Neutral Citation Number: [2023] EWCA Civ 464

Case No: CA-2022-000343

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON**
**HIS HONOUR JUDGE RAESIDE KC**
**H40CL229**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 April 2023

**Before :**

**LADY JUSTICE THIRLWALL**
**LORD JUSTICE MALES**
and
**LORD JUSTICE SNOWDEN**

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**Between :**

| | |
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| **SAHRA MOGE** | **Appellant** |
| **- and –** | |
| **LONDON BOROUGH OF EALING** | **Respondent** |

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**Toby Vanhegan and Stephanie Lovegrove** (instructed by Polpitiya & Co.) for the **Appellant**

**Genevieve Screeche-Powell and Clare Cullen** (instructed by Legal Services, London Borough of Ealing) for the **Respondent**

Hearing date : 25 January 2023

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# Approved Judgment

*Remote hand-down:* This judgment was handed down remotely at 12 noon on 27 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Lord Justice Snowden:**

Introduction

1. The issue in this appeal is whether, when seeking to discharge its relief duty under section 189B of the Housing Act 1996 ("section 189B" and "the Act") to take reasonable steps to help the Appellant ("Ms. Moge") secure suitable accommodation for her occupation, the Respondent local authority, the London Borough of Ealing ("the Council"), acted in accordance with the requirements of 208(1) of the Act, "so far as reasonably practicable … [to] … secure that accommodation is available … in their district".

2. The case arises from a decision by the Council on 25 May 2021 to serve notice on Ms. Moge, informing her that it took the view that its relief duty to assist her had come to an end. The reason given was that Ms. Moge had refused an offer of suitable accommodation arranged by the Council of a 24 month assured shorthold tenancy of a two-bedroom flat with a private sector landlord in Elvedon Road, Lower Feltham, in the neighbouring London Borough of Hounslow ("the Flat"). The Council also contended that the consequence of its decision was that it did not owe Ms. Moge the full housing duty under section 193 of the Act.

The legal framework

3. It is at the outset necessary to distinguish between Parts VI and VII of the Act.

*Part VI*

4. Part VI of the Act sets out a regime for the allocation of housing accommodation by a local authority. An applicant for allocation of housing accommodation under Part VI may be a person who is homeless. But it also may be a person who is not homeless, but who is, for example, currently living in unsatisfactory housing conditions, or who has a medical or welfare need.

5. Under section 159 of the Act, such an allocation might be achieved in a number of ways. For present purposes, these include the selection by the local authority of a person to become a secure or introductory tenant of housing accommodation held by the local authority itself; or the nomination by the local authority of a person to become an assured tenant of housing accommodation held by a private registered provider of social housing or a registered social landlord pursuant to arrangements between the local authority and the registered provider or landlord. An assured tenancy includes an assured shorthold tenancy for this purpose.

6. Local authorities are required by section 166A of the Act to have a scheme for the allocation of housing accommodation which gives people a choice or the opportunity to express a preference about housing accommodation, and also gives reasonable preference to people in various categories of need. In Ealing and the London Boroughs of Brent, Harrow and Hillingdon, the allocation of housing accommodation by local authorities pursuant to Part VI is administered through an online system called LOCATA, to which a number of registered provider landlords are members and on which available properties are listed. Each local authority is, however, only able to allocate properties located within its own district.

*A local authority's duties under Part VII*

7. Part VII of the Act – which is the Part with which this appeal is primarily concerned - imposes duties on local authorities in relation to persons who are homeless. For present purposes it is necessary to distinguish between three different duties: the interim duty under section 188, the full housing duty under section 193, and the relief duty under section 189B of the Act.

8. Section 188 of the Act applies where the local authority have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need. In such a case, the authority,

> "… must secure that accommodation is available for the applicant's occupation".

9. Section 193 of the Act imposes what is conventionally referred to as the "full housing duty". That full housing duty applies (a) where the authority is satisfied that an applicant is homeless and eligible for assistance and has not become homeless intentionally, (b) where the applicant has a priority need, and (c) where the relief duty has come to an end. Unless the full housing duty is otherwise disapplied, the local authority,

> "… shall secure that accommodation is available for occupation by the applicant."

10. Section 189B(2) was added to the Act with effect from 3 April 2018 by the Homelessness Reduction Act 2017 (the "2017 Act"). Section 189B(2) imposes an initial duty, conventionally referred to as the "relief" duty, where the local authority are satisfied that an applicant is homeless and eligible for assistance. There is no requirement that the applicant have a priority need. For a period of 56 days, or until the relief duty ends at an earlier stage, the local authority,

> "… must take reasonable steps to help the applicant to secure that suitable accommodation becomes available for the applicant's occupation for at least six months".

11. The Explanatory Notes to the 2017 Act explained the purpose of the relief duty as follows,

> "28. Section 189B places a duty on local housing authorities to take reasonable steps for 56 days to relieve homelessness by helping any eligible homeless applicant to secure accommodation.
>
> 29. Help would be provided for households whether or not they are in 'priority need' under the 1996 Act … Local housing authorities will be required to take reasonable steps that are likely to help the applicant to secure accommodation. Reasonable steps could include, for example, providing a rent deposit or access to mediation to keep households together."

12. The local authority's relief duty under section 189B(2) can come to an end in a variety of ways. It will end if the authority is satisfied that suitable accommodation is available for the applicant's occupation for at least six months: it will also end if the authority has complied with its duty to provide help to the applicant for a period of 56 days, whether or not the applicant has secured accommodation: see sections 189B(7)(a) and (b).

13. Another method by which the local authority may bring the relief duty to an end is under section 193A(1) of the Act. That section applies if, having been informed of the consequences of refusal and the right to request a review of the suitability of the accommodation offered, the applicant refuses either a "final accommodation offer" or a "final Part 6 offer".

14. Section 193A(4) defines a "final accommodation offer" as an offer of an assured shorthold tenancy for a fixed term of at least six months made by a private landlord to the applicant pursuant to arrangements made by the local authority in discharge of their relief duty under section 189B(2). A "final Part 6 offer" is an offer of accommodation under Part VI of the Act that is made by the authority in discharge of their duty under section 189B(2) and which states that it is a final offer. By section 193A(6) of the Act, a local authority may not approve a final accommodation offer or a final Part 6 offer unless they are satisfied that the accommodation is suitable for the applicant.

15. Importantly, if section 193A(1) applies, in addition to ending the relief duty, the local authority will also not be subject to the full housing duty under section 193: see section 193A(3). The making of a final accommodation offer is therefore capable of having very significant consequences for an applicant.

*Discharge of functions: section 208(1)*

16. The manner in which a local authority discharges its various duties under Part VII is dealt with in section 205 of the Act as follows,

> "(1) The following sections have effect in relation to the discharge by a local housing authority of their functions under this Part to secure that accommodation is available for the occupation of a person—
>
> Section 206 (general provisions),
>
> Section 208 (out-of-area placements),
>
> Section 209 (arrangements with private landlord).
>
> (2) In sections 206 and 208 those functions are referred to as the authority's "housing functions under this Part".
>
> (3) For the purposes of this section, a local housing authority's duty under section 189B(2) or 195(2) is a function of the authority to secure that accommodation is available for the occupation of a person only if the authority decide to discharge the duty by securing that accommodation is so available."

17. Section 208(1) of the Act – which is the key provision on this appeal – is headed "Discharge of functions: out-of-area placements". It provides,

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

18. It is clear that section 208(1) applies to the discharge of a local authority's housing functions under both the interim duty in section 188 and the full housing duty in section 193 of the Act. In those cases the local authority is itself required to secure that accommodation is available for occupation by the applicant. Indeed, the leading cases on the requirements of section 208(1) are all cases in which the applicant was owed the full housing duty.

19. The application of section 208(1) is not so straightforward in relation to the discharge of a local authority's relief duty under section 189B(2). Section 205(3) provides that the requirements of section 208(1) only apply where the local authority decides to discharge its relief duty by securing that accommodation is available for the applicant. The limitation in section 205(3) manifestly reflects the fact that the relief duty is intended to be a more flexible and less onerous obligation than the interim duty or the full housing duty.

20. However, section 205(3) clearly means that if a local authority was to decide to discharge its relief duty by itself providing (or as the Act calls it, "securing") accommodation for an applicant, it would be obliged to comply with section 208(1). Although the language of section 205(3) is less clearly applicable in a case in which the local authority does not itself secure the accommodation, it would be a surprising result if section 208(1) did not also apply if, instead of itself providing the accommodation, the local authority instead sought to bring its relief duty to an end under section 193A(4) by making a final accommodation offer of suitable accommodation with a private landlord. If it were otherwise, a local authority could make a final accommodation offer and both bring an end to its relief duty and prevent any full housing duty arising without having to give any consideration to section 208(1) at all.

21. That conclusion is consistent with the guidance published by the Secretary of State on suitability (below). I also note that it was not contended by the Council that section 208(1) did not apply in the instant case.

*Suitability*

22. The concept of "suitability" is central to the ways in which a local authority can discharge its housing functions under Part VII: see e.g. sections 206 and 210 of the Act. That concept is addressed in The Homelessness (Suitability of Accommodation) (England) Order 2012 (the "2012 Order"). Among other things, Article 2 of the 2012 Order provides:

> "In determining whether accommodation is suitable for a person, the local housing authority must take into account the location of the accommodation, including—

> (a) where the accommodation is situated outside the district of the local housing authority, the distance of the accommodation from the district of the authority;
>
> (b) the significance of any disruption which would be caused by the location of the accommodation to the employment, caring responsibilities or education of the person or members of the person's household…"

23. Section 182 of the Act also requires that in the exercise of their functions relating to homelessness, a local authority shall have regard to guidance given by the Secretary of State from time to time. Such guidance was originally provided in a "Homelessness Code of Guidance for Local Authorities" promulgated by the Department for Communities and Local Government in 2006 (the "2006 Code"). The 2006 Code was supplemented in 2012 by "Supplemental Guidance" following the coming into force of the Localism Act 2011. The 2006 Code and the 2012 Supplemental Guidance were both considered by the Supreme Court in the leading case of Nzolameso v Westminster City Council [2015] UKSC 22; [2015] PTSR 549 ("Nzolameso"). Following that decision and further consultation, in 2018 the Secretary of State promulgated a significantly revised version of the Code of Guidance ("the 2018 Guidance").

