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Case Comment

Affordability and intentional homelessness: *Terryann Samuels and Birmingham CC [2015] EWCA Civ 1051*

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Introduction

2015 may prove to be a significant year in terms of the interpretation of important provisions of the homelessness legislation, now contained primarily in Part VII of the Housing Act 1996. The ECtHR has recently held in *Ali v United Kingdom*¹ that entitlements which arise under the legislation can amount to ‘civil rights’ for the purposes of Art 6 ECHR. The ECtHR’s judgment was the sequel to the Supreme Court decision in *Ali v Birmingham CC*² in which the court concluded that the discretion-laden nature of such entitlements indicated that they could not be ‘civil rights’. Given that the Supreme Court has held that domestic courts should proceed on the basis of a (very) strong presumption that the meaning of Convention articles and the textually identical Convention Rights created by the HRA 1998 should be the same,³ we should probably now conclude that the ECtHR’s judgment represents ‘the law’. Lower courts will however be spared any difficulty in deciding if this is one of those rare instances when a prima facie binding judgment of the Supreme Court need not be followed. This is because the ECtHR also held in *Ali* that that the process whereby a council’s initial decision on entitlement can be challenged in an internal review (per Housing Act 1996 s.202) and thereafter through a statutory appeal to the county court (per Housing Act 1996 s.204) was sufficiently independent and rigorous to satisfy Art 6’s procedural requirements. From an applicant’s perspective therefore, *Ali v United Kingdom* is of purely symbolic benefit. A series of recent judgments of the Supreme Court may prove more important in practical terms.

¹ Application number 40378/10; 20 October 2015.

² [2010] UKSC 8; [2010] 2 A.C. 39. See T. Cross, “Is there a “civil right” under article 6? Ten principles for public lawyers” (2010) 14(4) *Judicial Review* 366; M. Elliot, “Statutory duties, administrative discretion and ‘civil rights’” (2010) 69 (2) *Cambridge Law Journal* 215. *Ali* is perhaps a good example of the ECtHR’s ‘living instrument’ approach to the Convention (cf. *Tyrer v United Kingdom* (1979-1980) 2 E.H.R.R. 1); the weight of the court’s own authority in analogous areas just ten years ago pointed firmly towards such entitlements not being civil rights; see I. Loveland, “Does homelessness decisionmaking engage Art 6 ECHR?” (2003) 2 *European Human Rights Law Review* 176.

³ *R v Horncastle* [2009] UKSC 14; [2010] 2 A.C. 373; *Manchester CC v Pinnock* [2011] UKSC 6; [2011] 2 W.L.R. 220 at para 48.

In *Hotak v Southwark London Borough Council (Equality and Human Rights Commission and others intervening)*⁴ the Supreme Court modified the previously prevailing approach to assessing if a person is in ‘priority need’ because he/she is ‘vulnerable’ per Housing Act 1996 s.189(1)(c). Absent priority need status, an applicant’s benefits under the Act are negligible, since only priority need cases are entitled to the so-called ‘full housing duty’ provided under s.193. The courts’ treatment of the vulnerability question has long been rather unsatisfactory, insofar as many local authorities have proceeded on the assumption that the relevant ‘test’ to be applied in making this decision was to be found a passage in the Court of Appeal’s 1998 judgment in *R v Camden London Borough Council, Ex p Pereira*⁵, where Hobhouse LJ indicated that a person would be vulnerable if she/he would be:

“when homeless less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable man would be able to cope without harmful effects”.

