



Neutral Citation Number: [2019] EWCA Civ 57

Case No: B5/2018/1171

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT**  
**Mr Recorder Howlett**  
**D40CL427**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 04/02/2019

**Before :**

**LORD JUSTICE LEWISON**

and

**LORD JUSTICE MOYLAN**

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**Between :**

**MR SIVAPRAGASAM KANNAN**

- and -

**LONDON BOROUGH OF NEWHAM**

**Appellant**

**Respondent**

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**Mr Edward J Fitzpatrick** (instructed by **Hodge Jones & Allen LLP**) for the **Appellant**  
**Ms Tina Conlan** (instructed by **Newham Legal Services**) for the **Respondent**

Hearing date : 29 January 2019

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**Approved Judgment**

**Lord Justice Lewison:**

1. On 3 August 2016, in response to Mr Kannan’s application for assistance with homelessness, Newham LBC accepted that he was unintentionally homeless and in priority need. That acceptance triggered what is called the “full housing duty” under section 193 of the Housing Act 1996. Section 193 (2) describes that duty as a duty to “secure that accommodation is available for occupation by the applicant”. Section 206 provides that a housing authority may only discharge that duty by securing that “suitable accommodation” is available; provided either by the authority or by a third party. The issue raised on this appeal is whether the accommodation provided for Mr Kannan is “suitable”. By a decision made on 31 October 2017 Newham decided that it was. Mr Kannan appealed to the county court against that decision. But on 26 April 2018 Recorder Howlett dismissed his appeal. Following the hearing of the appeal in this court we announced that we would allow the appeal and put our reasons in writing. These are my reasons for joining in that decision.
2. Since 5 August 2016 Mr Kannan and his family have been housed at 157a High Street North in East Ham; so they have now been there for some 2 ½ years. The property is owned by a private landlord. The accommodation consists of a flat on the first floor above a casino. Access is via an external metal staircase of 14 steps. The flat is equipped with a bathroom; but the bathroom has no shower. Mr Kannan suffers from a number of medical conditions which have required extensive reconstructive surgery; and which seriously affect his mobility. Newham accepts that the effect of these conditions amounts to a disability for the purposes of the Equality Act 2010. Mr Kannan has complained about the suitability of the accommodation from the time he moved in. His main complaints have been about the stairs, and the lack of a shower. He has also complained about noise from the casino, but that complaint is not relevant for the purposes of this appeal.
3. Section 210 of the 1996 Act enables the Secretary of State to prescribe what is or is not to be regarded as suitable accommodation; and to prescribe matters to be taken into account in determining that question. He exercised that power in the Homelessness (Suitability of Accommodation) (England) Order 2012; but none of the specific criteria in that order bear on this case. Section 182 also requires housing authorities to take into account guidance given by the Secretary of State. At the relevant time the guidance included the following:

“Housing authorities will need to consider carefully the suitability of accommodation for applicants whose household has particular medical and/or physical needs. The Secretary of State recommends that physical access to and around the home, space and bathroom and kitchen facilities, access to a garden and modifications to assist sensory loss as well as mobility needs are all taken into account. These factors will be especially relevant where a member of the household is disabled.”
4. Lady Hale and Lord Neuberger considered the question of suitability in *Birmingham CC v Ali* [2009] UKHL 36, [2009] 1 WLR 1506. At [18] they noted the different duties that a housing authority may have: on the one hand to provide interim

accommodation pending a decision and on the other to provide accommodation in fulfilment of the “full housing duty” under section 193. They said:

“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 section 193(2); but what is suitable for discharging the “full” duty in section 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 council’s allocation policy determined in accordance with Part VI of the 1996 Act.”

5. They went on to say at [47]:

“There are degrees of suitability. What is suitable for occupation in the short term may not be suitable for occupation in the medium term, and what is suitable for occupation in the medium term may not be suitable for occupation in the longer term. ...the suitability of a place can be linked to the time that a person is expected to live there. Suitability for the purpose of section 193(2) does not imply permanence or security of tenure.”

6. What is clear from that case is that the mere passage of time may turn accommodation that was suitable for the short term into accommodation that is no longer suitable. Lady Hale said so in terms at [48]. In considering whether accommodation is or remains suitable, a housing authority must consider not only the length of time for which the applicant has been there, but also the time for which he is expected to stay: Lord Hope at [3]; Lord Scott at [5]; Lady Hale at [41] and [47]. Clearly this requires some degree of looking to the future.

