mid-November, including briefly keeping her dogs there. To an extent, this softens the difficulty of constrained circumstances of B&B accommodation.

However, that is genuinely academic now given the Defendant's agreement to accommodate the Claimant in non-B&B accommodation from 22nd April 2024 (as I understand it until 2nd May 2024). I make no comment on any period beyond that.

100. Finally, I must record my sincere gratitude to Counsel, not only for their detailed and erudite submissions, but for their considerable patience with my inquiries and further 'homework' after the hearing. I hope their huge assistance to me in preparing this judgment will through it end up assisting others in dealing with these very difficult cases.