24. Chapter 17 of the 2018 Guidance contains guidance on the suitability of temporary accommodation. In that regard, paragraph 17.1 provides that such guidance applies to temporary accommodation secured by the local authority under its interim duty or the main (full) housing duty,

> "as well as settled accommodation which would bring the relief or main [full] housing duty to an end."

Although "settled accommodation" is not defined, it is plainly intended to include accommodation which is the subject of a final accommodation offer which would bring the relief duty to an end under section 193A(1) of the Act and prevent the full housing duty arising by reason of section 193A(3).

25. The relevant paragraphs of the 2018 Guidance which were in place at the time of the offer to Ms. Moge included the following:

> "17.48 Housing authorities, particularly those that find it necessary to make out of district placements, are advised to develop policies for the procurement and allocation of accommodation which will help to ensure suitability requirements are met. This would provide helpful guidance for staff responsible for identifying and making offers of accommodation, and would make local arrangements, and the challenges involved with sourcing accommodation, clearer to applicants.
>
> 17.49 *Where it is not reasonably practicable to secure accommodation within district and an authority has secured accommodation outside their district, the housing authority is required to take into account the distance of that accommodation*

> *from the district of the authority. Where accommodation which is otherwise suitable and affordable is available nearer to the authority's district than the accommodation which it has secured, the accommodation which it has secured is not likely to be suitable unless the applicant has specified a preference, or the accommodation has been offered in accordance with a published policy which provides for fair and reasonable allocation of accommodation that is or may become available to applicants.*
>
> 17.50 *Generally, where possible, housing authorities should try to secure accommodation that is as close as possible to where an applicant was previously living.* Securing accommodation for an applicant in a different location can cause difficulties for some applicants. Where possible the authority should seek to retain established links with schools, doctors, social workers and other key services and support."
>
> (emphasis added)

The important words that I have emphasised in italics did not appear in the 2006 Code. They originated in the 2012 Supplemental Guidance and were modified in light of the decision in Nzolameso.

26. An applicant who is dissatisfied with a decision of the local authority either (a) as to the suitability of accommodation offered by way of a final accommodation offer, or (b) that the relief duty under section 189B(2) has come to an end, may request a review of that decision under section 202 of the Act.

27. Under section 204 of the Act, an applicant who has requested a review under section 202 and is dissatisfied with the review decision may appeal to the County Court on any point of law arising from the review decision. On that appeal, the County Court applies the same principles as those applicable to judicial review. On a second appeal to the Court of Appeal, the focus for the Court is whether the review decision was lawful, and the court has no independent fact-finding function. A finding of fact may, however, be challenged on public law grounds. See generally Abdikadir v Ealing LBC [2022] EWCA Civ 979, [2022] HLR 36 ("Abdikadir") at [8]-[9] and the authorities there cited.

Ealing's decision in the instant case

28. Ms. Moge is now 58. She applied to the Council in March 2020 for assistance under Part VII of the Act on the basis that she and her 20 year old son had been staying with friends in a house in North Ealing but had been given a month to leave. At the time Ms. Moge was working for an agency providing visiting care services to people in Ealing.

29. The Council drew up a personal housing plan (PHP) for Ms. Moge and accepted that it owed her a duty to prevent her from becoming homeless under section 195 of the Act. Ms. Moge was accommodated in temporary housing in 2020, but on 30 April 2021 the Council wrote to Ms. Moge accepting that she had become homeless and that as a consequence it owed her the relief duty under section 189B(2) of the Act.

30. The previous day, 29 April 2021, one of the Council's "Acquisitions Officers", Patrice Walker, arranged for Ms. Moge to view a property in Southall. Although Ms. Moge reported back on 30 April 2021 that the location of the property was "feasible", she rejected it on the basis that it was too small and unsuitable for her due to various health issues.

31. The documents in the appeal bundles show that on 7 May 2021, Percy Oduro, one of the Council's Acquisitions Officers circulated an internal email that stated,

> "Hi All,
>
> Please see properties available.
>
> These are DLs [Direct Lets], please put forward uncapped clients with affordability."

The email then listed six properties, of which three were two bedroom properties. Two of those three properties were in Ealing (in Southall and Perivale); the third was in the neighbouring London borough of Hillingdon. No further details of the precise locations were given.

32. The Council's officer who had been dealing with Ms. Moge, Besidone Adeyemo, emailed Mr. Oduro to request details of "the 2 bedroom property" [sic] mentioned in his email. It does not appear, however, that any of the three two-bedroom properties identified by Mr. Oduro were subsequently offered to Ms. Moge.

33. Also on 7 May 2021, another of the Council's Acquisitions Officer, Daniel Teixeira, circulated a further internal email entitled "Re: 2 Bedroom property available in the Private Rented Sector" which stated,

> "Hi Team
>
> I hope you're all well.
>
> I've got the following 2 bedroom properties available for prevention/relief clients. Please only refer clients that aren't [r]ent capped."

Mr. Teixeira's email then listed the Flat and a second property on Cricklewood Broadway in northwest London.

34. Ms. Adeyemo subsequently spoke to Mr. Teixeira. Her file note recorded that Mr. Teixeira was reluctant to offer the Flat to Ms. Moge because she had refused the offer of the property identified by Mr. Walker at the end of April, and the Flat had also been rejected by another applicant, so that Mr. Teixeira was wary that the landlord might pull out. Mr. Teixeira also told Ms. Adeyemo that the flat on Cricklewood Broadway was "very expensive".

35. However, Mr. Teixeira said that he would consider Ms. Moge for the Flat in Lower Feltham, and he subsequently emailed Ms. Moge on 11 May 2021, notifying her that he had arranged for her to view it. Mr. Teixeira's email stated that the Flat was managed by a private landlord, that the Council had arranged for the landlord to make her an

offer of a 24 month fixed term assured shorthold tenancy of the Flat, and that the Council's offer "will apply when you are selected by the landlord". The email also asserted that this was a final accommodation offer for the purposes of section 189B(2) of the Act.

36. Mr. Teixeira's email was followed up by a more formal letter in similar terms that added that the Council would not be making any other offers of accommodation, with the consequence that whether Ms. Moge accepted or rejected the offer, the Council would no longer be subject to any further duty to her under the Act.

37. Neither the email nor the formal letter from Mr. Teixeira contained any information as to what inquiries the Council had pursued to ascertain whether there was any other suitable accommodation available for Ms. Moge. The formal letter did, however, contain a generic statement to the effect that in reaching its decision that the Flat was suitable for her, the Council had "fully considered" the 2012 Order, and "all existing legislation, statutory guidance and caselaw relating to making suitable offers of accommodation and specifically Chapter 17 of the Homelessness Code of Guidance."

38. Ms. Moge sent an email to Mr. Teixeira on 14 May 2021 expressing her appreciation for the offer, but making the point that the Flat was "really far" from her places of work in Ealing, and that she was concerned she might lose her job as a result. After viewing the property on 17 May 2021 and reiterating her concerns, Ms. Moge was told that she could move in and then request a suitability review. In the event, however, Ms. Moge did not sign the necessary tenancy agreement with the private landlord.

39. The Council took the view that this meant that Ms. Moge had refused its final accommodation offer and that its duty to Ms. Moge under section 189B(2) of the Act had therefore come to an end. That decision was communicated to Ms. Moge in an emailed letter dated 25 May 2021 (the "decision letter") which was electronically signed by Celia Grant, the Council's Housing Demand Team Leader. So far as the location of the Flat was concerned, the decision letter stated,

> "You informed us that the property is far from your workplace and you might lose your job due to the distance.
>
> We have considered the location of the accommodation and we are satisfied that it would not cause any significant disruption to you. Unfortunately, due to the difficulties in procuring accommodation, it is not always possible to meet all your wishes. The offered property is in a neighbouring borough to Ealing Borough and there are good transport links to your workplace and [it is] reasonable for you to commute."

<u>The review</u>

40. Ms. Moge immediately requested a review of the Council's decision by an email of 25 May 2021 which stated that she had not refused the offer and had been waiting to sign the paperwork for the Flat.

41. Ms. Moge then instructed solicitors, who requested a copy of the Council's housing file. The solicitors wrote to the reviewing officer (Navroz Shariff) on 17 June 2021,

raising a number of grounds of review. The main ground raised for review was that Ms. Moge had not in fact refused the offer of the Flat, but had been prepared to move in and then request a review of its suitability. The letter also highlighted that the basis upon which Ms. Moge contended that the Flat was unsuitable was its distance from her places of work in Ealing.

42. Mr. Shariff was assisted in his review by Ajibola Obe. On 20 July 2021 Mr. Obe sent an email asking one of the Council's Allocations Team whether there had been other two bedroom properties available in Ealing at the time of the offer.

43. On 28 July 2021 Mr. Shariff sent a letter to Ms. Moge's solicitors, indicating that he was "minded to find" that the relief duty to Ms. Moge had been properly ended (the "minded to letter"). The minded to letter listed a series of matters which had been considered. These included the decision of the Supreme Court in Nzolameso, the 2012 Order and what was simply referred to as the "Homelessness Code of Guidance for Local Authorities".

44. The minded to letter then addressed the issues raised by Ms. Moge's solicitors, the first such issue being the location of the Flat. In that respect, the minded to letter quoted an extract from the out-of-date 2006 Code. That stated,

> "Housing authorities should avoid placing applicants in isolated accommodation away from public transport, shops and other facilities, and, wherever possible, secure accommodation that is as close as possible to where they were previously living, so they can retain established links with schools, doctors, social workers and other key services and support essential to the well-being of the household."

It will be appreciated that because it dates from 2006, this paragraph does not take into account the decision in Nzolameso, the 2012 Order, the enactment of the relief duty in section 189B(2) of the Act, or the relevant parts of paragraphs 17.49 and 17.50 of the 2018 Guidance emphasised in paragraph 25 above.

