Neutral Citation Number: [2023] EWCA Civ 992

Case No: CA-2022-001935

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
MR RECORDER MIDWINTER KC
J40CL109

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 August 2023

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE ARNOLD
and
LORD JUSTICE LEWIS

- -

Between:

KATIE-LEIGH WEBB-HARNDEN	**Appellant**
- and -	
LONDON BOROUGH OF WALTHAM FOREST	**Respondent**

- -
- -

Karon Monaghan KC and Amritpal Bachu (instructed by **Hackney Community Law Centre**) for the **Appellant**
Michael Mullin and Scarlet Taylor-Waller (instructed by **London Borough of Waltham Forest**) for the **Respondent**

Hearing date: 13th July 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This is an appeal against a decision of the county court dismissing an appeal against a decision of a reviewing officer of the respondent, the London Borough of Waltham Forest, dated 29 April 2022, finding that accommodation offered to the appellant, Ms Webb-Harnden, in the discharge of the respondent's duty under section 193(2) of the Housing Act 1996 ("the 1996 Act") was reasonable and suitable.

2. In brief, the appellant is a single mother with three children who had lived in London all her life. She became unintentionally homeless and was in priority need. The respondent arranged for an offer of an assured shorthold tenancy in the private sector with a fixed term of 24 months at a rent of £149.59 per week. The accommodation was in Walsall. The appellant requested a review of the suitability of the accommodation. The reviewing officer upheld the decision to offer the appellant the accommodation in Walsall. The reviewing officer considered that the respondent did not have a suitable three-bedroomed property available for the appellant and her family in or near London and, in any event, the appellant would have been unlikely to be able to afford a suitable property in or near London as she was subject to a cap, or limit, on the amount of welfare benefits she was able to receive.

3. The appellant contends that the reviewing officer failed to have due regard to certain of the matters identified in section 149 of the Equality Act 2010 ("the 2010 Act"), namely the need to eliminate discrimination and advance equality, when reviewing the offer of accommodation.

THE LEGAL FRAMEWORK

The 1996 Act

4. Part VII of the 1996 Act provides that various duties are owed to persons who are homeless or threatened with homelessness. A person is homeless if he has no accommodation available for occupation by him and any person who resides with him as a member of his family or who might reasonably be expected to reside with him (see sections 175 and 176 of the 1996 Act).

5. For present purposes, the material duty is that imposed by section 193(2). That duty applies when a person is homeless, eligible for assistance, the authority is satisfied that the person did not become homeless intentionally and has a priority need, and that any interim duty to provide relief has ended (see section 193(1)). Section 193(2) provides that:

> "(2) Unless the authority refer the application to another local housing authority (see section 194), they shall secure that accommodation is available for occupation by that person".

6. The authority may only discharge their duty in certain specified ways, one of which is by securing that the person obtains suitable accommodation from a third party: see section 206(1) of the 1996 Act. One of the ways in which the authority can do that is by securing the offer of a fixed term tenancy for a period of at least 12 months' duration

in the private rented sector. The duty under section 193(2) is brought to an end by the acceptance or refusal of such an offer. The material provisions of section 193 provide as follows:

> "(7AA) The authority shall also cease to be subject to the duty under this section if the applicant, having been informed of the matters mentioned in subsection (7AB)–
>
> (a) accepts a private rented sector offer, or
>
> (b) refuses such an offer.
>
> (7AB) The matters are–
>
> (a) the possible consequence of refusal or acceptance of the offer, and
>
> (b) that the applicant has the right to request a review of the suitability of the accommodation
>
> …
>
> (7AC) For the purposes of this section an offer is a private rented sector offer if–
>
> (a) it is an offer of an assured shorthold tenancy made by a private landlord to the applicant in relation to any accommodation which is, or may become, available for the applicant's occupation,
>
> (b) it is made, with the approval of the authority, in pursuance of arrangements made by the authority with the landlord with a view to bringing the authority's duty under this section to an end, and
>
> (c) the tenancy being offered is a fixed term tenancy (within the meaning of Part 1 of the Housing Act 1988) for a period of at least 12 months."