While the Supreme Court criticised the obvious circularity of this formulation, it did not in terms disapprove it. Rather, the court altered the comparator used in *Pereira* from ‘an ordinary homeless person’ to ‘an ordinary person when homeless’. This might initially seem a semantic distinction. However it is on close consideration quite important. The notion of vulnerability is at root concerned with the likelihood of a homeless person suffering severe harm to his physical and mental health when homeless. It is likely that the percentage of homeless people who suffer from severe psychiatric or psychological disorders is much higher than among the ‘ordinary population’. An ‘ordinary person’ who becomes homeless will likely have little money, be unemployed and have little imminent prospect of securing the employment and income that will equip her to bring her homelessness to an end. But the ‘ordinary’ person will not lack the basic physical and psychological capacity to cope with the difficulties that becoming homeless has caused her in the limited sense of avoiding freezing to death on a cold winter night, becoming malnourished or leaving untreated serious health impairments. One may expect the new comparator to result in some, perhaps many, homeless people who would not previously have been found vulnerable now to be so regarded.

The provision in issue in *Haile v Waltham Forest LBC*⁶ was s.191 of the Act, which contains the concept of ‘intentional homelessness’.⁷ *Haile* might also be regarded as another doctrinal landmark in the Supreme Court’s construction of the homelessness legislation, insofar as the court substantially altered the effect of (without formally overruling) the House of Lords’ 1981 decision in *Din (Taj) v Wandsworth LBC*.⁸ The applicant in *Din* was found intentionally homeless on the basis that, having accumulated significant rent and rates arrears on a former home, he voluntarily left that property and moved in with relatives for a few months. The House of Lords accepted the authority’s argument that the voluntary departure from the initial accommodation did amount to intentionality notwithstanding the local authority also accepted that by the time the homelessness application was made (when the relatives asked Mr Din to leave) Mr Din would have been evicted from that home because of the rent arrears.

⁴ [2015] UKSC 30; [2015] 2 W.L.R. 1341.

⁵ (1998) 31 H.L.R. 317.

⁶ [2015] UKSC 34; [2015] 2 W.L.R. 1441.

⁷ Per s.190, an applicant who is intentionally homeless is entitled only to short-term assistance in securing accommodation.

⁸ [1983] 1 A.C. 657; [1981] 3 W.L.R. 918.

Although it has long been accepted that an ‘intentional’ departure from accommodation becomes irrelevant if the applicant has subsequently lived in ‘settled accommodation’, *Din* enabled councils to make an intentionality finding in circumstances where the relied upon causal factor had no empirical significance. *Haile* appears to have modified this principle by drawing a distinction between ‘hypothetical’ and ‘actual’. The applicant in *Haile* had voluntarily left hostel accommodation while she was pregnant. The hostel did not allow children to reside there. Several months later, having had the baby and being required to leave her new temporary accommodation, Ms Haile applied as homeless. The Supreme Court held that Waltham Forest could not rely on her voluntarily departure to make a finding on intentional homelessness as the actual birth of her baby would certainly have triggered her eviction from the hostel. Mr Din might very well have been evicted had possession proceedings been commenced against him, but because no proceedings had been issued and so no possession order made, that was a purely hypothetical assumption.

One would expect this conclusion, like *Hotak*’s deployment of a more restrictive comparator in assessing vulnerability, to lead to an increase (though it is impossible to quantify how much of an increase) in the number of homeless applicants who qualify for the ‘full housing duty’ per s.193. For resource-strapped local authorities – which it seems is a good many of them – *Hotak* and *Haile* may be unwelcome news. And for London authorities, the same might be thought of the Supreme Court’s judgment in *Nzolameso v Westminster*.⁹

Nzolameso addressed the issue of the nature of the inquiries that a local authority should make before satisfying itself that it could discharge its s.193 duties towards an applicant with dependent children by providing accommodation outside its own area, an issue which has become increasingly pressing for inner-London authorities in recent years.¹⁰ *Nzolameso* has certainly made it more difficult for authorities to justify such placements. This is partly because the Supreme Court held that s.11 of the Children Act 2004, a provision curiously overlooked until now in the context of homelessness decisionmaking, imposed rigorous investigative duties on an authority to establish that its decisions as to the allocation of housing would (per s.11(2)(a)) ‘safeguard and promote the welfare of children’.