45. Mr. Shariff's minded to letter continued,

> "Furthermore, this Council has a legal duty to ensure that accommodation secured is available within its district in so far as it is reasonably practicable. However, along with many other London Councils, Ealing is experiencing a significant increase in households requesting assistance with housing. Along with the increased local housing demand, the Council is experiencing increasing difficulty in acquiring suitable affordable temporary accommodation and private rented sector accommodation, particularly within Ealing.
>
> The Council is dependent upon a constant supply of accommodation to meet the needs of households who have been required to leave their previous accommodation and need emergency assistance, often without forewarning and not allowing the household to find alternative accommodation. This

> has led the Council being required to place households into accommodation outside of Ealing Borough, and in some cases out of London.
>
> The Council identifies those in greatest need of remaining in borough and has split the temporary accommodation priorities into 3 separate areas, which are:
>
> Zone 1 – Offer of accommodation within Ealing Borough
>
> Zone 2 – Offer of accommodation within the West London Boroughs … and/or within 45 minutes travel time … to the nearest boundary of Ealing …
>
> Zone 3 – Offer of accommodation in any other area, which may be inside or outside of London.
>
> As stated, wherever possible, and unless it is in the household's best interests or at the household's request, the Council will aim to place households within the Borough. However, if there are insufficient placements available the Council will prioritise households taking into consideration their housing needs."

46. The minded to letter then referred to Ealing's Temporary Accommodation Placement Policy (the "TA Placement Policy"), which it said set out the considerations for placing households within Zone 1. The relevant paragraphs of that TA Placement Policy stated,

> "The following households will be prioritised for placement in Zone 1, where only accommodation in Ealing would be suitable in the longer term due to the household's circumstances.
>
> …
>
> 5. Households where one or more persons is in permanent and settled employment within the Brough for the past 12 months to the homeless application, working a minimum of 16 hours (one person) or 24 hours (2 persons). Working household members are expected to be able to commute and consideration of 60 minutes commuting time from home to work is reasonable within London."

Mr. Shariff stated that he was satisfied that Ms. Moge's circumstances did not require her to be prioritised for accommodation in Zone 1.

47. Importantly for present purposes, the minded to letter continued,

> "As stated above, it has been extremely difficult for local authorities to find affordable accommodation in their borough, and this is made even more difficult when sourcing larger properties for families. *Our Temporary Accommodation (Reduction) team advised that the property offered to Ms. Moge*

> *on the 25 May 2021* [sic] *was the only 2 bedroom accommodation available at the time of offer.*
>
> Our Acquisitions team assessed the information that was provided to match [Ms. Moge] with a suitable property. From the information provided, it was decided that she and her child's [sic] needs could be met outside the London Borough of Ealing."
>
> (my emphasis)

48. The minded to letter went on to consider other matters, including the dispute over whether Ms. Moge had in fact refused the offer of the Flat. In that respect, Mr. Shariff indicated that he was inclined to accept the Council's version of events, supported by the managing agent for the Flat, which was to the effect that although given the option of accepting the accommodation and putting in a review request, Ms. Moge had refused to sign the tenancy agreement for the Flat in spite of being given several opportunities to do so.

49. From the fragments of emails which were in the appeal bundles before us, it would appear that after the minded to letter had been sent, on 2 August 2021, Azra Khan, an Allocations Officer, sent an email to Mr. Obe in response to his enquiry about the accommodation which had been offered to Ms. Moge. The email stated,

> "Hi Ajibola,
>
> This was a Direct Let offer made by Daniel [Teixeira] – this process is different to PSL offers. Anyway, we did not have any 2 Beds in Ealing at the time this offer was made."

50. On 3 August 2021, Ms. Moge's solicitors responded to the minded to letter of 28 July 2021, making further representations to Mr. Shariff. The first point taken was to reiterate that Ms. Moge had not refused the offer of accommodation at the Flat. The letter of 3 August 2021 then went on to make representations as to the suitability of the Flat for Ms. Moge. In that regard, after setting out a number of medical matters, the letter asserted that, "The decision maker has failed to consider Ms. Moge's employment and her travel time and costs." The letter then went on to make a number of detailed submissions concerning the nature of Ms. Moge's work as a carer, which required her to visit people at a number of addresses within Ealing, with gaps between jobs. The letter claimed that it would not be practical for Ms. Moge to return to the Flat in Lower Feltham between jobs. It asserted that due to her work pattern, Ms. Moge needed to live in or close to the Borough of Ealing.

51. The representation letter did not, however, take issue with the reported view of the Council's Temporary Accommodation (Reduction) Team that the Flat offered to Ms. Moge "was the only 2 bedroom accommodation available at the time of offer". Nor, importantly, did the representation letter refer to section 208(1) or raise any other issue as to the adequacy of the search conducted by the Council for suitable properties closer to Ealing than the Flat.

52. The Council's decision was affirmed by Mr. Shariff in a letter of 12 August 2021 (the "review decision"). Mr. Shariff adhered to his view that the Flat was suitable for Ms.

Moge and that she had refused the offer, with the result that the Council's housing duties to her had come to an end. The format of the review decision closely followed the earlier minded to letter, with additions to address the further representations that had been made. On the question of suitability, the review decision letter contained the same paragraphs from the minded to letter as set out in paragraphs 44 to 47 above.

53. On the specific question of the distance which Ms. Moge would be required to travel to work, and in response to the further representations, Mr. Shariff stated that Google Maps had indicated that the journey time from Feltham to the first of Ms. Moge's places of work in Ealing would be 52 minutes. He added that he did not think that Ms. Moge needed to return home during her working day. He suggested that during her waiting periods she could stay with friends in Ealing or go to a library. Mr. Shariff stated that he was satisfied that the distance between the accommodation offered and Ms. Moge's places of work was reasonable.

The first appeal to the County Court

54. Ms. Moge appealed to the County Court. Her appeal was dismissed by HHJ Raeside KC ("the Judge) on 6 January 2022. In all, Ms. Moge advanced five grounds of appeal. Ground 1 was a challenge on the basis of procedural unfairness in relation to the supply of the Council's housing file, and Ground 2 contested the finding that Ms. Moge had rejected the offer of accommodation at the Flat. It is apparent from the note of the Judge's judgment that most of the focus at the appeal hearing was on these grounds, and in particular Ground 2.

55. Ground 3 challenged the lawfulness of the Council's TA Placement Policy and the categorisation of Ms. Moge as not qualifying for priority placement in Zone 1 according to paragraph 5 of the criteria in the TA Placement Policy. The further point was made that this mischaracterisation had caused a breach of section 208(1) of the Act because the Council had not considered Ms. Moge for accommodation in Ealing.

56. Ground 4 made a further allegation that the Council had breached section 208(1) of the Act,

> "… because they did not carry out any or any proper search for accommodation in their area or nearby areas as at the date of the offer and at the date of the review … this is because they decided that under their [TA Placement] Policy, the appellant did not qualify for prioritisation for accommodation in their area.
>
> ….
>
> The breach is illustrated in two ways.
>
> First, there is no evidence that the Council carried out any search for accommodation in their area or nearby at the date of the offer and at the date of the review. There is only an assertion in the review decision letter that nothing else was available.
>
> Secondly, if they did search, they did not make a sufficiently extensive search that included properties available under their

> allocation scheme, and temporary accommodation. The term "accommodation" in section 208(1) covers more than just private sector accommodation…."

57. Ground 5 contended that having offered accommodation to Ms. Moge in Hounslow, the Council had breached the requirement to notify the London Borough of Hounslow of that fact under section 208(2) of the Act.

58. In his *ex tempore* judgment, the Judge set out the facts and referred to the law on section 208 as summarised by the Supreme Court in Nzolameso and by Lewison LJ in Alibkhiet v Brent LBC [2018] EWCA Civ 2742; [2019] HLR 15 ("Alibkhiet"). He then rejected the appeal on Grounds 1 and 2 on the facts.

59. In relation to Ground 3, the Judge first rejected the challenge to the lawfulness of Ealing's TA Placement Policy. On the question of whether that TA Placement Policy had been misapplied to Ms. Moge, the Judge held that this was not a question of law. He then held that even if Ms. Moge did qualify for priority placement in Zone 1 within paragraph 5 of the TA Placement Policy, in light of the contents of what he described as a letter dated 2 August 2021 from the Council,

> "… there were in fact no Zone 1 properties available for Ms. Moge so the matter is somewhat academic."

The Judge's reference to a letter of 2 August 2021 was in fact to the internal email dated 2 August 2021 from Ms. Khan to Mr. Obe set out in paragraph 49 above.

60. On Ground 4, the Judge held, referring to Broderick v Bromley LBC [2020] EWCA Civ 1522, [2021] HLR 19 at [43], that the reviewing officer had to consider the question of the suitability of the accommodation at the date of the offer and not at any other date. In that regard, the Judge held,

> "The belated provision of the email of 2 August 2021 necessarily accords with what was said in the [review decision], both of which make clear that the [Flat] was all that was available for rehousing Ms. Moge…
>
> Reading the [review decision] fairly and having regard to the material available at that time to [the Council's] officer I have found no point of law which indicated that [the Council] failed to carry out the appropriate researches expected and the simple fact as explained in the [review decision was] that there was very limited housing stock available with only one property that could be offered to Ms. Moge and on her refusal it went off to someone else."

61. On Ground 5, the Judge essentially held that since Ms. Moge had rejected the Flat, the Council had no obligation to notify London Borough of Hounslow of anything under section 208(2).

The second appeal

62. Permission for a second appeal to the Court of Appeal was given by Arnold LJ on two grounds in May 2022. It was, however, recognised that the grounds were very similar to those advanced in the appeal to the Court of Appeal in Abdikadir, and so this appeal was stayed pending the outcome of that other appeal. The decision in Abdikadir was handed down on 15 July 2022. In light of that judgment, only one of the two grounds for which permission had been given was pursued before us.

63. The sole remaining ground of appeal corresponds to Ground 4 of the appeal before the Judge. It was that in making a final offer of accommodation to Ms. Moge, the Council was in breach of section 208(1), (a) because it had not demonstrated that its officers had carried out a search for suitable accommodation closer to Ms. Moge's places of work in Ealing than the Flat in Lower Feltham; and (b) because the Council's officers only searched for private sector accommodation and did not search for suitable properties from the accommodation available to the Council under Part VI of the Act.

64. The Council contends that the Judge was right to dismiss that ground for the reasons that he gave.

The Respondent's Notice and application to adduce fresh evidence

65. By a Respondent's Notice filed after the decision in Abdikadir on 29 July 2022, the Council also seeks to uphold the Judge's decision,

> "… because the respondent operated a temporary accommodation acquisitions policy and the respondent was following that policy."