7. In considering whether accommodation is suitable the reviewing officer is entitled to have regard to “the realities given the practical constraints imposed, both by the numbers of competing applicants for a housing stock limited in quantity and quality by financial constraints”: *R (Omar) v Brent LBC* (1991) 23 HLR 446 at 459. He is equally entitled to take into account “the background of serious shortage of housing and overwhelming demand from other applicants, many no doubt equally deserving”: *Poshteh v Kensington and Chelsea RLBC* [2017] UKSC 36, [2017] AC 624 at [39].

8. Because Mr Kannan has a disability, the public sector equality duty imposed by section 149 of the Equality Act 2010 also comes into play. The impact of this duty on decisions in the field of homelessness has been considered both by the Supreme Court (*Hotak v Southwark LBC* [2015] UKSC 30, [2016] AC 811) and also by this court (*Haque v Hackney LBC* [2017] EWCA Civ 4, [2017] PTSR 769; *Lomax v Gosport BC* [2018] EWCA Civ 1846, [2018] HLR 40). This duty applies at all stages in the decision-making process. In *Hotak* Lord Neuberger said at [78]:

“It is therefore appropriate to emphasise that the equality duty, in the context of an exercise such as a s 202 review, does require the reviewing officer to focus very sharply on (i)

whether the Applicant is under a disability (or has another relevant protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on the Applicant if and when homeless, and (iv) whether the Applicant is as a result "vulnerable".

9. Although the question in *Hotak* was vulnerability, the same approach applies to the question whether offered accommodation is suitable, which was the question in *Haque*; as well as to the question whether it is reasonable for someone to continue to occupy accommodation, which was the issue in *Lomax*. It must be emphasised that Lord Neuberger was instructing the reviewing officer how to go about his task. He was not providing a reviewing officer with a defensive ritual incantation.
10. The public sector equality duty also has a significant impact on the way in which a reviewing officer is entitled to have regard to general housing conditions. In *Lomax* I said, in a judgment with which David Richards and Coulson LJ agreed:

“50. I agree with Mr Hodgson that a generalised reference to the situation of people on the council's housing list, who may or may not have disabilities, let alone disabilities as severe as Ms Lomax', does not have the required sharp focus on Ms Lomax' particular disabilities and the consequences for her of remaining in her current accommodation; and the particular reasons why continuing to occupy her current accommodation would continue to damage her mental health (and in due course her physical health). The reviewing officer says no more than that the accommodation occupied by those households "is having a medical or social impact on them". A social impact is not itself a disability. Nor did the reviewing officer comment on the severity of that medical or social impact.

51. As Mr Drabble submitted, ss.149(3)(b) and (4) require a local authority to have regard to the duty to take steps to meet the different needs of a disabled person as compared to those who are not disabled. Moreover, those steps may involve treating a disabled person more favourably than a person who is not disabled. The comparative exercise that the reviewing officer carried out did not, in my judgment, comply with these duties. Nor did the reviewing officer ever ask himself the question whether Ms Lomax's situation was one which was out of the ordinary or out of the norm. These were significant errors which led the reviewing officer to conclude that he should give "considerable weight" to the general circumstances in relation to housing in the Gosport area. Had he properly applied the PSED in his comparative exercise he would probably have reached a very different conclusion.”

11. As I have said, Mr Kannan has repeatedly complained about the suitability of the accommodation at 157 a High Street North. In his letter of 20 August 2016 he said:

“To reach my present accommodation I have to climb nearly 14 steps. After climbing steps I feel tired and experience severe pain in my abdominal and thigh areas. Doctors have advised me not to strain and complicate the surgical area.”

“I have leg pain.... I have stomach pain, back pain, leg pain and pain in the kneel disc... The climbing of steps up and down is aggravating my pain both in the knee and in the surgical area. If I continue to live in this accommodation it might make me a permanent disabled person.”

“I am advised to take bath 2 times a day. The present accommodation does not have a shower. I cannot even keep a bucket inside the bathtub. I find it extremely difficult while taking bath as I have to bend down several times without shower facilities. There is no hook to put a shower curtain. So after bath there is fear of fall.”

12. In support of his case he produced a letter from his GP which stated:

“I gather that he has been provided with temporary accommodation... Unfortunately that is in the first floor and the stairs are too steep. Due to his illness he finds it difficult to climb the stairs.

It will be helpful if he could be provided with suitable accommodation.”

13. In the light of these representations Newham consulted Now Medical. Dr Thakore assessed him. He noted Mr Kannan’s “chronic health needs and mobility issues.” His assessment was:

“REASONABLE PREFERENCE applies on medical grounds.

Future housing needs:

ground floor maximum if unlifted

any floor with a lift

adequate heating

accessible bathing facilities.”

14. Newham explained to Mr Kannan what “reasonable preference” meant. In their letter of 13 February 2017 they said:

“Reasonable preference – Your home is unsuitable and you need accommodation on medical grounds. When this is awarded and you do not have any other housing need, you are able to bid for advertised properties.”

