



Neutral Citation Number: [2024] EWCA Civ 314

Case No: CA-2023-000758

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CAMBRIDGE
His Honour Judge Moloney KC (sitting in retirement)
Claim No. J01PE636

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2024

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE NEWBY
and
LORD JUSTICE WARBY

Between:

JULIAN QUERINO

- and -
CAMBRIDGE CITY COUNCIL

Claimant/
Respondent

Defendant/
Appellant

Iain Colville (instructed by 3C Shared Services-Legal Practice) for the Appellant
Toby Vanhegan and Stephanie Lovegrove (instructed by Duncan Lewis Solicitors) for the
Respondent

Hearing date: 12 March 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal from a decision of His Honour Judge Moloney KC (“the Judge”), sitting in retirement, raises issues as to whether the appellant, Cambridge City Council (“the Council”), was justified in offering the respondent, Mr Julian Querino, accommodation that had only one bedroom despite his wish for his children to stay overnight and whether a review decision confirming the suitability of the property should stand.

Basic facts

2. Mr Querino formerly lived with his wife and their three daughters in Coton, near Cambridge. Mr Querino also has another, adult, daughter.
3. In January 2022, Mr Querino left the property in Coton and applied to the Council for assistance on the basis that he was homeless. In May 2022, the Council accepted that it had a duty under section 188 of the Housing Act 1996 (“the 1996 Act”) to secure interim accommodation for Mr Querino. That was first provided in a hotel, but Mr Querino was subsequently housed pursuant to a licence in a hostel forming part of the Council’s own housing stock in Chesterton Road, Cambridge (“the Hostel”). On 22 July 2022, the Council accepted that it owed Mr Querino the “main housing duty” under section 193(2) of the 1996 Act and, in a letter dated 2 September 2022, it offered Mr Querino a social tenancy of a flat in Hartree Lane, Cambridge (“the Flat”) pursuant to Part 6 of the 1996 Act (which deals with allocation of housing accommodation).
4. As the offer letter explained, the Flat has one bedroom. The letter stated that the author was “satisfied that the property is suitable and that it would be reasonable for you to accept it”. After comments on the Flat’s location, the letter continued:

“I appreciate you may wish for more bedrooms to accommodate your children however following the Cambridge City Council Lettings Policy, specifically 5.5.1 and 5.5.2 I am satisfied that a 1 bedroom property is suitable for your needs.

This is because the police have confirmed that your children remain safe to reside at their mother’s house In addition to this there are no concerns raised by Social Services for me to consider as part of this offer and its suitability.

You have advised that the eldest child wishes to attend Cambridge Regional College (CRC) The travel time to CRC from her mother’s address is indicated to be around 45 minutes by public transport and CRC advise on their website there may be alternative transport arrangements or financial help they can provide or help arrange. You have advised that the remaining children attend a school local to the mother’s house.

I am therefore satisfied that the children remain safe to reside at [the Coton property] and such a residence will not impact their education or wellbeing.

Given the above in total I am satisfied that the offered property ... is suitable for your needs and requirements.”

5. The Council’s “Lettings Policy” (“the Policy”), to which there was reference in the offer letter, stated as follows in paragraphs 5.5.1 and 5.5.2:

“5.5.1 A child, or children, living between parents at separate addresses will only be considered as having one main home unless there are exceptional circumstances that mean that both parents should provide a home. A Court Order allowing access to children, or confirming residence between separated parents, does not mean that Cambridge City Council must consider that the child is part of an applicant’s household for the purposes of a housing register application.

5.5.2 An assessment will be made by Cambridge City Council as to which parent’s property is considered as the child’s main home. If Cambridge City Council considers that an applicant does not provide the child with his or her main home then the child will not be considered as part of the housing register application. The child would then not be considered as part of the bedroom requirements when assessing overcrowding or under-occupation. They would also not be considered when assessing the size of property (number of bedrooms) that the application would be eligible to bid for and offered through the lettings process.”

6. The letter went on to explain that acceptance of the offer would bring the main housing duty to an end under section 193(6)(c) of the 1996 Act; that Mr Querino was entitled to request a review of the Flat’s suitability; and that refusal of the offer would bring the main housing duty to an end under section 193(7), with the consequence that Mr Querino would be given notice to leave his temporary accommodation in the Hostel.

7. Mr Querino accepted the offer and moved into the Flat. His tenancy commenced on 12 September 2022. He also, however, requested a review, and his solicitors, Duncan Lewis, submitted representations in support of this on 11 October 2022. The main thrust of the representations was to the effect that the Flat was “not suitable due to space and arrangement as [Mr Querino] is seeking an additional bedroom to accommodate his children”. Paragraph 3 of the representations stated:

“At present, Mr Querino has access to his children for several hours for a few days a week. Mr Querino is seeking increased access including overnight stay during 3-4 nights a week and

we submit that increased contact is likely to be granted by Court. At present, Mr Querino is occupying a one bedroom property and is concerned that his daughters will be unable to stay with him due to a lack of space in the property.”

The representations quoted paragraph 5.5.1 of the Policy and continued in paragraph 11:

“We submit that Mr Querino’s circumstances are exceptional as his children are heavily reliant on him for emotional support. We submit that this includes but is not limited to Mr Querino providing his children with safe space; warmth; and attention after everything they have been through after the separation.”

In paragraph 14, the representations explained that Mr Querino’s eldest daughter “has expressed a desire to stay over at Mr Querino’s accommodation a few days a week whilst she attends college”, but that, “[u]nfortunately, she is unable to stay at present due to lack of space and Mr Querino is afraid that this will begin to affect his relationship with his eldest daughter”. The representations went on:

“15. The authority are aware that Mr Querino has been diagnosed with ADHD. Mr Querino also suffers with health conditions including asthma; depression; anxiety and arthritis, which predominantly affect his knees. Mr Querino has suffered extreme trauma throughout his life thus far and is also grieving for his late father, who passed away in September 2022.