66. For the purpose of that Respondent's Notice, by an application dated 29 September 2022, the Council seeks to adduce evidence that was not before the Judge on the first appeal. The evidence sought to be adduced consists of a statement made on 26 September 2022 by Ms. Grant which exhibits the Council's Temporary Accommodation Acquisitions Policy (the "TA Acquisitions Policy") and asserts both that it is relevant to offers to end the relief duty and that her team follows it daily. Her evidence also contends that Ms. Moge was not registered to use the Council's LOCATA system on 11 May 2021, that she therefore could not have bid for properties under Part VI of the Act, and that there were no two bedroom properties available in Ealing on the LOCATA system at that date in any event.

67. The Council's Respondent's Notice and its application to adduce Ms. Grant's evidence are opposed by Ms. Moge, essentially on three grounds, (a) that Ms. Grant's evidence is not fresh evidence because it was available to the Council and could and should have been adduced before the Judge, (b) that the TA Acquisitions Policy does not actually apply to the discharge of the relief duty which the Council owed to Ms. Moge; and (iii) that Ms. Grant's witness statement does not contain any evidence that the Council actually followed its TA Acquisitions Policy, or any other relevant evidence as to what was actually done in Ms. Moge's case.

The authorities on section 208(1)

*Nzolameso*

68. The leading case on section 208(1) of the Act is the decision of the Supreme Court in Nzolameso. That was a case in which the London Borough of Westminster offered an applicant, to which it owed the full housing duty, accommodation in Bletchley near Milton Keynes.

69. Giving a judgment with which the other members of the Supreme Court agreed, Lady Hale said at [19] that the effect of the Act is,

> "… that local authorities have a statutory duty to accommodate within their area so far as this is reasonably practicable. "Reasonable practicability" imports a stronger duty than simply being reasonable. *But if it is not reasonably practicable to accommodate "in borough", they must generally, and where possible, try to place the household as close as possible to where they were previously living.*"
>
> (my emphasis)

70. Lady Hale then considered how a local authority should justify a decision to place an applicant "out of borough". She stated, at [31]-[32]

> "31. The Secretary of State for Communities and Local Government has also intervened in this case, in order to emphasise that when making decisions about where to accommodate homeless persons, local authorities have a number of duties to evidence and explain their decisions. They 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: see R (Khatun) v Newham London Borough Council [2004] EWCA Civ, [2005] QB 37, para 47. Very good reasons are required to depart from a policy formulated after public consultation: Royal Mail Group plc v Postal Services Commission [2007] EWHC 1205 (Admin), para 33. This is especially so where the Code is designed to protect vulnerable people: R(Munjaz) v Mersey Care NHS Trust [2005] UKHL 58, [2006] 2 AC 148. By definition, any homeless household in priority need will be vulnerable in this sense. The authority must also have a proper evidential basis for their decision: R (Calgin) v Enfield London Borough Council [2005] EWHC 1716 (Admin), [2006] HLR 58, para 32.
>
> 32. 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 and therefore unchallengeable or invalid and therefore open to challenge": see R v City of Westminster, ex p Ermakov (1996) 28 HLR 819, at 826–827.
>
> Nor, without a proper explanation, can the court know whether the authority have properly fulfilled their statutory obligations."

71. Lady Hale then recorded the submissions of the Secretary of State that the Court of Appeal in Nzolameso had been too ready to assume that the local authority had properly complied with its statutory obligations. She said, at [35],

> "The Secretary of State complains that the effect of this approach would be to encourage courts to infer, on no other basis than the assumed experience and knowledge of a local authority, that the authority knew of the Code and Guidance and had taken it into account; that the authority had considered and rejected the possibility of providing closer accommodation than that offered; and that the authority had good reasons for their decision in this particular case. If the courts are prepared to assume all this in the authority's favour, this would immunise from judicial scrutiny the "automatic" decisions to house people far from their home district, which was just what the 2012 Order and Supplementary Guidance were designed to prevent."

72. Lady Hale then applied the principles that she had outlined to the facts. She stated, at [36], that there was little to suggest that the authority had given serious consideration to its obligations before the decision was made to offer the property in Bletchley. She then continued,

> "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 in Westminster and why that had not been offered to her. There was no indication of the accommodation available near to Westminster, or even in the whole of Greater 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*.
>
> 37. It follows that the authority cannot show that their offer of the property in Bletchley was sufficient to discharge their legal obligations towards the appellant under the 1996 Act. Moreover, their notification to the appellant that their duty towards her had come to an end was purportedly given in

> circumstances where she did not know, and had no means of knowing, what, if any, consideration had been given to providing accommodation in *or nearer to* the borough…"
>
> (my emphasis)

73. After concluding that the local authority in that case had failed to demonstrate that it had discharged its duties to the applicant, Lady Hale went on to explain, at [38], how she envisaged that a local authority could demonstrate that it had discharged its duties in future cases by promulgating and following published policies both for the procurement and allocation of temporary accommodation. Lady Hale stated, at [39]-[40],

> "39. 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.
>
> 40. This approach would have many advantages. It would enable homeless people, and the local agencies which advise them, to understand what to expect and what factors will be relevant to the decision. It would enable temporary letting teams to know how they should go about their business. It would enable reviewing officers to review the decisions made in individual cases by reference to those published policies and how they were applied in the particular case. It would enable reviewing officers to explain whether or not the individual decision met the authorities' obligations. It would enable applicants to challenge, not only the lawfulness of the individual decision, but also the lawfulness of the policies themselves."

*Saleh*

74. As indicated above, after the decision in Nzolameso, the Secretary of State promulgated the revised and updated 2018 Guidance. The effect of the decision in Nzolameso and the 2018 Guidance is that even if suitable accommodation is not available in-borough, a local authority is nonetheless obliged, where possible, to try to find accommodation as close to the borough as possible. As noted above, the 2018 Guidance explains,

> "17.49 … Where accommodation which is otherwise suitable and affordable is available nearer to the authority's district than the accommodation which it has secured, the accommodation which it has secured is not likely to be suitable unless the applicant has specified a preference, or the accommodation has been offered in accordance with a published policy which provides for fair and reasonable allocation of accommodation that is or may become available to applicants.
>
> 17.50 Generally, where possible, housing authorities should try to secure accommodation that is as close as possible to where an applicant was previously living."

75. In Waltham Forest LBC v Saleh [2019] EWCA Civ 1944 ("Saleh") at [26] per Patten LJ, it was explained that where accommodation which is also suitable for an applicant is available closer to a housing authority's area, Nzolameso and the 2018 Guidance require the housing authority to carry out a "comparative exercise" between the available properties and to offer the applicant the closer one unless they have expressed a preference or the offer complies with a published policy for the allocation of properties between applicants. Or, as Mr. Vanhegan put it in argument, all other things being equal, a local authority must consider the suitability of the available properties in concentric circles.

*Abdikadir*

76. As I have indicated above, the instant appeal was stayed pending the decision in Abdikadir. That case also concerned the London Borough of Ealing, but the appellant was an applicant to whom the Council accepted that it owed the full housing duty rather than the relief duty. The Council purported to discharge that duty by making the applicant an offer of accommodation in a four bedroom house owned by a housing association in the neighbouring London Borough of Hillingdon, close to the border with Ealing. When the applicant refused the offer, inter alia on the basis that the house was too far from the school attended by her daughter who was taking her GCSE examinations, the Council notified her that its full housing duty had come to an end because she had refused an offer of suitable accommodation.

77. On appeal, the applicant claimed (a) that the Council had misapplied its TA Placement Policy and (b) had also not complied with its TA Acquisitions Policy by making a sufficient search for in-borough accommodation before offering the out-of-borough placement.

78. Giving the lead judgment, Lewison LJ summarised the effect of Nzolameso in paragraph [37] of his judgment as follows,

> "(i) A housing authority is entitled to take account of the resources available to it, the difficulties of procuring sufficient units of temporary accommodation at affordable prices in its area, and the practicalities of procuring accommodation in nearby boroughs: Nzolameso at [38].
>
> (ii) If there is available accommodation within-borough, it does not follow that the authority must offer it to a particular

> applicant because it may be acceptable to retain a few units, if it can be predicted that applicants with a particularly pressing need to remain in the borough will come forward in the relatively near future: Nzolameso at [38].
>
> (iii) The housing authority has a positive obligation to show that in offering an out of borough placement it has complied with its duty under section 208(1): Nzolameso at [36] and [37].
>
> (iv) The decision in an individual case may depend on a policy that the authority has adopted for the procurement and allocation of accommodation: Nzolameso at [38].
>
> (v) The policy should 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: Nzolameso at [39].
>
> (vi) The policy should be publicly available: Nzolameso at [39].
>
> (vii) In principle, where a public authority has a lawful policy, then provided that it implements the policy correctly, its decision in an individual case will itself be lawful: see Alibkhiet v Brent LBC [2018] EWCA Civ 2742, [2019] HLR 15 at [48], citing Mandalia v Secretary of State for the Home Department [2015] UKSC 59; [2015] 1 WLR 4546 at [31]."

79. At paragraphs [51]-[53] of his judgment, Lewison LJ made a number of observations on the requirement for a housing authority to make inquiries before coming to a decision. He referred to the decision in Balajigari v SSHD [2019] EWCA Civ 673 as support for the proposition that the court should only interfere with the decision of a public body on the grounds of a failure to make reasonable inquiries if it concluded that no reasonable public authority could have been satisfied that the information obtained by its inquiries was sufficient. In the context of inquiries made under Part VII of the Housing Act, Lewison LJ added that,

> "… since an applicant dissatisfied with an initial decision has the right to a review (which entails at least two opportunities to make representations if the review decision is likely to be adverse to them), the court should be wary of imposing on the reviewing officer a duty to inquire into matters that were not raised…This approach applies particularly where the matters in question are within the knowledge of the applicant … A reviewing officer is entitled to expect an applicant to bring forward any relevant information, particularly if they have been asked to do so…"

80. Lewison LJ also emphasised the importance of the Council's published policies to the fulfilment of its duty under section 208(1), commenting, at [54],

> "What steps are reasonable steps to take in order to fulfil that duty is a question of judgment for the housing authority; but its decision on that question is, in my judgment, to be found in the terms of its policies which can be taken to be Ealing's considered judgment on the question."

81. In that regard, Lewison LJ identified at [50] that a key point in the TA Acquisitions Policy was the statement that in seeking to find available properties for applicants,

> "The Council's Acquisition Officers are instructed to focus on Zone 1 and Zone 2 areas first … Acquisition Officers liaise with accommodation providers and check relevant websites on a daily basis for new supply."