7. The accommodation provided for the person and his family must be suitable: see section 206(1) of the 1996 Act. Section 210(2) of the 1996 Act provides that the Secretary of State may, amongst other things, specify matters "to be taken into account or disregarded in determining whether accommodation is suitable for a person". The Secretary of State has made the Homeless (Suitability of Accommodation) Order 1996 ("the Order") Article 2 of which provides so far as material:

> "2. Matters to be taken into account
>
> In determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation

> and in determining whether accommodation is suitable for a person there shall be taken into account whether or not the accommodation is affordable for that person and, in particular, the following matters-
>
> (a) the financial resources available to that person, including, but not limited to,-
>
> (i) salary, fees and other remuneration;
>
> (ii) social security benefits;
>
> …
>
> (b) the costs in respect of the accommodation, including, but not limited to,-
>
> (i) payments of, or by way of, rent;
>
> …
>
> (vii) the amount of council tax payable in respect of the accommodation;
>
> …
>
> (d) that person's other reasonable living expenses."

8. Section 208 provides that, so far as reasonably practicable, a local housing authority shall secure that accommodation is available for the occupation of the applicant in their district.

9. An appellant may request a review of particular decisions of a local housing authority under section 202 of the 1996 Act including under section 202(1)(g):

> "any decision of a local authority as to the suitability of accommodation offered to the applicant by way of a private rented sector offer (within the meaning of section 193)."

10. Section 204 provides a right of appeal to the county court on any point of law if the applicant is dissatisfied with the decision on the review.

The 2010 Act

11. Section 149 of the 2010 Act imposes an obligation on a public authority to have due regard in the exercise of its functions to certain specified matters. So far as material, section 149 provides:

> "149 Public sector equality duty
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—

> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> …..
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

12. "Protected characteristics" are defined in section 149(7) and include sex and disability.

13. The general approach to whether the duty has been complied with is well established. The duty applies in the exercise of an authority's functions. In broad terms, the duty under section 149 is a duty to have due regard to the specified matters not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had due regard to the relevant matters, taking into account the nature of the decision and the public authority's reasoning (see, e.g, *Baker v Secretary of State for Communities and Local Government (Equality and Human Rights Commission intervening)* [2009] PTSR 809 at paragraphs 36-37, and *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] Eq LR 60, at paragraph 26). As Lord Neuberger of Abbotsbury PSC observed at para 74 of his judgment in *Hotak v Southwark London Borough Council (Equality and Human Rights Commission intervening)* [2015] PTSR 1189 "the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment". Relevant principles are set out at paragraph 26 of the judgment of McCombe LJ in *Bracking*. As the Court of Appeal has subsequently observed, that decision has to be read in context and the application of the duty will differ from case to case depending upon the function being exercised and the facts of the case. Furthermore, courts should be careful not to read the judgment in *Bracking* as though it were a statute: see *Powell v Dacorum Borough Council* [2019] EWCA Civ 23, [2019] HLR 21 at para 51 and see *R (Kays) v Secretary of State for Work and Pensions* [2022] EWCA Civ 1593 at paragraphs 41 to 42.

THE FACTS

The Appellant's Application for Housing Assistance

14. The appellant is a single mother with three children. On 19 May 2021, she approached the respondent for assistance with housing as her landlord had indicated that he wished to recover possession of the flat in which the appellant and her children were living.

15. On 12 August 2021, the respondent notified the appellant by letter that it had accepted that the appellant was eligible for assistance, was homeless, had a priority need and had not become homeless intentionally. The respondent therefore accepted that the appellant was owed a duty under section 193(2) of the 1996 Act.

The Respondent's Policy

16. The respondent has a policy, adopted in April 2021, of offering private rented sector accommodation (referred to in the policy as PRSO) as a means of discharging, amongst other duties, its duty under section 193(2). The introductory section of the policy noted that in Waltham Forest there was a high demand for accommodation but a very limited supply of social housing. It noted that the respondent anticipated that a private sector tenancy would be appropriate for most tenants unless there were exceptional circumstances which meant that that was not possible. Section 2 of the policy set out the key principles. The material parts are in the following terms:

> "2.1 The Council's policy is to make available suitable PRSO accommodation within Waltham Forest wherever reasonably practicable, except in cases were there is a specific reason why the household should not be accommodated within the borough (e.g. those at risk of violence in Waltham Forest).
>
> …
>
> 2.3 Changes to the local housing market and other factors largely outside the Council's control have made it increasingly difficult to acquire properties for use as PRSO accommodation in the borough and surrounding areas that meet the standards that are required. The service may therefore acquire properties in a range of other locations where it appears the supply of units in the borough will not be sufficient for the anticipated demand.
>
> …
>
> 2.5 In assessing the suitability of any property for a PRSO for a particular applicant, the Council will consider whether or not that applicant can afford their housing without being deprived of basic requirements such as food, clothing, heating, transport and other essentials, and in so doing will take account of the costs arising from the location of the accommodation.
>
> 2.6 The Council will also take account of the distance from the borough, potential disruption to employment, education or caring responsibilities, accessibility of essential medical services and transport, and accessibility of local amenities…

> 2.7 Any decisions regarding an offer of a PRSO will have regard to the Council's obligations under the Children Act 2004 including the need to safeguard and promote the welfare of children.
>
> 2.8 Any decisions regarding the offer of a PRSO will have regard to the Homeless (Suitability of Accommodation) Order 2012."

17. The remainder of the policy makes it clear that the power to discharge the homelessness duty through an offer of private rented sector accommodation will be "actively considered in all cases" (paragraph 3.0). It notes that the decision on whether to make such an offer will depend on a number of facts. It noted that properties would be zoned as follows: Zone A, properties located in the London Borough of Waltham Forest, Zone B, properties located in Greater London and districts in six neighbouring counties, Zone C, properties located outside Zones A and B. Paragraph 3.6 of the policy noted that applicants would be individually assessed to determine the type and location of the accommodation to be offered. Paragraph 3.8 set out the households that would normally be given the highest priority for accommodation within or close to the borough, including, by way of example, those households with children about to take significant examinations, or who had education health and care plans, or who were the subject of child care plans, or households where a person was receiving treatment for mental health problems. Paragraph 3.11 of the policy set out further factors which would be taken into account when prioritising between households. Paragraph 3.13 noted that before an offer of private rented sector accommodation was offered, "an affordability assessment will be carried out to ensure that the offer is suitable for the household". Paragraph 3.14 provided that:

> "3.14 Households in receipt of welfare benefits may be subject to restrictions on the amount of benefits they can receive, which may affect their ability to pay rent. Offers of accommodation in Waltham Forest or nearby boroughs are subject to affordable accommodation being available and the applicant being able to afford accommodation in those areas. If the benefit restrictions (cap) makes properties in Waltham Forest and London unaffordable then they will not be regarded as suitable."

The Offer of Accommodation.

18. On 8 September 2021, the appellant was notified that she would be evicted from the property that she then occupied on 22 September 2021. The appellant informed the respondent.

19. By letter dated 20 September 2021, the respondent notified the appellant that it had arranged an offer of an assured shorthold tenancy with a fixed term of 24 months of a 3-bedroom first floor flat in Walsall at a rent of £149.59 a week. The letter noted that, if the appellant accepted or rejected the offer, the respondent's duty under section 193(2) would come to an end. The appellant accepted the offer and moved to Walsall.

The Review

20. On 30 September 2021, the appellant requested a review of the offer of accommodation. She explained in her request that she was a single mother with three young children (one a two-month old baby) who had lived all her life in Newham in London. Her family and friends lived there and her support network was there. She also noted that she felt that she had been treated unfairly because of the benefits cap (that is, the restriction on the amount of universal credit to which she was entitled). Her mother had been told that a property was available but that the appellant would not be able to afford the rent for this property because the amount of her benefits was capped.

21. On 9 December 2021, lawyers from the Hackney Community Law Centre made detailed submissions to the reviewing officer on behalf of the appellant. On 23 March 2022, the reviewing officer sent a letter indicating that she was "minded to conclude" that the property offered was suitable. The letter was detailed, running to 121 paragraphs, and gave an opportunity to comment in writing or in person.