16. Mr Querino is keen to re-build his life and is seeking to be the best father to his daughters. He is continuing to seek professional medical help to ensure he is able to manage his emotions and therefore progress with his life We submit that it is fundamental for the authority to consider Mr Querino’s children’s needs as well as his needs.”

The representations concluded with a request for a two-bedroom property.

8. There was enclosed with the representations a report by Cafcass, the Children and Family Court Advisory and Support Service. The representations recorded the belief that disclosure of the report to the Council had been authorised and they contained various references to the contents of the report.
9. On 18 October 2022, the reviewer emailed Ms Sally Jackson, the author of the Cafcass report, to ask for assistance on certain points. However, Ms Jackson replied that, while there was leave to share with the Council a court order which had been made following a hearing on 17 August 2022, permission had not been granted for the Cafcass report to be released to the Council. The order, Ms Jackson explained, provided for a further hearing on 29 and 30 December 2022. With regard to the report, Ms Jackson said this:

“Until there is consent from both parties/ the court for sharing the section 7 report, I am advised that technically you should disregard its content which I appreciate is not helpful.”

10. In the light of Ms Jackson’s comments, the reviewer stated in her decision, which was dated 24 November 2022, that she would “progress with the review disregarding any submissions you have made specific to the Cafcass report” and that she would not “put forward any information specific to the Cafcass report in my considerations”. The reviewer concluded that the Flat and its location were suitable for Mr Querino’s occupation. She summarised her conclusions as follows:

- “1. Your children are adequately housed and supported financially, practically, and emotionally in the primary care of their mother ... at the family home [in Coton], where they reside full time.
2. Your children reside full time with their mother [in Coton], and do not reside with you with any degree of permanence or regularity.
3. I do not find as is set out in this decision that your children are not reasonably expected to reside with you in the context of a scheme for housing the homeless where they have a home with their mother
4. I do not find that the circumstances surrounding your family and the separation of you and [your wife] to be exceptional as set out in this decision.
5. I do not find that your 18 year old daughter ... is either resident or reasonably expected to reside with you.
6. The accommodation or tenancy at [the Flat] does not preclude your children from visiting or staying overnight.
7. The accommodation at [the Flat] does not prohibit you from sharing parenting of your children with their mother, neither does it inhibit your ability to spend quality time with your children
8. The decision of the family court regarding any future staying access for your children would not be contingent on the accommodation at [the Flat] having one bedroom.
9. Were the family court to issue a final court order acknowledging shared parenting and staying access of up to 50%, based on the information available to me at this time I am satisfied that it would still not be

reasonable to expect your children to reside with you and allocate additional bedroom space.

10. Having reviewed your file, I find that the Lettings Policy has been correctly applied and the assessment of eligibility for a one-bedroom need to be appropriate and correct for your circumstances
 11. While it is acknowledged that having larger accommodation to enable your children to have their own bedroom(s) when they visit is desirable and, may improve your own mental health in that you feel you are more able to meet your aspirations as a parent, I do not find that occupation of [the Flat] is of significant detriment to your mental health so as to render the property unsuitable for your occupation.
 12. As has been set out in this decision regard has been given to S11 Children's Act 2004 in respect of your children's wellbeing.
 13. As has been set out in this decision regard has been given to Article 8, European Human Rights Convention, and the offer of [the Flat] is not in breach of this.
 14. Acknowledging that you may in fact have a disability regard has been given to the Council's Public Sector Equality Duty as has been set out in this decision.
 15. The decision that [the Flat] was suitable for your needs as a single person and to be made to you as a final offer of accommodation to bring Cambridge City Council's housing duties to an end was correct.
 16. The accommodation at [the Flat] meets your particular housing needs and is suitable for your occupation."
11. Earlier in her decision, the reviewer had quoted the Policy and also said the following, among other things:
- i) "Acknowledging the ongoing proceedings in the family court regarding future shared parenting and staying access arrangements, I refer to R v Oxford CC ex p Doyle (1997) concluding that a Child Arrangement Order does not mean the Children are reasonably expected to live with both parents. I also refer to Holmes-Moorhouse v Richmond Upon Thames LBC (2009) where it was held that while the housing authority should have regard to a shared residence order, it remains a matter for the authority to decide in the context of a scheme for housing the homeless whether the children can reasonably be expected to reside with one parent when they already have a home with the other. It was

also set out that the authority cannot be dictated to by the existence of a residence order.

With this also in mind it is my finding that should a final Child Arrangement Order be granted giving shared time spent with of up to 50% it would not be reasonable to expect your children to reside with you as well as residing with their mother [in Coton], where any additional bedrooms allocated in respect of the children staying with you would in practice unoccupied for up to half the week.

It has been submitted that you are concerned that in the likelihood that the family court are agreeable to shared overnight access that your children would not be able to stay with you at [the Flat] as it is a one-bedroom property. It is the for the family court to put the interests of the children and if the interests of the children are to spend more time with both parents, the court would not put size of accommodation above the interests of the children where there are no safeguarding concerns. Furthermore, I refer again to *Holmes-Moorhouse v Richmond Upon Thames LBC (2009)* a family Court should not use a residence order as a means of putting pressure upon a local housing authority to allocate its resources in a particular way.

Occupation of a one-bedroom property, specifically [the Flat] does not prohibit your children from staying at the property overnight. You have told me that you have arrangements for a bunk bed in the bedroom for the children and you would sleep in the living room. Moreover, occupation of 1-bedroom accommodation does not prohibit your children from spending quality time with their father or receiving the care and support they need”;

- ii) “Even looking to the longer term and the prospect that you may be successful, and the court may issue an order granting shared residency, such an order would not be binding on the Authority”; and
- iii) “It is my finding that your [three younger] children ... are neither currently resident with you, nor reasonably expected to reside with you at the current time. It is also the expectation that any future Child Arrangement will allow for shared parenting and staying access meaning that the children will continue to have a principal home with their mother [in Coton], and accommodation with you would be over occupied for a proportion of the week. Taking this into account alongside the appropriate application of the Councils Lettings Policy and the general housing circumstances and pressure on social housing in the district, I am satisfied that [the Flat] was correctly offered to you as a single person, so I am only required to consider whether the accommodation is suitable for you.”