82. However, as Lewison LJ stated at paragraph [56],

> "The real question, as it emerged during the course of the hearing, is whether Ealing actually complied with its policies.

On that point, as Lewison LJ identified at paragraphs [56] and [57], the problem for the Council was although it had been asked in correspondence what it had done to comply with section 208(1), its response did not mention any steps taken to investigate the availability of private sector properties. As Lewison LJ commented,

> "The acquisition policy stated that acquisition officers "check relevant websites on a daily basis for new supply." But there was no evidence that that had been done."

83. Lewison LJ therefore (reluctantly) concluded that the applicant's appeal succeeded. He stated, at [59],

> "59. Ms. Screeche-Powell rightly warned us against the "judicialization" of welfare services; and was understandably concerned about the imposition of burdensome duties on hard-pressed and cash-strapped local authorities (particular those in London) dealing with a never-ending flow of applications for assistance with homelessness. There is undoubtedly force in these points. But that is the sort of situation against which the guidance given by Lady Hale in Nzolameso was designed to protect; and if [the Council] had been able to demonstrate that it had followed its policy its decision would have been lawful, as Mr. Vanhegan accepted. If in fact [the Council] had followed its policy, all that would have been required would have been a statement saying that it had, and explaining how it had done that."

## Analysis

84. I shall initially concentrate, as did the majority of the argument before us, on the first limb of Ms. Moge's appeal relating to the question of whether the Council has demonstrated that its officers complied with section 208(1) by carrying out a search for

suitable private sector accommodation closer to Ms. Moge's places of work in Ealing other than the Flat in Lower Feltham. I shall return to the second limb relating to the potential use of Part VI properties to meet a relief duty more briefly at the end of the judgment.

85. I did not understand Ms. Screeche-Powell to dispute Mr. Vanhegan's basic proposition that even if Ms. Moge did not qualify for priority accommodation in Ealing itself, section 208(1), as interpreted in Nzolameso and as supplemented by the 2018 Guidance, meant that the Council should generally and where possible, have tried to secure accommodation for her "out-of-borough" that was as close as possible to her place of work in Ealing.

86. I also did not understand Ms. Screeche-Powell to dispute that where the issue of compliance with section 208(1) is raised, the onus is on the Council to show that it has discharged its duty: see Nzolameso at paragraph [37] and Abdikadir at paragraphs [37(iii)] and [59].

87. In that regard, Mr. Vanhegan pointed out, correctly, that there was nothing in the decision letter, or in the review decision by Mr. Shariff to indicate what inquiries the Council actually made to locate properties for Ms. Moge other than the Flat.

88. The minded to letter and the review decision letter simply contained a statement of a conclusion subsequently reported to Mr. Shariff during the review process,

> "Our Temporary Accommodation (Reduction) team advised that the property offered to Ms. Moge on the 25 May 2021 was the only 2 bedroom accommodation available at the time of offer."

89. It is difficult to accept that statement at face value. The Flat was offered to Ms. Moge on 11 May 2021 and not 25 May 2021. Mr. Oduro's email of 7 May 2021 set out in paragraph 31 above shows that there were a number of other two bedroom properties in the private sector that were available both within Ealing (i.e. Southall and Perivale) and in a neighbouring borough (Hillingdon) shortly before the offer was made on 11 May 2021. The date of 25 May 2021 is when the letter notifying the termination of the Council's duty was sent to Ms. Moge two weeks later, when the position might well have been different.

90. The absence of any statement in the minded to letter or the review decision of what inquiries the Council's officers had carried out to find suitable properties for Ms. Moge is, however, entirely understandable, because although Ms. Moge had complained from the outset that the Flat was unsuitable because of its distance from her place of work in Ealing, at no point during the review had Ms. Moge or her solicitors contended that the Council had failed to make adequate inquiries or had failed to offer her other available properties closer to Ealing.

91. Nor, significantly, did Ms. Moge's solicitors challenge or correct Mr. Shariff's reference in his letters to the out-of-date 2006 Code, or refer him to the relevant up-to-date provisions in paragraphs 17.49 and 17.50 of the 2018 Guidance on the question of suitability.

92. That position changed on appeal to the County Court. Notwithstanding that it had not been raised during the review, Ms. Moge was permitted to raise on appeal the issue of non-compliance with section 208(1) in the respects set out in paragraph 56 above, and the Judge was referred to Nzolameso and Saleh.

93. The Council did not, however, seek to adduce any evidence from its officers explaining what searches they had conducted in an effort to find other properties outside Ealing closer than the Flat. Nor did the Council seek to put its TA Acquisitions Policy before the Judge or suggest to the Judge that that policy contained anything of relevance to Ms. Moge's case.

94. In the absence of any evidence from the Council, the Judge relied on two documents to support his reasoning on Ground 4. The first was the statement in the review decision letter to which I have referred in paragraph 88 above. But, as I have indicated, this said nothing about what searches had been done and was of doubtful accuracy. The second was Ms. Khan's subsequent email of 2 August 2021 which stated,

> "Hi Ajibola,
>
> This was a Direct Let offer made by Daniel [Teixeira] – this process is different to PSL offers. Anyway, we did not have any 2 Beds in Ealing at the time this offer was made."

It is, however, clear that this email was only addressing the lack of availability of properties *in Ealing*. It said nothing about the availability or lack of availability of other properties in neighbouring boroughs.

95. Against that background, the Judge held that,

> "…I have found no point of law [sic] which indicated that [the Council] failed to carry out the appropriate researches expected and the simple fact as explained in the [review decision was] that there was very limited housing stock available with only one property that could be offered to Ms. Moge and on her refusal it went off to someone else."

The Judge did not, however, explain what the "appropriate researches" were; and to the extent that he relied upon the statements in the review decision to support a conclusion that the Flat was "[the] only … property that could be offered to Ms. Moge", for the reasons set out above, the evidence did not support that conclusion.

96. In these circumstances, and in light of the fact that it was for the Council to satisfy the Judge that it had complied with its duty under section 208(1), in my view the Judge was wrong to reject this ground of challenge to the review decision on the limited evidence referred to in his judgment.

The application to adduce Ms. Grant's statement

97. On this second appeal, the Council now seeks to make good the deficiency in its evidence before the Judge by adducing Ms. Grant's witness statement.

98. Ms. Grant's statement was plainly drafted in light of the decision in Abdikadir, and seeks to show that the Council had published policies complying with the relevant statutory provisions and guidance, and that its officers followed those policies when the Flat was offered to Ms. Moge.

99. To that end, Ms. Grant's statement exhibits copies of the Council's TA Placement Policy (which was referred to in the review decision and was before the Judge) and its TA Acquisitions Policy (which was not).

100. Ms. Grant's statement then continues,

> "I can confirm that my team follows these policies daily, and that these policies apply to the type of offer made in this case, specifically final offers of accommodation made in discharge of the relief duty. The offer was made on 11 May 2021 and the policies in force at the time and which continue to be the policies in force are those exhibited to this statement."

101. Ms. Grant does not specifically identify any part of the TA Acquisitions Policy upon which the Council seeks to rely, but it can be surmised that it includes the statement referred to by Lewison LJ in Abdikadir at [50], namely,

> "The Council's Acquisition Officers are instructed to focus on Zone 1 and Zone 2 areas first … Acquisition Officers liaise with accommodation providers and check relevant websites on a daily basis for new supply."

102. In that regard, Ms. Grant's statement continues,

> "In terms of the searches that are carried out by my team, I can confirm they look on a daily basis for available properties from existing sources with whom they have a relationship, including managing agents, individual landlords, local letting agents, the Landlord's inbox where landlords contact the Council to express interest in offering the Council their properties, referrals from the Empty Properties team, and Registered Social Landlords. In particular, online searches are conducted daily of properties available to let via Gumtree, Rightmove and Zoopla. Additionally, telephone calls are made to new and existing letting agents in the borough, surrounding areas and further afield. The officers are expected to obtain new leads daily therefore they will go on Zoopla and other relevant websites to see what is available at Local Housing Allowance and will contact the agent advertising to see if they would work with us if they are not known to us. If known to us we will highlight our interest in what they are advertising and try to get the agent to encourage the owner to work with us, e.g., telephone calls are made, and emails are sent to old and new letting agents. My team has a daily engagement with existing managing agents over the phone and face to face to chase up void and new units in the pipeline. We currently have 5 officers in the Acquisitions Team who are actively seeking private units for the use of

> Temporary Accommodation or move on accommodation, such as PRSOs and final accommodation offers, the officers are looking for all bedroom sizes from rooms in shared accommodation e.g. HMOs, to 5 beds and larger. Officers also communicate with landlords face to face, or by phone."

103. The remainder of Ms. Grant's statement deals with the different point of whether Ms. Moge was able to bid for accommodation from the Council under Part VI of the Act using the LOCATA system, and what was available to bid on that system (to which I shall return below).

104. The general principles which are applicable to an application to adduce fresh evidence on an appeal are well known and were considered by this court in Terluk v Berezovsky [2011] EWCA Civ 1534. At [31]-[32], Laws LJ stated, (some citations omitted),

> "31. It is convenient first to consider the law relating to the deployment of fresh evidence in civil appeals. The *locus classicus* is Ladd v Marshall [1954] 1 WLR 1489, 1491 where three criteria were articulated by Denning LJ as he then was: (1) the evidence could not with reasonable diligence have been obtained for use at the trial; (2) the evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and (3) the evidence is apparently credible though it need not be incontrovertible.
>
> 32. The admission of fresh evidence in this court is now addressed in the CPR. CPR 52.11(2) provides in part:
>
> > "Unless it orders otherwise, the appeal court will not receive … (b) evidence which was not before the lower court."
>
> The impact of the CPR on the established approach set out in Ladd v Marshall has been considered in a number of cases. It is clear that the discretion expressed in CPR 52.11(2)(b) has to be exercised in light of the overriding objective of doing justice ... The Ladd v Marshall criteria remain important ("powerful persuasive authority") but do not place the court in a straitjacket. The learning shows, in my judgment, that the Ladd v Marshall criteria are no longer primary rules, effectively constitutive of the court's power to admit fresh evidence; the primary rule is given by the discretion expressed in CPR 52.11(2)(b) coupled with the duty to exercise it in accordance with the overriding objective. However the old criteria effectively occupy the whole field of relevant considerations to which the court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence. It seems to me with respect that so much was indicated by my Lord the Chancellor (then Vice-Chancellor) in Banks v Cox (17 July 2000, paragraphs 40 – 41):

> "In my view, the principles reflected in the rules in Ladd v Marshall remain relevant to any application for permission to rely on further evidence, not as rules, but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the Court below.""