22. The Hackney Law Centre made further representations on 30 March 2022. The representations stated, amongst other things, that the appellant had not been offered temporary accommodation but instead had been made a final offer of accommodation which would bring the duty under section 193(2) to an end. The representations stated that if temporary accommodation had been offered, rather than a final offer of a private sector tenancy, the housing costs would be met through housing benefits, payable by the respondent, and would not be taken into account for the purposes of determining the amount of universal credit to which the appellant was entitled. The representations further stated that it had been held that the benefits cap "indirectly discriminated against women over men" (citing the Supreme Court decision in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289). They stated that reliance on the benefits cap to justify placements was based on a discriminatory form of benefit and that the respondent's policy of offering private sector tenancies described in paragraph 3.14 of its policy was tainted with illegality. The representations made further points over 15 pages.

23. By letter dated 29 April 2022, the reviewing officer decided that the offer of the property in Walsall was a reasonable and suitable offer. She further concluded that the decision to bring the duty under section 193(2) to an end was lawful and correct. The reviewing officer set out her reasons in detail. The review letter should be read fairly and as a whole. The letter sets out the background. It identified the grounds (approximately 13) appearing from the e-mail sent by the appellant on 30 September 2021 and the representations made by the solicitor from the Hackney Community Law Centre. The review letter set out extracts from the relevant guidance and set out, amongst other provisions, section 149 of the 2010 Act.

24. The letter identified that the first ground on which a review was sought was that the appellant claimed that she had been treated unfairly in relation to the benefit cap in that a property with the rent being around £1,400 had been found but the appellant could not afford it because her benefits were capped. The letter noted the solicitor's representations about the benefit cap which alleged that the respondent had relied on the benefit cap as a justification for housing the appellant out of London. The reviewing officer said she disagreed with the solicitor's views.

25. The review letter then considered the other grounds on which the review was sought. One of these involved criticism of the affordability assessment carried out in respect of

the appellant. The reviewing officer reviewed the assessment of the likely costs that the appellant would incur if living at the property in Walsall to determine if that property was affordable. She considered the appellant's rent and daily living costs. The reviewing officer also considered the costs of travel to London to visit family and friends. The reviewing officer considered that the appellant would be able to visit London one weekend in four. The reviewing officer concluded that the accommodation offered was affordable having "fully considered the cost of the rent and other expenditure relating to the property compared to the income available to" the appellant.

26. The reviewing officer considered the relevant aspects of the public sector equality duty. She considered that the move would not affect the appellant's health nor her children's health. She also considered the impact on the appellant of having to move away from her support network and close associations. See paragraph 121 to 124 of the decision letter.

27. The reviewing officer then considered the availability and affordability of accommodation in London. Based on the information provided, the reviewing officer considered the appellant would not have been able to afford accommodation within London given her limited income. Furthermore, the reviewing officer considered whether the respondent had suitable, three-bedroomed accommodation, including temporary accommodation, available in London and concluded that it did not as there were no three-bedroomed properties available save for one property which had been already allocated to a family with a greater priority. The decision letter said this:

> "145. I have demonstrated above why you were not provided with the Zone A property. Aside affordability, there were no three-bedroomed properties available for your family unit in particular. I also checked to see the availability of three-bedroomed properties at the time of drafting the Minded To letter and noted that there were not any. In relation to there being a 3-bedroome house in Newham at the time of finalising this decision, this property was already offered to another family who had greater needs than yours.
>
> 146. In line with our Policy the property offered to you was the only property available at the point of offer and this was an appropriate offer for you and your household. As is demonstrated, there was no other three-bedroomed property available to us in London or near London.
>
> 147. In any event, when examining your case overall, it is reasonable for me to say that even if there were three-bedroomed properties available in London or near London, it is unlikely that they may have been offered to your family unit for the reason that you were a non-working household at the time, who was benefit capped and with children who were not at a critical stage in their studies. And if anything, it is possible that they would have been offered to families who would have fallen within the criteria for a placement within the borough or within London."

28. The reviewing officer turned to her conclusion. She noted that the respondent had carried out a balancing assessment between assessing the appellant's needs and the housing stock available to it. The respondent had considered physical and mental health and emotional well-being and had considered if there was any detriment to the children or their education. Finally, the reviewing officer concluded that "based on the current evidence before me there has been no infringement of your rights" under the 2010 Act (referring to the requirements of section 149 (see paragraph 161 of the review letter).