However, the larger question raised by *Nzolameso* is whether it should be seen as implicitly disapproving the comments of Lord Neuberger in *Holmes-Moorhouse v Richmond-Upon-Thames LBC*,¹¹ so often invoked by local authority counsel in s.204 appeals,¹² to the effect that courts should take a ‘benevolent’ view of s.202 decisions when deciding how rigorously such decisions should be reviewed:

47 ...[A] judge should not adopt an unfair or unrealistic approach when considering or interpreting such review decisions. Although they may often be checked by people with legal experience or qualifications before they are sent out, review decisions are prepared by housing officers, who occupy a post of considerable responsibility and who have substantial experience in the housing field, but they are not lawyers. It is not therefore appropriate to subject their decisions to the same sort of analysis as may be applied to a contract drafted by solicitors, to an Act of Parliament, or to a court’s judgment.....

50 Accordingly, 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.....

⁹ [2015] UKSC 22; [2015] P.T.S.R. 549.

¹⁰ D. Douglas, “Councils’ out-of-area placements breaking the law” (2015) *Inside Housing*.

¹¹ [2009] UKHL 7; [2009] 1 W.L.R.413.

¹² As indeed they were in the county court in *Samuels*; at para 51.

The Supreme Court certainly did not take a benevolent approach to the authority's decision in *Nzolameso*.¹³ And, perhaps surprisingly, it had been urged not to do by counsel for the Secretary of State for Communities and Local Government.¹⁴ *Holmes-Moorhouse* was not however disapproved, and it may be the Supreme Court's insistence on decisionmaking rigour in homelessness cases will be limited to cases involving children (and thus s.11 of the 2004 Act).

It remains to be seen how quickly and how significantly *Hotak*, *Haile* and *Nzolameso* affect both the way in which local authorities make homelessness decision and the content of the decisions they reach. It would not seem naïve to expect that county courts will be fielding a good many s.204 appeals on such matters in the coming months. But as the Court of Appeal's more recent decision in *Terryann Samuels and Birmingham CC*¹⁵ would suggest, it would be rash to assume that *Ali*, *Hotak*, *Haile* and *Nzolameso* signify a sea change in the content and implementation of the homelessness legislation in any systemic sense.

Background to *Samuels*

The applicant in *Terryann Samuels and Birmingham CC*¹⁶ had formerly (until July 2011) lived in private rented accommodation as an assured shorthold tenant. At the time she left that accommodation she evidently resided with two young children of her own and two of her nieces.¹⁷ When she applied as homeless to the council, Ms Samuels asserted that she had left that accommodation because she could not afford it. The landlord had evidently served a Housing Act 1988 notice on Ms Samuels in respect of rent arrears, but no possession proceedings had been initiated.¹⁸ Ms Samuels did not secure settled accommodation between that time and the application which led to the s.202 decision in dispute, and so the question of whether she was intentionally homeless focused on the circumstances of her departure from her home in July 2011.

The relevant statutory test is found in part in the Housing Act 1996 s.191:

191 Becoming homeless intentionally.

(1) A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy.

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

¹³ [2015] P.T.S.R. 549 at paras 31-37.

¹⁴ *Ibid* at para 33.

¹⁵ [2015] EWCA Civ 1051.

¹⁶ [2015] EWCA Civ 1051

¹⁷ Both of whom were apparently children. The judgment does not explain whether the applicant had any legal responsibility for the care of the children.

¹⁸ *Terryann Samuels v Birmingham CC* Case no: BM30213A; hearing 10.04.2014; judgment 12.05.2014; at para 15. References to this judgment hereafter are styled *Samuels – county court*. My thanks to Emily Orme of Arden Chambers, counsel for the authority, for a copy of the judgment.

One might assume that the question of ‘affordability’ would obviously be a relevant consideration in assessing if it was ‘reasonable’ for an applicant to continue to occupy accommodation per s.191(1). Any doubt in that point was removed in 1996 by the Homelessness (Suitability of Accommodation) Order 1996 SI 1996 no.650 which provides, *inter alia*:

2. Matters to be taken into account

In determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation ... there shall be taken into account whether or not the accommodation is affordable for that person and, in particular, the following matters –

- (a) the financial resources available to that person, including, but not limited to –
 - (i) salary, fees and other remuneration;
 - (ii) social security benefits;...
- (b) the costs in respect of the accommodation, including, but not limited to –
 - (i) payments of, or by way of, rent;...
- (d) that person's other reasonable living expenses.”