105. Mr. Vanhegan's submitted that Ms. Grant's statement failed the first requirement of Ladd v Marshall. He pointed out that the TA Acquisitions Policy was available and, if thought to be relevant, could have been adduced by the Council in evidence before the Judge, together with any evidence that such policy was in fact followed at the relevant time. Mr. Vanhegan submitted that no explanation had been given by Ms. Grant as to why that had not taken place.

106. Mr. Vanhegan also submitted that the court adopts a particularly restrictive approach to the admission of fresh evidence in homelessness appeals. He suggested that whilst the court can and, in appropriate cases, should admit evidence to allow the decision maker to elucidate or, exceptionally, correct or add to their reasons, it should be very cautious about doing so: see the judgment of Dyson LJ in Hijazi v Royal Borough of Kensington and Chelsea [2003] EWCA Civ 692 at [31], which approved the judgment of Hutchinson LJ in Westminster CC ex parte Ermakov [1996] 2 All ER 302 at 315H.

107. Ms. Screeche-Powell's answer to that point was that, as in Abdikadir, no argument about non-compliance with section 208(1) of the Act had been made at the review stage, that the focus of the Court of Appeal is on whether the review decision was correct, and that, as Lewison LJ had indicated at paragraph [41], if a challenge on appeal is based on a ground not advanced in the course of review, the authority must be entitled to defend itself against that challenge. In Abdikadir, that approach justified the Court of Appeal admitting evidence of the Council's TA Acquisitions Policy.

108. I agree with Ms. Screeche-Powell on this point. Although it could be said that the Council should not be given two chances to get its tackle in order, one on appeal in the County Court and the second in this Court, I am (just) persuaded that this would be unfair. Unlike the position in Abdikadir in which the applicant's solicitors did ask the Council prior to the appeal proceedings what it had done to comply with section 208(1), in the instant case no such inquiries were made, and the focus of Ms. Moge's appeal to the County Court was very much on other points, including whether Ms. Moge had in fact rejected the offer of the Flat and whether she had wrongly been classified as not qualifying for accommodation in Ealing itself. The issue of compliance with section 208(1) in relation to an out-of-borough placement was therefore not at the forefront of the appeal before the Judge in the same way as it is on the appeal in this Court.

109. On the Ladd v Marshall questions of whether Ms. Grant's evidence would have an important influence on the outcome of the case and is credible, Mr. Vanhagen took two points. The first was a contention that, in contrast to the position in Abdikadir which concerned the full housing duty, the Council's TA Acquisitions Policy did not state that it applied to relief duty cases like Ms. Moge's case. The second was that even if the TA Acquisitions Policy was regarded as applicable to relief duty cases, there was nothing in Ms. Grant's evidence to explain what the Council's officers had actually done to follow that policy in Ms. Moge's particular case.

110. On the first point, Mr. Vanhegan drew attention to the opening paragraphs of the TA Acquisitions Policy, which set out its scope and application,

> "This policy sets out the Council's approach to acquiring accommodation to meet the needs of households placed in accommodation to meet or to end a homelessness duty. The TA acquisitions Policy should be read in conjunction with the TA Placement Policy, which sets out the priorities of the Council in placing households in suitable temporary accommodation.
>
> Ealing Council has a duty to provide temporary accommodation (TA) for households that approach the Council as homeless and who meet the eligibility criteria set out in the Housing Act 1996, Part VII as amended by the Homelessness Act 2002. This policy covers:
>
> - Provision of interim accommodation under s188 of the Housing Act 1996
>
> - Provision of temporary accommodation under s193 of the same act
>
> The offer of a private render sector offer to discharge its housing duty under s193(7AA)-(7AC) Housing Act 1996 as amended by s148(5)-(7) Localism Act 2011.
>
> The offer of a private rented sector offer as a Qualifying Offer to pre 9 November 2012 Localism Act accepted homeless households."

111. Mr. Vanhegan was clearly correct to point out that a final offer of accommodation to discharge the relief duty under section 189B(2) is not mentioned as being covered by the Council's TA Acquisitions Policy. Indeed, the relief duty is not mentioned anywhere in the document at all.

112. The omission is probably because the TA Acquisitions Policy exhibited by Ms. Grant appears to pre-date the introduction of the relief duty by the 2017 Act and the promulgation of the 2018 Guidance, and does not appear to have been up-dated to take account of those matters. I say that because (for example) all of the statistics in the policy are taken from 2016 or earlier; the policy declares that "The Council's *aim* is to stabilise the numbers in temporary accommodation *by April 2016*" (my emphasis); in support of the assertion that "around 1/3rd of households are *currently* placed out of borough" (my emphasis), reference is made to a statistic from 30 September 2015; and a table showing the percentage of rents affordable to benefit dependent households in Ealing "over the next 4 years" merely covers the period until 2019/2020.

113. Mr. Vanhegan also submitted that it is not implicit from the structure of the Act that the TA Acquisitions Policy must necessarily apply to the search for accommodation with which to discharge the relief duty. He contended that the four matters which are specifically said to be covered by the TA Acquisitions Policy are all examples of a case in which the Council is either itself under a duty to secure accommodation for an

applicant (i.e. under the interim duty in section 188 of the Act, or under the full housing duty in section 193), or are a means by which the Council can bring that full housing duty to an end (e.g. by arranging a private rented sector offer under section 193(7AA)-(7AC) of the Act or a qualifying offer under the pre Localism Act 2011 regime). Mr. Vanhegan submitted that the relief duty is not *sui generis* with such matters because it merely requires the Council to provide help to enable an applicant to secure accommodation for themselves, and that assistance might take a number of forms. Moreover, the full housing duty can only arise after the relief duty comes to an end.

114. In response, Ms. Screeche-Powell argued that the Council's TA Placement Policy was referred to and relied upon in the review decision, notwithstanding that the list of matters to which that policy is said to apply is the same as the TA Acquisitions Policy (i.e. it also does not refer in any way to the relief duty under section 189B(2) of the Act). She also pointed out that the TA Placement Policy stated that it should be read in conjunction with the TA Acquisitions Policy. She submitted that it could therefore be extrapolated that both policies apply to relief duty cases.

115. This is a matter which has caused me considerable pause for thought. In paragraphs [39] and [40] of her judgment in Nzolameso (above), Lady Hale identified the importance of relevant policies in homelessness cases being approved by the democratically accountable members of a local authority, being publicly available and being kept up-to-date. She indicated that this was in order that those who administer the policies on behalf of the local authority can follow them, and so that those who are subject to the policies can understand what has been done, and why, in an individual case.

116. It must follow that the court should scrutinise carefully a bare assertion by a local authority that a policy applies in a particular type of case when that is not clearly and explicitly stated in the published policy for all to see. That is all the more so where the policy document does not appear to have been drafted with the particular legislative provision in mind at all, and where it does not appear to have been kept up-to-date to take into account important changes to the law and guidance.

117. By a narrow margin I have, however, come to the view that these are not reasons to refuse to admit Ms. Grant's statement. In this respect I start from the proposition that the issue at the heart of this appeal is whether, on or around 11 May 2021, the Council made sufficient inquiries to ascertain whether there were any other suitable two-bedroom properties available outside Ealing but closer to Ms. Moge's work.

118. In that regard, no-one has suggested any reason why, as a matter or practice or policy, the approach of the Council's acquisitions officers to searching for available properties for use as temporary accommodation should differ depending upon whether the applicants to whom the properties might be offered were persons to whom the Council owed the full housing duty (where the TA Acquisitions Policy plainly applied) or were persons to whom the Council owed only the relief duty. Nor is there any indication of any such differentiation in practice in any of the contemporaneous emails to which I have referred, including, in particular, those from Mr. Oduro and Mr. Teixeira on 7 May 2021.

119. It also seems to me that by far the most likely explanation for the failure of the TA Acquisitions Policy to refer expressly to the relief duty is simply that the Council has

failed to keep its published policies up-to-date, rather than that it had any intention or has given any instruction that its acquisitions officers should act differently when trying to locate suitable properties in such cases.

120. In short, notwithstanding the obvious deficiencies in the content of the Council's published policies, I accept the thrust of Ms. Grant's evidence to the effect that in May 2021, the relevant part of the TA Acquisitions Policy was regarded as applicable to the search for properties with which to make final accommodation offers in relief duty cases, and in particular that the Council's policy was that its acquisitions officers should liaise with accommodation providers and check relevant websites on a daily basis for new accommodation, focusing on looking first in Zones 1 and 2.

The result on the first limb of the appeal

121. On the basis that Ms. Grant's evidence is admitted, I consider, albeit again by a narrow margin, that the totality of the evidence now before this Court is sufficient to show that the Council complied with its obligations under section 208(1) and the 2018 Guidance and did what was reasonably practicable to find accommodation for Ms. Moge as close as possible to Ealing.

122. It is plainly not the law that in every case, a local authority should have to give chapter and verse on each and every internet search and property inquiry that its officers made to find accommodation as close as possible to an applicant's previous home or place of work. That would place an intolerable burden on hard-pressed local authorities dealing with homelessness cases. The question of how detailed and specific the information provided or evidence adduced will depend upon the facts of the particular case.

123. In that regard, I consider that Lady Hale in Nzolameso and Lewison LJ in Abdikadir both envisaged that a local authority facing a challenge under section 208(1) on review should generally be entitled to meet that challenge by pointing to a relevant published policy and explaining in general terms what is done to apply that policy. That is, I believe, what Lewison LJ indicated should have been done in Abdikadir at paragraph [59].

124. That approach will not, of course, be sufficient in every case. There may be cases where more detail is required. The recent decision in Zaman v London Borough of Waltham Forest [2023] EWCA Civ 322 provides an example. The local authority had an acquisitions policy that stated that properties would be procured as close to Waltham Forest in London as was reasonably practicable. The local authority had, however, offered the applicant accommodation in Stoke-on-Trent. As Newey LJ remarked, common sense indicated that it should normally have been possible for the authority to obtain accommodation much closer to London, for example in the major metropolitan locations in the West Midlands. However, in spite of repeated requests from the applicant, the local authority did not produce any evidence explaining how it had applied its policy and yet had still not been able to find any available properties closer to the borough. In allowing the appeal on the basis of a failure by the local authority to demonstrate compliance with section 208(1), Newey LJ concluded, "there is a dearth of evidence to show that [the policy] was followed, and common sense rather suggests that it was not".