29. The reviewing officer's conclusion there was that:

> "Based on all the information before me, I have concluded that the [Walsall] property offered to you …. to end the Council's statutory duty towards you under section 193(2) of the Housing Act 1996 was a reasonable and suitable offer. I am also satisfied that the decision dated 20th September 2021 to end the Main Duty under section 193(2) of the Housing Act 1996 is one which is lawful and correct."

The Appeal to the County Court

30. The appellant appealed to the county court. By a judgment given on 14 September 2022, Mr Recorder Midwinter KC dismissed the appeal.

THE APPEAL AND SUBMISSIONS

31. The appellant appeals with the permission of Arnold LJ on one ground, namely:

> "The Respondent breached s. 149(1) of the Equality Act 2010 (the Public Sector Equality Duty ("PSED") by failing to consider the discriminatory impact of moving the Appellant and/or single parent (female) households out of borough due to being impacted by the benefits cap."

32. Ms Monaghan KC, with Mr Bachu, for the appellant advanced a careful set of submissions to the effect that the respondent's reviewing officer had failed to have due regard to the need to eliminate discrimination and advance equality of opportunity when reviewing the suitability of the offer of accommodation. Ms Monaghan referred to the fact that a cap or limit was placed on the welfare benefits the appellant received. That cap was currently £23,000 a year, having been reduced from £26,000 pursuant to the Benefit Cap (Housing Benefit and Universal Credit) (Amendment) Regulations 2016 made under section 8 of the Reform and Work Act 2016. Ms Monaghan accepted that that limit or cap on benefits did not itself involve discrimination. The Supreme Court had held that the benefits cap involved differential treatment on grounds of sex as it was likely to have a greater impact on women, but that differential treatment was justified. The benefits cap was, therefore, not incompatible with Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") read with Article 8 and Article 1 of the First Protocol to the Convention (see *R v (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 and *R (DA) v Secretary of State for Work and Pensions*).

33. Ms Monaghan submitted that the benefits cap, however, was being used as a proxy, or practice, to determine what accommodation would be suitable for individual applicants so that, where an applicant was subject to the benefits cap, the applicant was offered accommodation in Zone C (outside London or the neighbouring counties). That, Ms Monaghan submitted, amounted to a provision, criterion or practice which put women at a disadvantage and which the respondent might not be able to show was a proportionate means of achieving a legitimate aim and so might amount to indirect discrimination contrary to section 19 of the 2010 Act. In those circumstances, the respondent had to establish that the reviewing officer had had due regard to the need to eliminate discrimination (section 149(1)(a)) and to advance equality of opportunity (section 149(1)(b)). On the evidence, the respondent had failed to establish that the reviewing officer had done so.

34. Further, Ms Monaghan submitted that it was not open to the respondent to submit that the result would necessarily be the same even if the reviewing officer had had due regard to the matters referred to in section 149. She submitted that there were steps that the respondent could have taken if due regard was had to the relevant factors. The respondent could have provided short term temporary accommodation rather than providing for a fixed term tenancy in the private sector which would bring the section 193(2) duty to an end. The cost of such temporary accommodation is met by way of housing benefit payable by the local authority (subsidised by central government) and would not be taken into account when calculating the appellant's benefits. Or the respondent could have prioritised single parent applicants for Zone B private housing or it could have considered making cash payments to top up the appellant's finances. By one or other of these means, Ms Monaghan submitted that the appellant could have been enabled to stay in accommodation within London rather than being relocated to Walsall and the differential impact of the policy on women would have been minimised.

35. Mr Mullin, with Ms Taylor-Waller, for the respondent submitted that Ms Monaghan was wrong to submit that the respondent used the benefit cap as a proxy for determining what accommodation was suitable. Rather, the appellant was offered accommodation following a detailed assessment of her needs and consideration of what accommodation was available and what was affordable to the appellant. While part of that assessment involved consideration of the appellant's income, which was affected by the benefits cap, that was not the basis of the policy or the basis upon which property was allocated. Further, the reviewing officer had considered all the consequences said to result from the decision to offer the appellant accommodation in Walsall and had, in substance, had due regard to the matters in section 149. Mr Mullin relied on the decision in *Haque v London Borough of Hackney* [2017] EWCA 4, [2017] PTSR 769, where the reviewing officer appreciated that the individual concerned had a disability and considered whether the accommodation was suitable having regard to his particular needs. The Court of Appeal held that that satisfied the requirements of section 149. Finally, Mr Mullin submitted that the decision would inevitably have been the same. The appellant overlooked the fact that she would have been unlikely to be allocated accommodation in or near London because of its unaffordability given her limited means. The respondent was entitled to discharge its duty under section 193(2) by securing the offer of a fixed term tenancy in the private sector and was not required to take other steps such as providing temporary accommodation or cash payments. The respondent already operated policies providing for prioritising particular households and those policies had not been found to be unlawful.