Ms Samuels’ rent had been some £700 per month. Her income at the time – derived from income support, tax credits and child benefit, was some £1350 per month. That income was sufficient to reduce her housing benefit entitlement to £548.51 per month, so leaving a monthly rent shortfall of some £151. In her original application Ms Samuels had provided an expenditure plan which identified: food and household items at £150 pm; electricity and gas and telephone at £110pm; school meals at £20 pm; travel at £60pm; and daughter’s gym class at £40pm. This totalled some £400 pm, which *prima facie* left a balance of some £950 per month. Perhaps unsurprisingly, the council’s s.184 decision concluded that Ms Samuels could have met the £150 pm rent shortfall from this sum, thus the accommodation had been affordable, and her departure from her previous home was a deliberate act in respect of accommodation it would have been reasonable for her to continue to occupy.

Ms Samuels subsequently sought legal advice and lodged a request for a s.202 review. Her solicitors informed the council that her monthly income had only been £1260, and also amended her expenditure figures quite substantially. The new figures were: food and household items at £750 pm; electricity and gas and telephone at £200pm; school meals at £43 pm; travel at £108pm; clothes at £50pm; tv at £43pm; and daughter’s gym class at £40pm. This totalled some £1191 pm, which did not leave a sufficient balance to cover the rent shortfall.

In its s.202 decision, the authority accepted that the initial figure of £150pm for food and household items was incorrect, but went on to conclude that:

It is now asserted that contrary to the provided figure of £150 for housekeeping, the actual figure was £750 per month, or £173 per week. This figure seems to me be excessive for a family of your size, given that this is purported to only account for food and household items, with utilities and travel expenses accounted for elsewhere. I accept that a figure of £150 per month for food and household bills for a family of your size is equally likely to be inaccurate, but I consider that it is a matter of normal household budgeting that you would manage your household finances in such a way as to ensure that you were able to meet your rental obligation. I cannot accept that there was not sufficient flexibility in your overall household income of in excess of £311 per week to meet a weekly shortfall in rent of £34.¹⁹

¹⁹ *Samuels* at para 19.

Ms Samuels subsequently issued s.204 proceedings in the county court.²⁰ Various grounds of appeal were raised – unsuccessfully - and then further pursued - equally unsuccessfully - in the Court of Appeal.

The Court of Appeal’s judgment

Three of the matters pursued before the Court of Appeal concerned the applicability of established principles to the particular facts of Ms Samuels’ case. These were respectively the adequacy of the council’s reasons for its decision; the precision with which the s.202 decision identified the provisions of the Code of Guidance taken into account; and the admission of evidence from the s.202 decisionmaker explaining (after the event) the basis of the decision. These matters are considered below. Firstly however, we might address a more novel argument which was raised in the appeal.

The affordability issue

The most innovative – and potentially very significant – ground of appeal taken by Ms Samuels in the Court of Appeal²¹ was to raise the question of whether or not it was proper as matter of principle for a local authority to assume that an applicant could be expected to meet any rent shortfall consequent upon her receiving less than a 100% rent rebate through housing benefit from other welfare benefits. There is, in the abstract, an obvious rationale for accepting such a suggestion. But there are equally obvious rationales for rejecting it.