15. The letter went on to say that Newham had decided to award Mr Kannan “reasonable preference on medical grounds”. Mr Kannan asked for a review of the suitability of his accommodation. In the course of the review Newham once again consulted Dr Thakore. He was asked to “comment on suitability of the current accommodation which is temporary accommodation”. He replied on 1 February 2017:

“Tenure is not a medical matter. Temporary accommodation would not be medically unacceptable.”

16. On 13 February 2017 Newham announced the result of its review of the suitability of Mr Kannan’s accommodation. It decided that the accommodation was suitable. Mr Kannan appealed to the county court against that decision. That appeal was compromised on the basis that Newham would undertake a fresh review. It is the fresh review with which we are concerned. The relevant parts of the decision letter on the fresh review, dated 31 October 2017, read as follows:

**“Grounds for review**

10. You stated that the accommodation offered to you at 157a High Street North ... is not suitable due to medical reasons. You stated that the accommodation is in top of a shop and the entrance is through the backyard. You stated that you have to climb several steps to access the property. Furthermore, you stated that you have mobility issues and you cannot climb more than two steps at a time.

12. Your solicitors ... made the following submissions “It is evident from this response from your own medical advisor that he has confirmed our client’s housing needs, having considered his mobility and chronic health conditions and advised that our client requires a “ground floor” or “any floor with a lift” and “accessible bathing facilities”. Despite these recommendations regarding his needs you have placed our client and his family in a property above ground floor with limited access via stairs only and inaccessible bathing facilities.

13. The solicitors have also argued that you have been forced to reside at this property for over a year since being made the offer in our letter of 05/08/16 and you have now resided on more than a temporary basis.

**Review Findings**

**Accommodation not suitable because of mobility issues**

14. You stated that your accommodation is not suitable because of your medical problems and in particular your mobility issues which limits your ability to climb stairs. ... You stated that the gangrene affected area feels inflated all the time and as a result you are unable to climb the 14 stairs.... You stated that after

climbing up you feel tired and experience severe pain in your abdominal and thigh areas.

17. The independent medical adviser noted that Reasonable Preference applies to your case on medical grounds and that for future housing needs there is the need for ground floor maximum if un-lifted, any floor with a lift, adequate heating and accessible bath facilities. They also recommended that the temporary accommodation was not deemed medically unacceptable.

18. ... Although I accept that you have mobility issues and the stairs are challenging, I am satisfied that the temporary accommodation is suitable. However, if the property becomes unsuitable as a result of a change in your circumstances or a deterioration in your health, then you are always at liberty to request a review.

20. I accept that you have chronic health needs and mobility issues and the stairs to the property on the first floor may not be easy or ideal to climb. Whilst I appreciate that the stairs may be uncomfortable and inconvenient, I do not accept that your present medical conditions render the accommodation unsuitable. The stairs may be an issue, but it seems to me that the number of stairs are modest for the family to climb and on balance I am satisfied that the accommodation is suitable for your housing needs.

### **Equality Act**

28. ... I am satisfied that you may have a disability as defined under section 6 (1) of the Equality Act 2010. However, notwithstanding this, the accommodation is adequate for your household's needs.

29. I can confirm that I have reached this decision with the equality duty well in mind and carried out this exercise in substance, with rigour and with an open mind. I have focused very sharply on (i) whether you have a disability (or other protected characteristic), (ii) the extent of the disability, (iii) the likely effect of the disability, when taken together with any other features.

### **The Decision**

30. I have looked at the information in relation to the suitability of the temporary accommodation at 157a High Street North... After careful consideration of all the material facts, the sequence of events and the Equality Act, I am satisfied that your case has been assessed fairly, taking into account all relevant factors.

32. There are many people living in different kinds of accommodation or in accommodation that is not ideal for their needs, however after consideration of all the information available, I have concluded that the present accommodation ... given the general conditions relating to the provision and availability procured by Newham Council is suitable for your housing needs.”