12. Towards the end of her decision, under the heading “Was there a deficiency or irregularity in the original decision?”, the reviewer said this:

“By law we have to consider if there was a deficiency or irregularity in the original decision, or in the way the decision was made. This involves considering if there was something lacking in the original decision which is of sufficient

importance to the fairness of the review procedure to require the additional procedural safeguards set out in Regulation 7(2) of the Homelessness (Review Procedure etc) Regulations 2018.

I have concluded that the original decision did not contain a deficiency or irregularity as the decision as to the property being a suitable offer of accommodation was made on the information available to the Officer at the point of decision.”

13. Mr Querino appealed to the County Court pursuant to section 204 of the 1996 Act and, at a hearing on 29 March 2023, the Judge allowed the appeal. He did so on three grounds. In the first place, the Judge held that the reviewer should have sent Mr Querino a “minded to” letter pursuant to regulation 7(2) of the Homelessness (Review Procedure etc.) Regulations 2018 (“the Review Regulations”). Mr Querino had argued that the decision of the Council reflected in its offer letter of 2 September 2022 “was deficient, at least retrospectively, in particular in that after it was made, an important Cafcass report was produced”. The Judge observed that the “potential importance” of the Cafcass report was plain and that it was likely that, had the reviewer sent a “minded to” letter, “the Family Court would have consented to [the report’s] use by the local authority for this purpose if application had been made”. Secondly, the Judge considered that the offer which the Council had made to Mr Querino in its letter dated 2 September 2022 had not complied with the requirements of section 193(7F) and (8) of the 1996 Act. The Judge noted that those subsections meant that a housing authority is not to make an offer of Part 6 accommodation unless satisfied that the applicant “is able to bring to an end his existing obligations in respect of other accommodation before being required to take up the part 6 offer”. The Judge said that it was “clear that the burden of proof is on the council to satisfy [him] that its offer complied with the statutory requirements” and that it had failed to do so. Thirdly, the Judge took the view that, in “shutting her eyes” to the Cafcass report, the reviewer had made a serious error of law. The Judge agreed with Mr Querino that the reviewer “was wrong to exclude the Cafcass report from its consideration, at least without applying to the Family Court for leave to use it”.
14. The Council now challenges the Judge’s decision in this Court.
15. We have not been told what, if any, order the Family Court made at the hearing that was listed for 29 and 30 December 2022, nor of any subsequent orders of the Family Court.

The legal framework

16. Where a local housing authority arrives at the conclusion that an applicant is homeless, did not become homeless intentionally, is eligible for assistance and has a priority need, it is obliged by section 193(2) of the 1996 Act to “secure that accommodation is available for occupation by the applicant” unless it refers the application to another housing authority in accordance with section 198. This is the “main housing duty”.
17. Ways in which a housing authority can cease to be subject to the main housing duty are given in section 193(5), (6), (7) and (7AA) of the 2006 Act. Section 193(6)(c) provides for the duty to come to an end if the applicant “accepts an offer of

accommodation under Part VI (allocation of housing)”. By section 193(7), the housing authority will cease to be subject to the duty “if the applicant, having been informed of the possible consequence of refusal or acceptance and of his right to request a review of the suitability of the accommodation, refuses a final offer of accommodation under Part 6”.

18. Accommodation offered to an applicant in discharge of the main housing duty must, however, be “suitable”: see section 206(1) of the 2006 Act. The “Homelessness Code of Guidance for Local Authorities” issued by the Secretary of State to which housing authorities are required by section 182 to have regard states in paragraph 17.2:

“Section 206 provides that where a housing authority discharges its functions to secure that accommodation is available for an applicant the accommodation must be suitable. This applies in respect of all powers and duties to secure accommodation under Part 7, including interim duties. The accommodation must be suitable in relation to the applicant and to all members of their household who normally reside with them, or who might reasonably be expected to reside with them.”

19. Section 193(7F) and section 193(8) provide:

“(7F) The local housing authority shall not—

- (a) make a final offer of accommodation under Part 6 for the purposes of subsection (7); or
- (ab) approve a private rented sector offer;

unless they are satisfied that the accommodation is suitable for the applicant and that subsection (8) does not apply to the applicant.

(8) This subsection applies to an applicant if—

- (a) the applicant is under contractual or other obligations in respect of the applicant's existing accommodation, and
- (b) the applicant is not able to bring those obligations to an end before being required to take up the offer.”

20. Section 202 of the 1996 Act confers on an applicant a right to request a review of various decisions of housing authorities. Such decisions include, by section 202(1)(b) and (f), “any decision of a local housing authority as to what duty (if any) is owed to him under sections 189B to 193C and 195 (duties to persons found to be homeless or threatened with homelessness)” and “any decision of a local housing authority as to the suitability of accommodation offered to him in discharge of their duty under any of the provisions mentioned in paragraph (b) or (e)”.

21. Part 3 of the Review Regulations deals with the procedure which is to be adopted in relation to a review. “Minded to” letters are the subject of regulation 7(2), which states:

“If the reviewer considers that there is a deficiency or irregularity in the original decision, or in the manner in which it was made, but is minded nonetheless to make a decision which is against the interests of A on one or more issues, the reviewer must notify A—

- (a) that the reviewer is so minded and the reasons why, and
- (b) that A, or someone acting on A’s behalf, may make representations to the reviewer orally or in writing, or both orally and in writing.”