125. In the instant case, Mr. Vanhegan points out that Ms. Grant's statement does not provide any specifics of what was actually done by the Council's officers in May 2021. That is correct. Ms. Grant's description of how the Council's acquisition officers go about searching for available accommodation is couched in general terms, and the reader is left to infer from the assertion that the same policies have been in place at all relevant times that the same practices were followed in relation to Ms. Moge in May 2021. Moreover, at no point does Ms. Grant's witness statement indicate that she has sought to ascertain what was actually done in Ms. Moge's case from any of the Council's officers who were involved, such as Mr. Oduro, Ms. Adeyemo or Mr. Teixeira. Nor is it suggested that they are no longer available to the Council.

126. Those are powerful criticisms of Ms. Grant's evidence, which could certainly have been better drafted. But for the reasons I have given, unlike the situation in Zaman, there is no reason to suppose that in May 2021 the Council's officers were not actively taking the steps identified in the TA Acquisitions Policy to find suitable properties in and close to Ealing.

127. In that regard it should not be forgotten that shortly before the Flat was identified, the Council's officers did find an earlier property in Southall, which is in Ealing itself, and which they thought was suitable for Ms. Moge, but which Ms. Moge rejected for reasons unconnected to its location.

128. Moreover, as the emails from Mr. Oduro and Mr. Teixeira show, on 7 May 2021 they each had complied a list of available properties in Ealing and other surrounding London boroughs. Unlike the position in Zaman, the focus of their lists of available properties (i.e. Zones 1 and 2) was entirely consistent with the approach to finding properties set out in the Council's TA Acquisitions policy, and there is no reason to suppose that the properties that they identified were not the result of making the type of inquiries to which Ms. Grant referred.

129. In addition, and importantly, although the so-called "concentric circles" approach applies to properties in neighbouring London boroughs just as much as it would apply to properties in more distant parts of the UK, no-one has actually pointed to any suitable alternative private sector property which was available in Zone 2 closer to Ealing at the relevant time. The most obvious alternative property which was identified as potentially suitable and available at the time was a property listed by Mr. Oduro in Hillingdon, which, like Hounslow, is a neighbouring borough to Ealing. However, there is no evidence that this property in Hillingdon was actually any closer to Ms. Moge's work in Ealing, and Mr. Vanhegan did not suggest that the fact that Ms. Moge was offered the Flat rather than this property in Hillingdon was evidence of a failure to carry out the comparative exercise envisaged in Saleh.

130. Accordingly, although I do not agree with the way that the Judge dealt with the challenge under section 208(1), I think that with Ms. Grant's evidence there is (just) sufficient evidence before this Court to show that at the relevant time the Council's acquisitions officers did carry out an appropriate search to find suitable private sector properties for Ms. Moge in neighbouring boroughs to Ealing, that there is no evidence that any other more suitable property of this type was available, and hence that the offer of the Flat did not breach the Council's obligations under section 208(1) or the 2018 Guidance in this respect.

The second limb of the appeal: use of Part VI housing to discharge a relief duty

131. The foundation of Mr. Vanhegan's second argument on appeal was that section 208(1) simply refers in general terms to a local authority being under a duty, so far as reasonably practicable, to secure that "accommodation" is available for the occupation of the applicant in their district. He contended that this required the Council to check the stock of housing available to it under Part VI as well as any other properties available in the private sector when discharging its relief duty by making a final accommodation offer.

132. This point was to some extent ventilated at the hearing, and the parties subsequently provided us with a brief note supplementing their submissions. In that note, Mr. Vanhegan confirmed that on reflection he no longer contended that section 208(1) required the Council to consider making an allocation of one of its own properties to Ms. Moge under Part VI. That realistic concession doubtless reflected the evidence adduced by Ms. Grant to the effect that Ms. Moge was not registered on the LOCATA system, and hence was unable to bid for properties in Ealing pursuant to Part VI, at the relevant time.

133. However, Mr. Vanhegan maintained his submission that section 208(1) required the Council to investigate whether a private registered provider of social housing or registered social landlord (e.g. housing associations), with which the Council had an arrangement for the purposes of nominating tenants pursuant to Part VI of the Act, might have been prepared to take one of their properties in Ealing out of the Part VI arrangements and to grant an assured tenancy or assured shorthold tenancy of that property to Ms. Moge to fulfil the Council's duties to her under Part VII. In support of the proposition that this was technically permissible under the Housing legislation, Mr. Vanhegan referred to the comments of Lewis LJ in R (Elkundi) v Birmingham City Council [2022] EWCA Civ 601, [2022] QB 604 at [57] and [144] which (albeit in the context of a debate over what remedy to grant in that case) were premised on the basis that it might be possible for a local authority use the stock of housing available to it under Part VI to meet its different duties under Part VII of the Act.

134. Ms. Screeche-Powell's response was that this was all unrealistic. She pointed out that registered providers of social housing or registered social landlords will have made arrangements to make properties available for the purposes of the Council nominating tenants of those properties under Part VI, and that the Council had a specific allocation policy in relation to Part VI (the "Allocation Policy") to which it was required to adhere in relation to such properties: see section 159 of the Act.

135. That Allocation Policy does permit persons to whom the Council owes the full housing duty under section 193 of the Act to apply for social housing to be allocated to them under Part VI. But there is no suggestion in the Allocation Policy that the limited stock of accommodation available to the Council for allocation under Part VI should be used for the purposes of Part VII. There is also no mention in the Allocation Policy of providing accommodation to persons to whom the relief duty is owed, not least because the Allocation Policy states on its face that it was last updated in 2013 (i.e. before the relief duty was created).

136. Ms. Screeche-Powell also observed that the reality that there is a substantial demand for social housing in Ealing under Part VI, and an insufficient supply of properties to

meet that demand, makes it highly unlikely that the Council would consider it appropriate to agree to redeploy one of the limited number of properties available to it for the purposes of Part VI in order to provide temporary accommodation under Part VII. She added that there was also no obvious basis for the suggestion that registered providers of social housing or registered social landlords would necessarily be willing to have their properties removed from those arrangements and used as temporary accommodation for the purposes of Part VII.

137. I agree with Ms. Screeche-Powell on these points. Section 208(1) only requires a local authority to take steps which are "reasonably practicable" to accommodate an applicant under Part VII in-borough, and in discharging this duty, the authorities to which I have referred make it clear that an important factor will be whether a local authority has, and has followed, a published policy. Although it has not been updated since 2013, the fact remains that there is nothing in the Council's Allocation Policy to indicate that any housing available under Part VI should be made available to applicants under Part VII, and the shortfall of accommodation to meet demand under Part VI in Ealing indicates why such a step would be controversial.

138. Accordingly, even if an otherwise suitable Part VI property had been available in Ealing at the relevant time, I see no basis for a conclusion that it would have been reasonably practicable for the Council to have made bespoke arrangements to procure that it should have been made available to be offered to Ms. Moge under Part VII. Still less do I consider that the fact that the Council's officers did not investigate such a possibility amounted to a breach of section 208(1).

Disposal

139. Accordingly, and not without some hesitation given the deficiencies in the Council's published policies and evidence, I would dismiss this appeal.

**Lord Justice Males:**

140. I am grateful to Lord Justice Snowden for setting out the facts and the law with such clarity. I agree that the appeal should be dismissed.

141. The only issue before this court, although it was only a subsidiary issue in the court below, is whether the Council complied with its duty under section 208(1) of the Housing Act 1996. This provides that:

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

142. The section does not say in terms that accommodation must be provided as near to an applicant's previous place of residence as possible, but it is settled law and not disputed that if it is not reasonably practicable to accommodate an applicant "in borough", the housing authority must generally, and where possible, try to place the household as close as possible to where they were previously living (*Nzolameso v Westminster City Council* [2015] UKSC 22, [2015] PTSR 549 at [19]). This principle, described in argument as the "concentric circles" approach, is essentially a judge-made expansion

of section 208 which is now included in the 2018 Guidance to which local housing authorities are required by section 182 to have regard.

143. It appears to have had its origin in cases like *Nzolameso* where a London housing authority sought to discharge its duty to an applicant by providing accommodation which was not merely out of borough, but in a completely different part of the country (near Milton Keynes). Other examples are *Alibkhiet v Brent LBC* [2018] EWCA Civ 2742, where accommodation was offered in the West Midlands and *Zaman v Waltham Forest LBC* [2023] EWCA Civ 322, where the accommodation offered in one case was in Stoke-on-Trent and in the other was slightly nearer, in Chatham. However, it applies also to an offer of accommodation in a neighbouring London borough, as in *Waltham Forest LBC v Saleh* [2019] EWCA Civ 1944, [2020] PTSR 621 and *Abdikadir v Ealing LBC* [2022] EWCA Civ 979.

144. In either case it is important that the principle should be applied with reasonable flexibility. If a person to whom housing duties are owed by a London borough is offered accommodation in another part of the country, the court is likely to expect convincing evidence that nothing suitable was available any nearer. But it will recognise that, once it is shown that nothing is available in Greater London, suitable and affordable accommodation is likely to be available only in metropolitan areas, such as the West Midlands. Hence it has been said that a local authority is "not required to scour every estate agent's window between Brent and Birmingham", or to investigate every theoretical possibility where something closer may be found (*Alibkhiet* at [80]).

145. In my view some flexibility is also appropriate when considering an offer of accommodation in a neighbouring borough. If the accommodation offered is reasonably close to where an applicant was previously living, it should not matter that some other accommodation is marginally closer: a local authority's obligation is to have regard to the Guidance, which is after all only Guidance, while the authorities formulate the principle in terms of what must generally be done, where possible (*Nzolameso* at [19]). Any other conclusion would risk the "judicialisation" of the process against which the cases have repeatedly warned and would impose unduly onerous obligations on hard-pressed local authorities with limited resources, faced with an acute housing shortage with multiple applicants for every property (*R (A) v Croydon LBC* [2009] UKSC 8, [2009] 1 WLR 2557; *Nzolameso* at [32], warning against "an overly technical or nit-picking approach"; *Poshteh v Kensington RLBC* [2017] UKSC 36, [2017] AC 624 at [22]; *Alibkhiet* at [36] to [38]; and *Abdikadir* at[ 59]).