Ms Samuels’ counsel apparently put the point in this way:²²

24...[W] when an applicant is reliant entirely on benefits to support herself and her family, regard should be had to the fact that such benefits are set at subsistence level and are not designed to give a level of income that allows flexibility to spend outside maintaining a very basic standard of living. In particular, income support, child tax credits and child benefit are not intended to cover housing costs; it is the purpose of housing benefit to cover those costs. Further, child tax credits and child benefit are specifically designed to address the costs and expenses of the upbringing of children and to support the welfare of the children, and that purpose is likely to be affected if sums are diverted to pay additional housing costs. The starting point in such a case should therefore be that reasonable living expenses are matched by benefits income and that there is no flexibility within such income for the payment of additional housing costs

The Court of Appeal rejected that contention,²³ in part because the applicant could not invoke any helpful authority closely on the point, nor identify any supportive legislative history. The Court of Appeal seemed primarily influenced however by the fact that Parliament has consistently approved measures which necessarily create a housing benefit/rent shortfall for many people whose income is derived largely or wholly from welfare benefits - the bedroom tax and the benefit cap being obvious examples of this – suggests that Parliament envisaged that some portion of benefit other than housing benefit

²⁰ *Samuels county court* at fn. 18 above.

²¹ The point does not seem expressly to have been taken in the county court; see *Samuels county court* especially at para 37. In the Court of Appeal it seems to have been taken within the more general concept of a failure to take account of relevant considerations; *Samuels* at para 2.

²² *Samuels* at para 24.

²³ At paras 23-31.

could be used to meet any rent shortfalls. That reasoning is not especially compelling. One might have thought that one of – perhaps the – primary purpose of the bedroom tax and the benefit cap is to force people to move to cheaper accommodation precisely because they cannot afford their current housing. (That there may not actually be any such housing is a factual inconvenience about which the current and previous government are and were apparently untroubled).

Ms Samuels was not affected either by the bedroom tax or the benefit cap, so those considerations were not especially germane to her case. But it was perhaps surprising not to see any reference in the judgment on this question²⁴ to this passage in the homelessness code of guidance, which passage certainly suggests that successive Secretaries of State since 2006 have regarded such a ‘starting point’ as appropriate:

17.40 In considering an applicant’s residual income after meeting the costs of the accommodation, the Secretary of State recommends that housing authorities regard accommodation as not being affordable if the applicant would be left with a residual income which would be less than the level of income support or income-based jobseekers allowance that is applicable in respect of the applicant, or would be applicable if he or she was entitled to claim such benefit.

Whatever the reason for that omission, the judgment stands as clear authority for the proposition that there is no principled basis for assuming that applicants cannot be expected to make up housing benefit shortfalls from other welfare payments. Obviously it does not follow from this that all applicants can be expected to meet rent shortfalls from benefit incomes. Any council which adopted that premise would be acting unlawfully on the basis that it had improperly fettered its discretion.

Taking account of the Code of Guidance

It is unusual to meet a s.202 decision that does not include the phrase: ‘I have taken account of the [relevant provisions of the] Code of Guidance’. Such an omission would point strongly towards the decision being unlawful, as s.182 of the Act expressly requires council to have regard to such guidance in exercising all of the Part VII functions. But frequently a s.202 decision will do no more than refer to the Code in such general terms, which might prompt the more cynical (or realistic) applicant’s adviser to wonder if one is merely reading a platitude cut and pasted automatically into every s.202 text rather than seeing evidence that the relevant provisions of the Code²⁵ have been carefully considered.

The s.202 decision in Ms Samuels’ case invoked the Code in such terms. No express reference was made to the most obviously relevant part of the Code, para 17.40, cited above. Drawing on *Nzolameso*,²⁶ Ms Samuels contended the court could therefore not safely conclude that the Code had been properly considered. The Court of Appeal seemed unmoved

²⁴ It appears in another context, discussed below.

²⁵ Which has 21 chapters and 18 annexes and runs to some 180 pages.

²⁶ The relevant passage being [2015] PTSR 549 at para 31 and para 32 per Baroness Hale:

“[31]...Local authorities] are required to take the Code and supplementary guidance into account, If they decide to depart from them they must have clear reasons for doing so....”