By regulation 9(1), notice of the decision on a review of a decision which falls within section 202(1)(b) or (f) must be given to the applicant within eight weeks or “within such longer period as [the applicant] and the reviewer may agree in writing”.

22. In *Holmes-Moorhouse v Richmond upon Thames London Borough Council* [2009] UKHL 7, [2009] 1 WLR 413 (“*Holmes-Moorhouse*”), in a passage endorsed by the Supreme Court in *Poshteh v Kensington and Chelsea Royal London Borough Council* [2017] UKSC 36, [2017] AC 624, Lord Neuberger said this about review decisions at paragraph 50:

“a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision. That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions.”

On the other hand, “[i]t must be clear from the decision that proper consideration has been given to the relevant matters required by the Act and the Code” (*Nzolameso v Westminster City Council* [2015] UKSC 22, [2015] PTSR 549, at paragraph 32, per Baroness Hale, with whom Lords Clarke, Reed, Hughes and Toulson agreed).

23. By section 204 of the 1996 Act, a person dissatisfied with a review decision may appeal to the County Court on “any point of law arising from the decision or, as the case may be, the original decision”. “Although the county court’s jurisdiction is appellate, it is in substance the same as that of the High Court in judicial review” (*Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, at paragraph 7, per Lord Bingham). The grounds of challenge can include “procedural error, the extent of legal powers (vires), irrationality and inadequacy of reasons”: see *James v Hertsmere Borough Council* [2020] EWCA Civ 489, [2020] 1 WLR 3606, at paragraph 31, per Peter Jackson LJ, and also *Abdikadir v Ealing*

London Borough Council [2022] EWCA Civ 979, [2022] PTSR 1455, at paragraph 8, per Lewison LJ.

The significance of proceedings relating to children of an applicant

24. The Cafcass report which Mr Querino’s solicitors sent to the reviewer was central to two of the grounds on which the Judge ruled in Mr Querino’s favour. I find it convenient to consider at this stage (a) whether it was permissible for the reviewer to be supplied with the report and (b) the significance for housing issues of decisions made in proceedings under the Children Act 1989 (“CA 1989”) for which such reports are prepared.

Disclosure of the Cafcass report

25. The confidentiality of children involved in proceedings under CA 1989 is protected by section 12 of the Administration of Justice Act 1960 (“AJA 1960”). That provides that the publication of information relating to proceedings before any Court sitting in private (as the Court normally does when hearing CA 1989 matters – see rule 27.10 of the Family Procedure Rules (“the FPR”)) shall not of itself be a contempt of Court *except* where, among other things, “the proceedings ... are brought under the Children Act 1989”. Unless the Court expressly prohibits this, publication of an order made by a Court sitting in private will not be objectionable (see section 12(2) of AJA 1960). Further, the dissemination of information can be authorised by rules of Court (see section 12(4) of AJA 1960), and chapter 7 of the FPR allows information relating to proceedings held in private to be communicated where the Court gives permission and in certain other specified circumstances. However, “a disclosure of information that falls within s 12(1) AJA which is not authorised by the FPR or by an order of the court may be a contempt of court”: see *Griffiths v Tickle* [2022] EWCA Civ 465, [2022] 2 FLR 879, at paragraph 7, per Warby LJ. Moreover, the general bar extends to “the publication of accounts of what has gone on in front of the judge, and the publication of documents such as transcripts of judgments, witness statements, reports, position statements, skeleton documents [and] other documents filed in the proceedings”: see *Griffiths v Tickle* [2021] EWCA Civ 1882, [2022] EMLR 11, at paragraph 43, per Dame Victoria Sharp P, giving the judgment of the Court.
26. In the present case, it is not suggested that an order has been made authorising disclosure of the Cafcass report to the Council. Nor do the FPR provide for such disclosure. While, therefore, I do not doubt that Mr Querino’s solicitors believed it to be proper to supply the reviewer with the Cafcass report, they were mistaken about this. The provision of the report to the reviewer was not in fact permissible. It must follow, I think, that the reviewer was not entitled to have regard to its contents.

The significance of decisions in CA 1989 proceedings

27. The House of Lords considered the relationship between decisions of the Court under CA 1989 and those of housing authorities under the 1996 Act in *Holmes-Moorhouse*. In that case, a father who was homeless contended that he was in “priority need” on the basis that he was a “person with whom dependent children ... might reasonably be expected to reside” within the meaning of section 189(1)(b) of the 1996 Act. He relied on the fact that a shared residence order had been made providing for his children to spend alternate weekends and half of their school holidays with him. The House of

Lords, however, upheld a decision by the housing authority that the father was not in priority need.

28. Having noted that, when determining a question with respect to the upbringing of a child under CA 1989, the child's welfare is the paramount consideration, Lord Hoffmann, with whom Lord Scott, Lord Walker, Baroness Hale and Lord Neuberger expressed agreement, said in paragraph 9:

“The question for a housing authority under Part VII of the 1996 Act [which comprises sections 175 to 218] is not the same. In deciding whether children can reasonably be expected to reside with a homeless parent, it is not making the decision on the assumption that the parent has or will have suitable accommodation available. On the contrary, it is deciding whether it should secure that such accommodation is provided. And this brings in considerations wider than whether it would be in the interests of the welfare of the children to do so. The fact that both the court and the housing authority apply criteria which look superficially similar - the court deciding what would be in the best interests of the child and the housing authority deciding whether the children can reasonably be expected to reside with the father - does not mean that the questions are the same. The contexts are quite different. The housing authority is applying the provisions of a Housing Act, not a Children Act. The question of whether the children can reasonably be expected to reside with him must be answered in the context of a scheme for housing the homeless. And it must be answered by the housing authority, in which (subject to appeal) the statute vests the decision-making power.”