17. In deciding whether this decision letter is susceptible to successful challenge it is for Mr Kannan to demonstrate that the reviewing officer has made a reviewable error; not for Newham to demonstrate that he has not. In approaching a decision letter of this kind, the court should adopt a benevolent approach; should not “nit-pick”; and should not subject the letter to minute textual criticism: *Homes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7, [2009] 1 WLR 413; *Poshteh v Kensington and Chelsea RLBC*; *Rother DC v Freeman-Roach* [2018] EWCA Civ 368, [2018] HLR 22.
18. Applying that approach, I consider that the reviewing officer did not conduct an adequate review. First, he appears to me to have misunderstood the thrust of Dr Thakore’s medical assessment, and the effect of Newham’s own decision based upon it. Both the assessment and the decision entailed the conclusion that Mr Kannan’s accommodation was “*unsuitable*” on medical grounds. Dr Thakore’s opinion was that a ground floor flat (or a flat accessible by lift) was not a matter of convenience, but a housing *need*. That ought to have been the starting point for the review.
19. What was there to weigh in the balance to overcome that assessment? Newham argues Dr Thakore’s opinion was given in the context of the permanent allocation of housing under Part VI of the Housing Act 1996; and not in the context of assistance to the homeless under Part VII. Newham also argues that Dr Thakore had said that temporary accommodation was not unacceptable on medical grounds. That is true; but equally he had also said that tenure was not a medical matter. I read him as saying that quality of tenure did not impact on his earlier assessment of Mr Kannan’s medical needs in relation to housing. If Dr Thakore meant to distinguish between current needs and future needs, he would surely have said so; and given some medical reason for the difference. I note also that Dr Thakore did not explain what he meant by “temporary accommodation.” Moreover, the mere fact that accommodation is not medically unacceptable does not mean that it is suitable.
20. In addition, his opinion to the effect that temporary accommodation was not unacceptable on medical grounds was given on 1 February 2017. But how temporary was temporary? By the time of the review decision a further nine months had passed. As Mr Kannan’s solicitors had pointed out, by the time of the review decision Mr Kannan had been living in that accommodation for over a year. The reviewing officer recorded the argument as one of the four grounds for review; but failed to deal with it. The only circumstances that he contemplated might cause the accommodation to become unsuitable were a change in Mr Kannan’s circumstances or a deterioration in his health. The mere passage of time was not taken into account at all. What the reviewing officer appears to have done is to have divided accommodation in a binary way: either it was temporary or it was not. But, as *Birmingham CC v Ali* shows, that is not legally correct. Suitability is a question of degree: not one of classification into rigid categories. The accommodation might have been suitable in the short term, but



not in the medium term, even within the overall context of the homelessness legislation in Part VII of the Act.

21. The reviewing officer's treatment of Mr Kannan's disability was also highly unsatisfactory. The reviewing officer acknowledged in paragraph 14 of his decision Mr Kannan's description of "severe pain" after climbing the stairs; but by paragraph 20 it had been down-graded, without any explanation, to "uncomfortable and inconvenient". Ms Conlan argued on behalf of Newham that Mr Kannan's description of severe pain was not supported by the medical evidence. However, she also accepted that the reviewing officer had accepted Mr Kannan's account. Had he decided to reject it he no doubt could have, at least if he had given reasons for doing so. But he did not. His unexplained down-grading of the severe pain felt by Mr Kannan cannot be described as a sharp focus on Mr Kannan's disability, its extent or its likely effect. It also overlooks Dr Thakore's opinion that a ground floor flat (or a flat accessible by lift) was not a matter of convenience, but a housing *need*.
22. In addition, one of the housing needs identified by Dr Thakore was accessible bathing facilities. The lack of such facilities was one of Mr Kannan's complaints. It was also recorded by the reviewing officer as one of the four grounds on which a review was sought. But apart from noting that ground, the reviewing officer did not deal with it at all. Ms Conlan argued that this was a minor matter; and that the issues were well known to the parties, having been extensively canvassed in correspondence. I do not agree that the question of bathing facilities was a minor matter. It was one of the three housing needs that Dr Thakore had specifically identified; and it was one of the four grounds for review. The reviewing officer was, in my judgment, required to give reasons for rejecting that ground of complaint (if, indeed, that is what he did). Ms Conlan advanced a number of reasons why the reviewing officer would have been entitled to reject the complaint. Those reasons may or may not be adequate. But since the reviewing officer never gave his reasons, we do not know whether the reasons advanced by Ms Conlan were those which motivated the reviewing officer.
23. While it is legitimate for a reviewing officer to consider housing conditions in the locality, when he does so through the lens of the public sector equality duty it is not adequate simply to refer to the generality of persons who are not living in ideal conditions. The reviewing officer did not consider whether any of those who were not living in ideal conditions had disabilities. That, too, shows that there was not the required sharp focus on Mr Kannan's disability and the impact it had on his housing needs.
24. As in *Lomax*, I do not consider that the decision is saved by the reviewing officer's subsequent reference to the public sector equality duty. The mere recitation of Lord Neuberger's formula in paragraph 28 of the decision letter is no substitute for actually doing the job.
25. These flaws in the review decision are such that, in my judgment, it cannot stand. It was for these reasons that I joined in the decision to allow the appeal.

**Lord Justice Moylan:**

26. I agree.