DISCUSSION AND CONCLUSION

36. On an appeal in such cases, the focus is the decision of the reviewing officer rather than the decision of the county court. In considering the decision, the court should not take an unduly technical approach to the language used or search for inconsistencies but should ensure that proper consideration has been given to the relevant matters: see the observations of Lord Neuberger at paragraphs 49 to 50 of *Holmes-Moorhouse v Richmond-upon-Thames London Borough Council* [2009] UKHL 7, [2009] 1 WLR 413 and the observations of Baroness Hale at paragraph 32 of her judgment in *Nzolameso v Westminster City Council (Secretary of State for Communities and Local Government and another intervening)* [2015] UKSC 22, [2015] PTSR 549.

37. The starting point is that the duty in section 149 of the 2010 Act provides that a public authority must "in the exercise of its functions" have due regard to certain specified matters. It is sensible first to identify the particular functions that were being exercised in the present case. Here, the respondent was performing its duty under section 193(2) to secure that accommodation was available to the appellant and her children. It could perform that duty by arranging for the offer of a fixed term tenancy lasting at least 12 months in the private rented sector provided that the accommodation was suitable (sections 193(7AA) and 206 of the 1996 Act). In considering whether accommodation was suitable, the respondent was required as a matter of law to have regard to the matters specified by order by the Secretary of State. Those matters included whether the accommodation was affordable and, in that regard, the respondent had to take into account the "financial resources available" to the applicant for housing including "social security benefits" and "costs in respect of the accommodation" including "payments of, or by way of, rent" (see article 2 of the Order). The section 149 duty to have due regard to certain matters, therefore, needs to be considered in the context of the particular housing functions that the respondent local housing authority was exercising. Similarly, the reviewing officer was carrying out a review of that decision and would herself have to have due regard to the specified matters in section 149 in conducting her review.

38. The premise upon which Ms Monaghan bases her submission is that the respondent's policy used the fact that a person was subject to a cap on the benefits that he or she received as a proxy for determining whether the person would be allocated accommodation in Zone A or B (i.e. within London or the neighbouring counties) or Zone C (i.e. further away). That premise is, however, incorrect. A fair reading of the policy indicates that the respondent does not use the fact that someone is subject to a cap on benefits as a means of determining which accommodation should be offered. It is not the case that the respondent's policy involves a crude allocation whereby people subject to the benefits cap are sent to areas away from London and others are not. Rather, read as a whole, the policy provides that the respondent will use offers of private sector tenancies as a means of fulfilling, and discharging, its duty under section 193(2). The policy requires the respondent to have regard to whether a person can afford the accommodation offered (as is required by law) as well as other factors such as disruption to employment, education, or caring responsibilities, and accessibility to essential medical facilities and support. There are provisions for prioritising certain households over others by reference to the needs of children, or by reference to health needs. Paragraph 3.14 of the policy (set out at paragraph 17 above), which is the only part of the policy about which specific criticism was made, simply makes the factual

point that those in receipt of welfare benefits may be subject to restrictions which may affect their ability to pay rent. That is not using the benefits cap as a proxy for determining the accommodation that a person will be offered. It is a simple recognition of one factor, the affordability of the accommodation, in considering what accommodation to offer to a person in fulfilling the duty imposed by section 193(2) of the 1996 Act.

39. Against that background, the question is whether the reviewing officer in this case did pay due regard to the matters set out in section 149. That is a question of substance not form. The concerns of the appellant were that she had spent her whole life in the London area and, by arranging for accommodation in Walsall, she would be removed from her family, friends and support network. The appellant was also concerned about what she perceived as the unfairness of the fact that she was subject to the benefits cap as she had been told that a three-bedroomed property was available but the rent was in excess of what she could afford because her benefits were capped.