29. In a similar vein, Lord Hoffmann said in paragraph 14:

“The question which the housing authority therefore had to ask itself was whether it was reasonable to be expected, in the context of a scheme for housing the homeless, that children who already had a home with their mother should be able also to reside with the father. In answering this question, it would no doubt have to take into account the wishes of both parents and the children themselves. It would also have to have regard to the opinion of a court in family proceedings that shared residence would be in the interests of the children. But it would nevertheless be entitled to decide that it was not reasonable to expect children who were not in any sense homeless to be able to live with both mother and father in separate accommodation.”

A shared residence order, Lord Hoffmann observed in paragraph 17, “will only be part of the material which the housing authority takes into account in coming to its decision”: “[t]he two procedures for deciding different questions must not be allowed to become entangled with each other”.

30. In paragraph 21, Lord Hoffmann said:

“I think it will be only in exceptional circumstances that it would be reasonable to expect a child who has a home with one parent to be provided under Part VII [of the 1996 Act] with another so that he can reside with the other parent as well. It seems to me likely that the needs of the children will have to be exceptional before a housing authority will decide that it is reasonable to expect an applicant to be provided with accommodation for them which will stand empty for at least half of the time. I do not say that there may not be such a case; for example, if there is a child suffering from a disability which makes it imperative for care to be shared between separated parents. But such cases, in which that child (but not necessarily any sibling) might reasonably be expected to reside with both parents, will be unusual.”

31. Baroness Hale said in paragraph 41:

“There may be cases where a child could reasonably be expected to live with a parent in accommodation provided under the homelessness legislation, despite also having a perfectly suitable home with the other parent. Lord Hoffmann has given the example of a disabled child, whose parents might be better able to look after him properly if they shared his care between them. Another example might (I only say might) be where a shared residence order was made some time ago and has been working extremely well, but one of the parents has unexpectedly and unintentionally become homeless (perhaps because of domestic violence from a new partner). It might then be reasonable to expect those children's existing living arrangements to be continued by the provision of social housing for one of the parents. But that is not this case.”

Should the reviewer have sent a “minded to” letter?

32. As I have said, the first ground on which the Judge ruled in Mr Querino’s favour was that the reviewer ought to have sent a “minded to” letter. Provision for such letters is made by regulation 7(2) of the Review Regulations. That requires an applicant to be notified where a reviewer “considers that there is a deficiency or irregularity in the original decision, or in the manner in which it was made, but is minded nonetheless to make a decision which is against the interests of [the applicant] on one or more issues”. The authorities on the regulation and its predecessors establish the following:

- i) Regulation 7(2) is “an important part of the mechanisms designed to ensure the fairness of the overall procedure”: *Hall v Wandsworth London Borough Council* [2004] EWCA Civ 1740, [2005] HLR 23 (“*Hall*”), at paragraph 25, per Carnwath LJ. See also *Banks v Kingston upon Thames London Borough Council* [2008] EWCA Civ 1443, [2009] PTSR 1354 (“*Banks*”), at paragraph 65;

- ii) The word “deficiency” does not have any particular legal connotation but “simply means ‘something lacking’”. The reviewer should treat regulation 7(2) as applicable, “not merely when he finds some significant legal or procedural error in the decision, but whenever (looking at the matter broadly and untechnically) he considers that an important aspect of the case was either not addressed, or not addressed adequately, by the original decision-maker”: see *Hall*, at paragraphs 29 and 30, per Carnwath LJ, and also *J v Wandsworth London Borough Council* [2013] EWCA Civ 1373, [2014] PTSR 497, at paragraph 70(3). “Although it will usually be the case that there was a deficiency in the original decision if the reviewing officer decides to uphold it on different grounds, there may yet be a deficiency if the reviewing officer decides to uphold the decision on the same grounds”: see *J v Wandsworth London Borough Council*, at paragraph 71(3), per Lewison LJ;
- iii) The “something lacking” must be “of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard”. Whether that is so involves an exercise of “evaluative judgment” on which the reviewer’s conclusions will only be open to challenge on public law grounds. See *Hall*, at paragraph 29, *Lambeth London Borough Council v Johnston* [2008] EWCA Civ 690, [2009] HLR 10 (“*Johnston*”), at paragraph 51, and *J v Wandsworth London Borough Council*, at paragraphs 70(2) and 71(5);
- iv) A “deficiency” can arise from events subsequent to the decision. On that basis, Lawrence Collins LJ said in *Banks* at paragraph 72:

“I am satisfied that, although the original decision itself cannot be faulted, it came to have a deficiency which was of sufficient importance to justify the additional procedural safeguard, in the sense that further representations made in response could have made a difference to the decision that the reviewing officer had to make.”

As Moore-Bick LJ said in *Mohamoud v Birmingham City Council* [2014] EWCA Civ 227, [2015] PTSR 17 (“*Mohamoud*”), at paragraph 59, “the failure of the original decision-maker to take into account subsequent events which it would have been unfair for him to ignore if they had already taken place at the time of his decision is sufficient to give rise to a deficiency in the decision”. See also *J v Wandsworth London Borough Council*, at paragraph 70(4).

- 33. Mr Iain Colville, who appeared for the Council, argued that regulation 7(2) of the Review Regulations can have no application where what is under review is an offer. He relied in this connection on *Akhtar v Birmingham City Council* [2011] EWCA Civ 383, [2011] HLR 28 (“*Akhtar*”), where a housing authority had made an offer of accommodation in a letter dated 12 August 2009. Etherton LJ, with whom Maurice Kay and Rimer LJ agreed, said in paragraph 46:

“So far as concerns the letter of August 12, 2009, I reject [counsel’s] submission that, as a matter of principle, every offer letter should give reasons explaining why the offered property is considered to be suitable and reasonable for the applicant to accept. It is obviously implicit in every such offer that the

housing authority considers the property to be suitable in all material respects, including location, size and configuration. I cannot see that any purpose would be served by a bald statement to that effect.”