“[32]..It must be clear from the decision that proper consideration has been given to the relevant matters required by the Act and Code....”

by this submission. Despite referring to – but not analysing - the relevant passages of *Nzolameso*, the court simply invoked an earlier Court of Appeal authority to swat away this argument:

[34]...It is not generally necessary to refer expressly to individual passages in the guidance concerning the matters considered. As Kitchin LJ put the point in *Balog v Birmingham City Council* [2013] EWCA Civ 158; [2014] HLR 14 , at paragraph 48:

“In my judgment review officers are not obliged to identify each and every paragraph of the guidance which bears upon the decision they have to make. That would be to impose upon them a wholly unreasonable and unnecessary burden. I do not therefore accept that the absence of any express reference to this paragraph [paragraph 17.40] indicates that the review officer failed to have regard to the guidance it contains.”

35 Applying that to the present case, there was in my view no need for the review decision to refer expressly to paragraph 17.40 of the guidance in relation to the issue of affordability. It was sufficient if the substantive consideration given to the issue showed that due regard had been had to the paragraph.

It is of course very much easier for a court to conclude that ‘substantive consideration’ had been given to the Code if the text of the s.202 decision is benevolently construed.

Reasons: how detailed must they be ?

Nzolameso also seems to suggest that courts should take a rigorous approach to the giving of reasons. As in respect of the Code of Guidance point however, the Court of Appeal in *Samuels* was content to follow the lead given in *Balog*:

52 In the course of his exposition of the legal framework, Kitchin LJ summarised the principles governing adequacy of reasons:

“22. More generally, a decision by a housing authority must, of course, be adequately reasoned so that a person adversely affected by that decision can understand how and why it has been reached and so form a view as to whether to challenge it on a point of law.

23. The reasons for a decision may, however, be stated relatively briefly, depending, of course, upon the particular issues under consideration. Moreover, the reasons do not need to detail every aspect of the decision making process

24. The need to adopt a realistic and practical approach to any consideration of a review decision was emphasised by Lord Neuberger in *Holmes-Moorhouse v Richmond-Upon-Thames LBC* [2009] UKHL 7; [2009] 1 WLR 413 at 428”

The particular ‘reason’ that was being challenged on *Samuels* was the s.202 conclusion that the £750 per month figure for food and household expenses was much too high was inadequately explained, in that the authority offered no detailed view on what an appropriate sum would be and of what it would be comprised. One might have thought this a strong point. The Court of Appeal did not, evidently on the basis that the specificity required in s.202 reasons was conditioned by the specificity of the information provided by applicant. Since the information provided by the applicant and her solicitors was itself not very detailed, the authority’s response to it need not be detailed either.²⁷

Positing such equivalence between a government body and a homeless person (even if represented by lawyers) might be though objectionable in terms of general principle. In

²⁷ [2015] EWCA Civ 1051 at para 58.

effect, it places a burden of proof on the applicant. One might hope that applicants who are assisted by solicitors will do a reasonable job of marshalling their case prior to the s.202 stage (subject of course to the limits of legal aid funding, which is available only under Legal Help and Advice in respect of s.202 reviews). But in respect of applicants who do not receive legal advice until after the s.202 stage, the Court of Appeal's conclusion perhaps pays insufficient attention to the realities of the way most s.202 reviews are prepared and presented.²⁸

Additional evidence

The Court of Appeal's judgment also suggests on several occasions that it was unhappy with the way in which the Appellant's case was presented, both in the county court and on further appeal.²⁹ The Civil Procedure Rules were amended in October 2012 to include a new practice direction for s.204 appeals,³⁰ evidently designed in part to deal with the problem of last minute amendments being made to the appellant's case.³¹ The direction includes the following provision:

28.1

(5) Unless the court orders otherwise—

(c) within 14 days after service of the appellant's notice the respondent must disclose any documents relevant to the decision under appeal, in so far as not previously disclosed;

(d) within 14 days after receipt of any documents disclosed under sub-paragraph (c) the appellant may make any amendments to its grounds of appeal which arise out of those documents

One would assume that the purpose of Rule 28.1 is to ensure that both parties have all of the requisite information available to them well in advance of the hearing date, so that comprehensive appeal bundles and skeleton arguments are compiled and exchanged in good time.³² This proviso seemed ineffective in *Samuels*, as it appears that Ms Samuels' counsel spotted a potentially important issue the day before the county court hearing, which issue had

²⁸ One could hardly find a more pungent illustration of the 'one-shooter vs repeat player' dichotomy identified in Marc Galanter's seminal paper, "Why the 'haves' come out ahead: speculations on the limits of legal change" (1974) *Law and Society Review* 165.