40. In considering these matters, the reviewing officer was well aware of the need to have regard to the section 149 duty. She set out its terms and referred to it. She considered all the matters that the appellant and the solicitors relied upon in reaching her decision. She considered the impact of moving to Walsall on the appellant and her family. She considered the effect of separation from family and support networks on the physical and mental health of the appellant and her children. She considered whether there were particular needs in terms of access to specialist medical facilities only available in London or whether the appellant carried out any caring responsibilities for family members in London. The reviewing officer assessed the affordability of the accommodation in Walsall and considered the extent to which the appellant would be able to travel to London to visit friends and family. In other words, the reviewing officer carefully considered, and formed a view, on all the disadvantages that were said to result from moving a person, such as the appellant who was a single mother with children, to accommodation away from London and its neighbouring area. The reviewing officer did also consider what was said to be the unfairness of not being able to afford a three-bedroomed property in London but that was the consequence of her limited means given the cap placed on her benefits. I am satisfied that, in substance, the reviewing officer did assess the possibility of providing accommodation in or closer to London, and considered the adverse consequences of offering the appellant accommodation in Walsall. The reviewing officer considered the particular disadvantages that might affect the appellant if she, and her children, were provided with accommodation away from London and its neighbouring area. In the circumstances, however, the reviewing officer concluded, as she said in her decision letter, that the offer was "a reasonable and suitable offer" and the decision to discharge the duty under section 193(2) by making the offer was correct. In reaching that decision, the reviewing officer did fulfil the obligations imposed by section 149 of the 2010 Act.

41. Finally, even if there had been (which I do not consider to be the case) any breach of section 149, this is not a case where it would have been appropriate to set aside the reviewing officer's decision. The decision would inevitably have been the same. The position is that the respondent determined to fulfil its section 193(2) duty by arranging for an offer of a private rented sector fixed term tenancy. That would have the effect of bringing the section 193(2) duty to an end. In making that offer, the respondent had to have regard to the affordability of the accommodation. The accommodation offered in

Walsall was affordable for the appellant. There was no temporary accommodation available for the respondent to allocate to the appellant in London or the neighbouring regions and, in any event, the appellant would be unlikely to be able to afford it and so it would not be suitable for the appellant. That situation would not be altered by having due regard to the matters specified in section 149 of the 2010 Act.

42. Ms Monaghan submitted that the respondent could have decided to perform its duty by providing temporary accommodation, that is accommodation which was suitable in the short or medium term but would not amount to a discharge of its duty. It is, however, for the respondent to determine when to discharge its duty and, in particular, whether to arrange for the offer a fixed term tenancy at a particular date rather than providing temporary accommodation with a view to seeing whether other suitable accommodation closer to the appellant's previous home would become available. As Lewison LJ observed at paragraph 75 of his judgment in *Alibkhiet v Brent London Borough Council* [2018] EWCA Civ 2742, [2019] HLR 15,

> "I would accept that in some cases considerations of timescale are relevant considerations. If, for example, a housing authority is aware that a development is approaching completion and that it will provide affordable housing, that may well be relevant to the question whether it should discharge its housing duty immediately, or whether it should wait until the development is complete. However, in this case the shortage of housing in Westminster is the constant backcloth against which all housing decisions are currently made. That is clear not only from the review decision, but also from the key principles of the placement policy. If a housing authority decides to discharge its full housing duty by making a private rented sector offer, I do not consider that it must wait in the Micawberish hope that "something will turn up". It follows, in my judgment, that Westminster discharged its duty by inquiring what suitable accommodation was available at the time at which it made its offer."

43. To like effect is the observation of Newey LJ at paragraph 42 of his judgment in *Broderick v Bromley London Borough Council* [2020] EWCA Civ 1522, [2021] PTSR 477 that:

> "I would think, however, that it would be relatively rare for an authority's decision to make an offer on a particular date rather than to delay to be susceptible to successful challenge, especially where, as was the case in *Alibkhiet* , a "shortage of housing … is the constant backcloth against which all housing decisions are … made". In a more normal case, it will not be possible to say that the authority has acted outside its discretion."