34. *Akhtar* shows, Mr Colville said, that a housing authority need not give reasons for thinking a property suitable when making an offer and, that being so, there can be no scope for a reviewer to detect a “deficiency” in the decision to make the offer. Regulation 7(2) is not engaged at all, Mr Colville said. The question whether a “deficiency” exists can be determined only by reference to reasons given for it. Where, as with an offer, no reasons are required, it would make no sense for regulation 7(2) to apply. In further support of this contention, Mr Colville pointed out that cases such as *Johnston, Banks, J v Wandsworth London Borough Council* and *Mohamoud* had involved reasoned decisions adverse to applicants, not offers.
35. I have not been persuaded. Regulation 7(2) provides for a situation in which there is a deficiency or irregularity in an “original decision”, and regulation 5(1) confirms that such an “original decision” can be a decision as to the suitability of accommodation offered in discharge of the main housing duty. Further, I cannot see why the fact that an offer does not have to include reasons should necessarily render it impossible to discern a “deficiency” in the decision to make it. It may be that, if no reasons are given for an offer, that may affect the scope for identifying a “deficiency”, but a housing authority may in fact choose to explain its thinking in an offer letter. Further, it may be obvious that a subsequent event was not taken into consideration. Suppose, for example, that an applicant was offered a first-floor flat in a building with no lift; accepted it but asked for a review of its suitability; and then, while the review was underway, became dependent on a wheelchair for some reason. It would be apparent that the original decision-maker had not taken into account something which it would have been unfair for him to ignore had he known of it when deciding what accommodation to offer. Again, a reviewer might perhaps be able to see from the housing file that an important consideration had been overlooked when the suitability of the accommodation offered was assessed.
36. In the present case, the Judge considered that the Cafcass report should have led the reviewer to send a “minded to” letter. As I have said, the reviewer should not in fact have been sent the report and was not entitled to take its contents into account. However, Mr Toby Vanhegan, who appeared for Mr Querino with Ms Stephanie Lovegrove, argued that the reviewer did not need to have regard to what was said in the report to conclude that there was a “deficiency” in the decision to offer Mr Querino the Flat. The simple fact that the Council had not known that there was a Cafcass report when it made the offer should have led the reviewer to consider that there was a “deficiency” in the original decision and, had she notified Mr Querino that she felt bound to disregard what was said in the report, he would have had an opportunity to obtain the Court’s permission to pass it to her. Instead, Mr Vanhegan said, it can be seen from her decision that the reviewer proceeded on the basis that there was no “deficiency” because the original decision was made “on the information available to the Officer at the point of decision”. That approach was wrong in law, Mr Vanhegan submitted, since a “deficiency” can arise from events subsequent to a decision.

37. As, however, Lord Neuberger said in *Holmes-Moorhouse*, “a benevolent approach should be adopted to the interpretation of review decisions”. In the present case, while the reviewer referred at the end of her decision to the original decision having contained no “deficiency” because it was made “on the information available to the Officer at the point of decision”, she had explained earlier in her decision that she had been advised that the content of the Cafcass report should be disregarded and so had “progress[ed] with the review disregarding any submissions ... made specific to the Cafcass report”. In the circumstances, the fact that the reviewer did not think that the Cafcass report revealed a “deficiency” is to be attributed to the fact that its contents fell to be disregarded rather than to any perception that information of which the original decision-maker had not been aware was irrelevant.
38. Should, however, the simple fact that there was now known to be a Cafcass report of which the original decision-maker had not been aware have led the reviewer to discern a “deficiency”? I do not think so. *Holmes-Moorhouse* indicates that “the needs of the children will have to be exceptional before a housing authority will decide that it is reasonable to expect an applicant to be provided with accommodation for them which will stand empty for at least half of the time” and, consistently with that, the Policy states that children living between parents at separate addresses “will only be considered as having one main home unless there are exceptional circumstances that mean that both parents should provide a home” and that “[a] Court Order allowing access to children, or confirming residence between separated parents, does not mean that Cambridge City Council must consider that the child is part of an applicant’s household for the purposes of a housing register application”. In the circumstances, the mere fact that a Cafcass report relating to children of an applicant has been prepared, or emerged, will not suggest that there was “something lacking” in the original decision “of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard”. There would, as it seems to me, have to be something further pointing to “exceptional” needs or circumstances before there would be good reason to conclude that there was a “deficiency”. If a Court order providing for shared residence would not compel a housing authority to provide a property large enough to accommodate the children, I do not see why the emergence of a Cafcass report, whose contents could not be taken into account and the recommendations in which might not be adopted by the Court, should of itself be deemed sufficiently important to necessitate a “minded to” letter.
39. By way of respondent’s notice, Mr Querino contended that the letter in which he was offered the Flat was deficient in further respects. In particular, it is said that the offer letter failed to consider (a) the fact that Mr Querino, his children and his wife all wished the children to stay overnight with him, (b) Mr Querino’s health issues, his receipt of “PIP” (i.e. personal independence payment) and whether he was “disabled” for the purposes of the Equality Act 2010, (c) the “public sector equality duty” (“the PSED”) for which the Equality Act 2010 provides and (d) affordability. However:
- i) For a reviewer’s decision as to whether there was a “deficiency” to be open to challenge, there must be a public law ground for doing so. It is not enough that a different reviewer, or the Court, might have taken a different view;
 - ii) The mere fact that something was not mentioned in an offer letter does not show that it was not taken into account or reveal a “deficiency” in the decision to make the offer;