146. Nevertheless, even allowing for a degree of flexibility, a local housing authority has a positive obligation to show that in offering an out of borough placement it has complied with its duty under section 208(1): *Nzolameso* at [36] and [37]; *Abdikadir* at [37(iii)]).

147. One way – but only one way – in which a housing authority may demonstrate that it has discharged this duty in any given case is by having a lawful policy for the procurement and allocation of accommodation and by providing evidence explaining how it had followed that policy (*Abdikadir* at [59]). It follows that an authority which does not have such a policy, or which does not provide evidence that the policy was followed, may be in difficulty in showing that it has discharged its section 208(1) duty.

148. But that is not necessarily so. Ultimately the question is not whether the Council had a lawful policy which took proper account of the 2018 Guidance (it appears that it did

not) or whether it followed that policy. Rather it is whether the Council has demonstrated, on the balance of probabilities, that the accommodation offered to Ms Moge in Feltham (i.e. the Flat) was the accommodation closest to where she was previously living which was available to the Council and suitable for Ms Moge and her son, who required a two bedroom flat, at the date of the offer.

149. In considering whether the Council has discharged that burden upon it, a balance needs to be struck between, on the one hand, requiring local authorities to evidence and explain their decisions so that they can be understood (and if appropriate, challenged) by applicants and, on the other hand, what has been described as an overly technical or nit-picking approach (*Nzolameso* at [31] to [32]). Fairness requires, moreover, that the evidence adduced by a local authority should be assessed in the light of the issues raised by an applicant when challenging the lawfulness of an offer of accommodation, particularly when (as here) the applicant is represented throughout by experienced housing solicitors.

150. Thus in *Cramp v Hastings BC* [2005] EWCA Civ 1005, [2005] HLR 786, Lord Justice Brooke said:

> "As I have shown, the review procedure gives the applicant and/or another person on his behalf the opportunity of making representations about the elements of the original decision that dissatisfy them, and of course they may suggest that further inquiries ought to have been made on particular aspects of the case. … Given the full-scale nature of the review, a court whose powers are limited to considering points of law should now be even more hesitant than the High Court was encouraged to be at the time of *ex p Bayani* if the appellant's ground of appeal relates to a matter which the reviewing officer was never invited to consider, and which was not an obvious matter he should have considered. …"

151. This passage was applied in *Abdikadir* at [52], where Lord Justice Lewison observed that "the court should be wary of imposing on the reviewing officer a duty to enquire into matters that were not raised", and in *Zaman* at [59] to [62].

152. This principle is particularly relevant in the present case. Ms Moge was represented from the outset by experienced housing solicitors, who made representations on her behalf before the Council's "minded to letter" dated 28th July and then again before the reviewing officer's decision letter dated 12th August 2021. Nowhere in those representations was there any suggestion that the Council had failed in its duty under section 208(1), either by failing to carry out adequate searches or indeed at all. The only point made in the initial representations was that Ms Moge had not refused the Council's offer of accommodation. That point was then supplemented by a suggestion that the Flat was unsuitable because of its distance from Ms Moge's places of work within the borough – but that is a separate point.

153. It was only when the matter was appealed to the County Court that it was first suggested that the Council was in breach of its duty under section 208, and even then that was the fourth of five grounds which, as is clear from the judge's judgment, occupied very little time at the hearing, which was mainly concerned with whether the Council was required

to disclose its housing file and whether the review decision was wrong to conclude that Ms Moge had refused the offer, points which the judge decided against Ms Moge and which are not challenged on this appeal. Moreover, it was no part of Ms Moge's case in the County Court that the Council had failed to comply with the 2018 Guidance or that the 2006 Guidance referred to in the review decision was out of date.

154. In my judgment, the way in which the focus of the case has been completely transformed on its journey from the review decision to the Court of Appeal has two consequences. First, in accordance with the principle identified in *Cramp*, *Abdikadir* and *Zaman*, we should be wary of criticising the reviewing officer for not having made detailed enquiries as to precisely what searches were carried out before the Flat was offered to Ms Moge. He was entitled to focus on the evidence about whether Ms Moge had or had not refused the offer. It would not be surprising if, by the time the section 208 point was finally taken, precise evidence about what searches Council employees had made, or why other properties which might have been available were not offered to Ms Moge, was harder to obtain than if the point had been taken at the outset.

155. Second, I would admit Ms Grant's witness statement. In my view that is what justice requires when the Council is now facing, effectively for the first time (albeit that it was a minor part of Ms Moge's case in the court below) a complaint that adequate searches were not carried out to find accommodation for her, either within the borough or outside the borough which was closer than the Flat in Feltham. Once that evidence is admitted, it is clear that there is at least evidence of the general practice carried out on a daily basis by Ms Grant's team. That evidence, which Lord Justice Snowden has set out at paragraph 102 above, is to my mind entirely convincing as a summary of their general practice. Why would the relevant officers not do what Ms Grant describes? That is their job. It is true that the statement is in the present tense and that there is no evidence from the officers themselves. But such criticisms apply a high degree of forensic scepticism to Ms Grant's evidence which is inappropriate in a case of this nature. Ms Grant's witness statement would be thoroughly misleading if it were carefully drafted to say only that this is what the officers do now, while saying nothing about what they did at the relevant time. In my view that possibility can be disregarded.

156. I consider, on a fair reading of Ms Grant's evidence, that she is describing, and intends to describe, the practice which applied at the relevant time in the spring and summer of 2021. If that practice was followed, and I see no reason to doubt that it was, it is hard to see what more should have been done, and Mr Vanhegan did not suggest otherwise. Accordingly I would reject the submission that there is nothing to show what the Council did to discharge its duty to Ms Moge.

157. In the light of these considerations, I turn first to the question whether the Council has shown that there was no available accommodation within Ealing itself. It has not been contended that there was suitable private-sector accommodation within the borough which ought to have been offered to Ms Moge. Nor has there been any challenge to the Council's decision that Ms Moge did not qualify for accommodation within the borough in accordance with the Council's Allocation Policy. Mr Vanhegan's submission as to accommodation within the borough was that the Council ought to have checked the stock of housing available to it under Part VI of the Act when discharging its duty to Ms Moge. I would reject that submission for the reasons given by Lord Justice Snowden at paragraphs 131 to 138 above.

158. Accordingly the Council has discharged the burden upon it as regards accommodation within the borough.

159. As for private-sector accommodation outside the borough, it is obvious that the Council did look for such accommodation. The Flat in Feltham was located in an adjacent borough and can only have been the result of a search of the kind described by Ms Grant. The acute difficulties which London local authorities face in securing or arranging suitable accommodation which is in very short supply, and for which there is enormous demand, are well known. The fact that, at any given time, very few if any properties will be available whatever efforts are made to locate them is entirely credible. Equally, there will at any given time be a number, and perhaps a large number, of applicants seeking accommodation, all of whose interests have to be taken into account by the local authority.

160. It is clear that the reviewing officer (Mr Shariff) was alive to the question whether other suitable accommodation would have been available which could have been offered to Ms Moge. The review letter (and the earlier minded to letter) stated in clear terms that "the property offered to Miss Moge on the 25th of May 2021 (i.e. the Flat) was the only 2 bedroom accommodation available at the time of offer". I would attach no significance to the fact that the date of 25th May 2021 was the date when the Council treated Ms Moge's failure to sign a lease as a refusal of the accommodation, rather than 11th May 2021, the date when the accommodation had first been offered. It appears from the email from Daniel Teixeira dated 7th May 2021 that there were two two-bedroom properties available in the private sector in boroughs adjacent to Ealing, one of which was too expensive for the applicant and the other was the Flat.

161. I would hold that although the evidence adduced by the Council on this issue is less than perfect, it is sufficient to show on the balance of probabilities that the Flat was indeed the closest available suitable accommodation, after proper enquiries were made, and that the Council has therefore discharged the burden upon it of showing that it complied with its duty under section 208.

162. The only matter which has caused me to hesitate is the email dated 7th May 2021, four days before the Flat was offered to Ms Moge, to which Lord Justice Snowden has referred at paragraph 31 above. That email referred to six direct let properties available, of which three had two bedrooms and were therefore potentially suitable for Ms Moge. Two of them were within the borough, which meant that Ms Moge did not qualify for them, and one was in the neighbouring borough of Hillingdon, although its precise location is not stated. We do not know, therefore, whether it was closer to Ms Moge's previous address than the Flat (either as the crow flies or by reference to travelling time on public transport) or, if it was, why it was not offered to her. There are of course a number of reasons why it may not have been, including that another family had greater priority or that it was (like the Cricklewood property) too expensive for her, although it is also possible (if it was closer) that it was simply overlooked when the offer of the Flat was made.

163. In these circumstances it might be possible to say that the burden is on the Council to show that the property actually offered was closer than anything else which was available, and that it is not shown that the Hillingdon property was further away or that there was some other good reason why it was not offered to Ms Moge. In my view, however, that would be an unduly rigid and unfair approach. The section 208 issue was

not raised by Ms Moge's solicitors during the course of the review, and the email referring to the property in Hillingdon does not appear to have been the subject of any argument in the court below. If the section 208 issue had been raised during the review, the reviewing officer would have had the opportunity to investigate the position more fully than he did. If the email had been relied on in the court below, the Council would have had the opportunity to address it in evidence. In the circumstances I do not think it would be fair to allow the appeal on the basis that the Council has failed to explain why the property in Hillingdon was not offered to Ms Moge.

164. As Lord Justice Snowden has pointed out, the Council's current policies do not refer to the relief duty or to the 2018 Guidance. If the Council is to avoid difficulties in other cases, its policies will need to be updated and it will need to introduce a system to ensure that it is able to produce evidence of compliance with them. Nevertheless, in this case the Council has in my judgment just about provided sufficient evidence to show on the balance of probabilities that it complied with its duty under section 208(1) in offering the Flat to Ms Moge. Accordingly I would dismiss the appeal.

**Lady Justice Thirlwall:**

165. I am grateful to Lord Justice Snowden for his clear exposition of the law and to Lord Justice Males for his analysis of the evidence provided by the Council and the conclusions drawn from it, with which I agree. I am satisfied that the Council has shown on the balance of probabilities that it complied with its duty under section 208(1) in offering the Flat to Ms Moge.

166. I also would dismiss the appeal.