²⁹ See paras 20, 26, and 37.

³⁰ Now para 28.1 of CPR PD 52D; www.justice.gov.uk/courts/procedure-rules/civil/rules/part52/practice-direction-52d-statutory-appeals-and-appeals-subject-to-special-provision

³¹ Cf. the comment of Brooke LJ in *Cramp v Hastings BC; Phillips v Camden LBC* [2005] H.L.R. 48:

72 Although an appeal court has a discretion to allow a notice of appeal to be amended, the grounds of appeal set the agenda for the appeal hearing and enable the respondent (and the court) to understand the agenda from the outset of the appeal. It is thoroughly bad practice to state the barest possible grounds in the original notice of appeal, as happened in the Phillips case ("The council erred in law in upholding their decision not to re-house the appellant under the Housing Act 1996"), and then to delay formulating and serving very substantial amended grounds of appeal for five months so that they surfaced for the first time less than a week before the appeal hearing.

³² Standard practice at the Central London County Court – which now seems to be hearing almost all s.204 appeals involving inner-London councils – is to order that appellant's skeletons are filed and served at least two weeks before the hearing date and respondent's at least one week.

not been flagged up expressly either as a ground of appeal or as a matter dealt with in the applicant's skeleton argument. The point was that the s.202 decision did not precisely identify how many children were residing with Ms Samuels when she left her accommodation. That was obviously a matter which could have some substantial bearing on Ms Samuels' appropriate household expenses. On being alerted to this point, the Respondent elicited 'evidence' in the form of an e-mail from the s.202 decisionmaker which accepted the decision letter was unclear but that he had assumed the applicant had 4 resident children.

The Court of Appeal's judgment in *R v City of Westminster v Ermakov*³³ indicates that county courts should not routinely allow authorities to rely on post-decision evidence from their decisionmakers in supplementation of the s.202 decision itself. The crucial passage is excerpted below:

(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should...be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence — as in this case — which indicates that the real reasons were wholly different from the stated reasons.³⁴

In the county court, HHJ Worster concluded that the email could be admitted and relied upon, on the basis that it was merely remedying a lack of clarity in the s.202 decision rather than altering the reasons for the decision.³⁵ That conclusion was upheld in the Court of Appeal:

45....In my judgment, the judge was plainly correct to hold that the email fell on the permissible side of the dividing line and to take it into account. This was a simple case of clarification or elucidation of the reasons given in the review decision, not a case of fundamental alteration or contradiction of those reasons or the plugging of a gap in the reasons.

Conclusion

It seems unlikely that the merits of the affordability argument deployed by the applicant in *Samuels* are sufficiently finely balanced to warrant further consideration in the Supreme Court, notwithstanding that court's evident appetite in the past year to engage with homelessness issues. The question raised is essentially – and perhaps unfortunately for applicants – more properly one to be pursued in the political rather than legal arena. Absent such a tightly defined doctrinal peg on which to hang any further appeal, it also seems unlikely that the Supreme Court would see any need to revisit such longstanding matters as the specificity of reasons given to justify decisions and the pervasive *Holmes-Moorhouse* question of benevolent construction.³⁶ But given that there is little prospect of any reduction of the size of the homeless population in the foreseeable future, it is a safe bet that such opportunities - should the Supreme Court wish to take them – will present themselves on a regular and frequent basis.

³³ (1995) 28 H.L.R. 819.

³⁴ Hutchison LJ at 833

³⁵ *Samuels county court* at para 49.

³⁶ The Court of Appeal's conclusion on the *Ermakov* point does not seem contentious.