- iii) Citing paragraphs 5.5.1 and 5.5.2 of the Policy, the offer letter said that the Flat was considered “suitable” notwithstanding Mr Querino’s “wish for more bedrooms to accommodate [his] children” in circumstances where the children “remain safe to reside [in Coton] and such a residence will not impact their education or wellbeing”. There can, I think, be no question of the reviewer having been obliged to view the fact that Mr Querino’s children and wife might also have been keen for the children to stay overnight as of sufficient importance to warrant a “minded to” letter;
 - iv) Whether there is an “important aspect of the case” that “was either not addressed, or not addressed adequately, by the original decision-maker” will depend to an extent on the representations made by or on behalf of the applicant. Where such representations have not suggested that a point is of significance, that may of itself indicate that the fact that it was not the subject of comment in the original decision does not matter. Take affordability. Mr Querino’s solicitors did not raise any issue as to the affordability of the Flat in their representations. That being so, there was no reason for the reviewer to think that the fact that the offer letter did not discuss affordability was relevant. Neither did the representations suggest that the PSED, Mr Querino’s receipt of PIP or whether he might be “disabled” for the purposes of the Equality Act 2010 was of any significance. Further, while the representations mentioned Mr Querino’s health issues, they appear to have done so only as providing an extra reason why it was desirable for Mr Querino’s children to spend more time with him.
40. In all the circumstances, it seems to me, with respect, that the Judge was wrong to think that the reviewer fell into error in failing to send a “minded to” letter. In my view, she was entitled to conclude that no such letter was required.

Compliance with section 193(7F) and (8)

41. Turning to the second ground of the Judge’s decision, section 193(7F) of the 1996 Act states that a housing authority “shall not ... make a final offer of accommodation under Part 6 for the purposes of subsection (7) ... unless they are satisfied ... that subsection (8) does not apply to the applicant”, and section 193(8) explains that the subsection applies to an applicant if:
- “(a) the applicant is under contractual or other obligations in respect of the applicant’s existing accommodation, and
 - (b) the applicant is not able to bring those obligations to an end before being required to take up the offer.”

Section 193(7), to which there is reference in section 193(7F), provides for a housing authority to cease to be subject to the main housing duty if “the applicant, having been informed of the possible consequence of refusal or acceptance and of his right to request a review of the suitability of the accommodation, refuses a final offer of accommodation under Part 6”.

42. As originally enacted, section 193 of the 1996 Act included the following:

- “(7) The local housing authority shall also cease to be subject to the duty under this section if—
- (a) the applicant, having been informed of the possible consequence of refusal, refuses an offer of accommodation under Part VI, and
 - (b) the authority are satisfied that the accommodation was suitable for him and that it was reasonable for him to accept it and notify him accordingly within 21 days of the refusal.
- (8) For the purposes of subsection (7) an applicant may reasonably be expected to accept an offer of accommodation under Part VI even though he is under contractual or other obligations in respect of his existing accommodation, provided he is able to bring those obligations to an end before he is required to take up the offer.”

Subsection (7F) was inserted into the 1996 Act by the Homelessness Act 2002 (though at that stage it referred to whether it was “reasonable for [the applicant] to accept the offer”) and subsection (8) was given its present form by the Localism Act 2011. It is perhaps also worth recording that the Homelessness Act 2002 substituted for the existing provision one substantially in the terms of the present subsection (7) and added this as a new subsection (7A):

“An offer of accommodation under Part 6 is a final offer for the purposes of subsection (7) if it is made in writing and states that it is a final offer for the purposes of subsection (7).”

43. The Judge said that the Council had not satisfied him that the offer of the Flat complied with the requirements of section (7F) and (8). Supporting that view, Mr Vanhegan referred to *Norton v Haringey London Borough Council* [2022] EWCA Civ 1340, [2022] PTSR 1892 (“*Norton*”). In that case, the housing authority contended that, although it had owed the main housing duty to an applicant, it had ceased to be subject to that duty on the strength of a “private rented sector offer” (or “PRSO”). The Court of Appeal decided otherwise on several grounds. One of them related to section 193(7F) and (8). Section 193(7F)(ab) is relevant to a PRSO. That operates to bar a housing authority from “approv[ing] a private rented sector offer” unless satisfied that subsection (8) does not apply to the applicant.
44. The reasoning of Elisabeth Laing LJ on this aspect of *Norton* is to be found in paragraph 44. She there said this:

“The question at the heart of Ground B is whether the Council was prohibited by section 193(7F)(ab) read with section 193(8) from approving the offer which it made in this case. By the end of the hearing Mr Johnson realistically accepted that it could be inferred that, in making the offer, the Council was at the same time approving that offer. Mr Grundy accepted, in effect, that,

on or before 8 January 2021, the Council knew the terms of the licence of property 1. So the Council knew that these two statutory provisions applied. The Council therefore had to be satisfied, at the time it approved the offer, that A could bring the obligations imposed by the licence to an end before being required to take up the offer. In order to be satisfied of that, the Council would have had to have known when A would be required to take up the offer. There is no suggestion in the offer that the Council addressed this question, still less that it knew the answer to it, not least because the offer does not say when the tenancy will start. The Council could not, therefore, have been satisfied, on 8 January 2021, that section 193(8) did not apply to A, and was therefore prohibited by section 193(7F)(ab) from approving the offer as a PRSO. I would therefore allow the appeal on Ground B.”

For his part, Males LJ said:

- “59. Section 193(7F) and (8) provides that a local authority shall not make a PRSO unless they are satisfied that the applicant is able to bring to an end any contractual obligations they may have in respect of their existing accommodation before being required to take up the offer. In practice, where an applicant has existing accommodation which requires payment of rent or other charges, it will be difficult for the local authority to satisfy itself about this without knowing the date on which the applicant will be required to take up the offer of a PRSO.
60. It appears that Haringey had made arrangements which ensured that in practice there was no period during which the appellant was required to pay rent or licence fees in respect of two properties and that the appellant did not in fact do so. The mischief at which section 193(7F) and (8) was aimed was therefore resolved, with no prejudice to the appellant, despite the local authority’s failure to comply with section 193(7F) and (8). Nevertheless, the section is clear that a local authority must not approve a PRSO unless they are satisfied at the time of doing so that an applicant is able to bring to an end any contractual obligations in respect of their existing accommodation before being required to take up the offer. It will be for local authorities operating in the same way as Haringey to ensure that their arrangements comply with this requirement.”