44. That is the position in the present case. The respondent decided to arrange for an offer of private rented sector accommodation on 20 September 2021 which would have the effect of discharging the duty under section 193(2). There was no proper basis for concluding that it was required to make a different decision and to offer temporary accommodation, apparently for an indefinite period, leaving the section 193(2) duty

undischarged. This was not a case where, realistically, other suitable accommodation was likely to become available such that the respondent should have considered whether it should not have discharged its duty immediately but should, rather, have provided temporary accommodation. The reviewing officer was correct in deciding that the decision to discharge the duty under section 193(2) was, in her words "lawful and correct". There is no basis for considering that consideration of the matters specified in section 149 would have led to any other conclusion.

45. Secondly, and separately, the duty under section 149 is, as Lewison LJ observed at paragraph in *McMahon v Watford Borough Council* [2020] EWCA Civ 497, [2020] PTSR 127:

> "not a freestanding duty. It applies to the way in which a public authority exercises it functions."

46. That observation applies here. The function that the authority was performing was the discharge of its duty under section 193(2) of the 1996 Act. It could perform that function by arranging for a private rented sector offer of an assured tenancy. The section 149 duty applied to that function. In performing that function, however, the respondent had to have regard to the affordability of the accommodation and that, in turn, required the respondent to have regard to the means of the appellant (including whether those means were limited by a cap on welfare benefits). That meant that the accommodation in Walsall would be suitable, as it was affordable, whereas temporary accommodation in or near London (which in fact was not available) would not be likely to be affordable to the appellant. Consideration of the section 149 duty could not lead to any different conclusion. What the appellant is, in truth, seeking is a different result. She wishes to have the section 193(2) duty performed in a different way by the provision of temporary accommodation which is suitable in the short or medium term but which will not bring the section 193(2) duty to an end. She does not want the respondent to discharge its duty by arranging a private rented sector offer within the meaning of section 193(7AC). The reason why the appellant wants the section 193(2) duty to be performed in that way is that it will avoid the application of the benefit cap and enable her to be provided with temporary accommodation in London with the cost of the accommodation being paid for by the local housing authority. That, however, is to seek to use section 149 to achieve a substantive result: the performance of a function in a different way with different legal consequences from the way in which the respondent wishes to perform the function. That is not the purpose of section 149 and is not what the section requires. In those circumstances, the reviewing officer was also entitled to conclude that the respondent's decision to bring the section 193(2) duty to an end by arranging for the offer of a fixed term tenancy was lawful and correct and that conclusion would not be affected by consideration of the specific matters identified.

47. The same applies to the other option suggested by Ms Monaghan, namely that the respondent could provide additional financial payments to the appellant, thereby enabling accommodation to be provided for the appellant in or near London which the appellant could afford by means of universal credit and the additional money provided. That would be to require the authority to exercise other statutory functions (the provision of discretionary housing payments). It is not a means of ensuring consideration of the specified matters in section 149 in the exercise of its functions in fulfilling the section 193(2) duty. Ms Monaghan also submitted in her skeleton argument that the section 149 duty "could involve prioritising single parent applicants

for Zone B private housing". The respondent has adopted a policy governing the prioritisation of households (see paragraph 3.11 of the policy which is described in paragraph 17 above). That policy has not been criticised or challenged in these (or, it seems) other proceedings. The section 149 duty, when applied to the decision to arrange for the offer a private rented sector fixed term tenancy, does not require the respondent to adopt a different policy and, more significantly, there is no evidential basis for considering that would result in the respondent exercising its functions under section 193(2) in a different way on the facts of this case.

CONCLUSION

48. For those reasons I would dismiss the appeal. The reviewing officer did have due regard to the matters specified in section 149(1)(a) and (b) of the 2010 Act in deciding that the offer of accommodation in Walsall was a reasonable and suitable offer and that the decision of the respondent to discharge its duty under section 193(2) by arranging that offer was lawful and correct. In particular, the reviewing officer had due regard to the consequences to the appellant, and her family, of discharging the function under section 193(2) in the way that the respondent proposed.

LORD JUSTICE ARNOLD

49. I agree.

LADY JUSTICE ASPLIN

50. I also agree.