Asplin LJ agreed with both Elisabeth Laing LJ and Males LJ.

45. In my view, however, there are two reasons why section 193(7F) and section 193(8) do not assist Mr Querino in the present case. In the first place, it seems to me that there is no reason to doubt that the Council was “satisfied ... that subsection (8) does not apply to the applicant”. Mr Querino was living in accommodation within the Council’s own housing stock (viz. the Hostel) and being offered other accommodation within that stock (viz. the Flat). It was thus the landlord of both properties. That being so, it lay within its own power to ensure that Mr Querino was able to bring such obligations as he had in respect of the Hostel to an end before being required to take up the offer of accommodation in the Flat, and there is no suggestion that it did not do so. The position is thus different from that in *Norton*, where the applicant was invited to move to accommodation provided by an independent landlord. In the present case, it was open to the Council so to arrange matters that Mr Querino did not owe contractual duties in respect of both the Hostel and the Flat at the same time and, in the circumstances, there is nothing to indicate that the Council was not satisfied when it offered the Flat to Mr Querino that section 193(8) did not apply to him.
46. The second point is that section 193(7F)(a) provides that a housing authority is not to “make a final offer of accommodation under Part 6 *for the purposes of subsection (7)*” (emphasis added). Subsection (7) provides for circumstances in which a housing authority ceases to be subject to the main housing duty as a result of an applicant refusing “a final offer of accommodation under Part 6”. By subsection (7A), an offer of accommodation is only to be considered a “final offer *for the purposes of subsection (7)*” if it is made in writing and states that it is a final offer for the purposes of subsection (7). By virtue of subsection (7F), a housing authority is not to make such an offer unless satisfied that subsection (8) is inapplicable.
47. Section 193(7A) and section 193(7F)(a) are thus alike concerned with what will constitute a “final offer for the purposes of subsection (7)” and, hence, when refusal of an offer will bring the main housing duty to an end. In the present case, however, subsection (7) is not in point. There is no question of the main housing duty which the Council owed to Mr Querino having ceased pursuant to subsection (7). The Council’s case is rather that the duty came to an end under subsection (6)(c) as a result of Mr Querino accepting its offer. Subsections (7A), (7F) and (8) are not stated to apply in such a situation, and there is sense in their not doing so. Thus, where an offer of accommodation under Part 6 has been accepted, it can rationally be thought irrelevant that the offer was not made in writing, that it did not state that it was a final offer for the purposes of subsection (7) or that the housing authority was not satisfied that subsection (8) was not in point. That subsections (7F) and (8) should be so interpreted is also, I think, consistent with their origins. They can be traced back to provisions dealing with whether it had been reasonable for an applicant to accept an offer for the purpose of determining whether the main housing duty had ceased as a result of such a refusal.
48. In short, I again part company from the Judge. I do not think Mr Querino’s appeal from the review decision fell to be allowed by reason of section 193(7F) and (8).

Is the review decision vitiated by the reviewer’s treatment of the Cafcass report?

49. Turning to the final ground of the Judge’s decision, he considered that the reviewer had made a “serious error of law” in “shutting her eyes” to the Cafcass report, which

the Judge was satisfied was “an important document, both as to the facts it disclosed and the opinions it expressed”.

50. In the light, however, of section 12 of AJA 1960 and the *Griffiths v Tickle* decisions (which were not, I believe, before the Judge), it is clear that the reviewer was right not to take into account the contents of the Cafcass report. The fact that she did not do so cannot vitiate her decision.
51. In different circumstances, there might have been scope for argument as to whether, as a matter of fairness, the reviewer should have deferred her decision until after the Family Court had made one. After all, (a) there was due to be a hearing before the Family Court within five weeks, on 29 and 30 December 2022, (b) while a review should ordinarily be concluded within eight weeks, that deadline can be extended by agreement (see paragraph 21 above) and (c) although *Holmes-Moorhouse* shows that procedures for determining issues under the CA 1989 and issues relating to homelessness are “deciding different questions” and “must not be allowed to become entangled with each other”, Lord Hoffmann also referred to the housing authority having to “have regard to the opinion of a court in family proceedings that shared residence would be in the interests of the children” (see paragraph 29 above).
52. In the present case, however, the reviewer was plain that a shared residence order, were one to be made, would not affect her decision. Thus, she said:
 - i) “it is my finding that should a final Child Arrangement Order be granted giving shared time spent with of up to 50% it would not be reasonable to expect your children to reside with you as well as residing with their mother [in Coton], where any additional bedrooms allocated in respect of the children staying with you would in practice unoccupied for up to half the week”;
 - ii) “Even looking to the longer term and the prospect that you may be successful, and the court may issue an order granting shared residency, such an order would not be binding on the Authority”; and
 - iii) “Were the family court to issue a final court order acknowledging shared parenting and staying access of up to 50%, based on the information available to me at this time I am satisfied that it would still not be reasonable to expect your children to reside with you and allocate additional bedroom space”.
53. Further, the reviewer was fully entitled to take this view. Having regard to *Holmes-Moorhouse* and the Policy, it was well open to the reviewer to consider that it would have been appropriate to offer Mr Querino larger accommodation only if there were reason to think that there was something exceptional about the children’s needs or the circumstances, and the reviewer had no reason to think that there was. To the contrary, Mr Querino had himself told the reviewer, as she recorded in her decision, that he had “arrangements for a bunk bed in the bedroom for the children and [he] would sleep in the living room”. There was, in all the circumstances, no necessity for the reviewer to await any decision of the Family Court.

Conclusion

54. I would allow the appeal.

Lord Justice Warby:

55. I agree.

Lord Justice Underhill:

56. I also agree.