

ENGLAND AND WALES / JUDGMENT

Waltham Forest v Maloba

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Neutral Citation Number: [2007] EWCA Civ 1281 IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM BOW COUNTY COURT HHJ Hornby
6B052043 Case No: B5/2006/2336 Royal Courts of Justice Strand, London, WC2A 2LL Date:
04/12/2007 Before: THE PRESIDENT OF THE QUEEN'S BENCH DIVISION LORD JUSTICE
CARNWATH and LORD JUSTICE TOULSON

- ----- Between: THE MAYOR & BURGESSES OF THE LONDON BOROUGH
OF WALTHAM FOREST
- and - DAVIS MALOBA Appellant Respondent -and- THE LAW SOCIETY Interested Party
- ----- (Transcript of the Handed Down Judgment of WordWave
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2AG Tel No: 020 7404 1400, Fax No: 020 7831 8838 Official Shorthand Writers to the Court)
- ----- Kerry Bretherton (instructed by London Borough of Waltham
Forest) for the Appellant Robert Latham (instructed by Messrs A M Vance & Co) for the
Respondent David Holland (instructed by the Law Society) for the Interested Party Hearing
date: 24th October 2007
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Judgement

Lord Justice Toulson :

Introduction

1. This appeal concerns the homelessness provisions in part VII of the Housing Act 1996, as amended. It raises, in particular, questions regarding the proper interpretation of s 175(3) “A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy”, about which differing views were expressed in this court in *Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306. The facts 2. 3. 4. 5. 6. 7. Mr Maloba was born in Uganda on 22 September 1962. Until the age of 14 he was brought up by his parents in the family home in the village of Kanyanya near Kampala. At 14 he was sent away to school in a small town near Kampala. After leaving school he rented accommodation in Kampala until he came to the UK in September 1989. He has lived in the UK since then and he acquired British citizenship in

1997. In 1999 Mr Maloba met his present wife, Angela, on a visit to Uganda. They formed a relationship. On 24 July 2001 Angela gave birth to their daughter, Bridget. In 2002 they were married in Kampala. After the marriage Mrs Maloba and Bridget lived for two years in an annex at the Maloba family home. The main building is a three bedroom house, but in the grounds of the house there is a separate building or annex containing a living room, bedroom and bathroom. Mr Maloba's father had died in 1993, and at the time of Mr and Mrs Maloba's marriage the house was lived in by Mr Maloba's brother and one of his three sisters together with their families. In December 2004 Angela and Bridget came to the UK to live with Mr Maloba. At first the family lived in privately rented accommodation, but the landlord was not prepared to allow them to remain there on a long term basis. On 18 March 2005 Mr Maloba approached Waltham Forest's housing department for help because the family was threatened with homelessness. He was interviewed on various occasions, and on 29 March 2005 a housing officer completed a homelessness application form. One of the questions on the form was "Does applicant own, rent or have access to property anywhere abroad?", to which the answer given was negative. Mrs Maloba had entered the UK on a visitor's visa, but Bridget had a visa to settle in the UK with her father. On 5 December 2006 Mrs Maloba was granted indefinite leave to remain, but this was long after the decision of the council which has given rise to this litigation. At the relevant time Mrs Maloba was not eligible for housing assistance and therefore not eligible for assistance under the homelessness provisions of the Act (s 185). Bridget was in a different position. If Mr Maloba satisfied the criteria of homelessness, her position as a dependant child potentially made him a person with a priority need for accommodation (s 189). On 3 May 2005 the council secured interim accommodation for the family at Southfields Court, Leytonstone E11. On 23 June 2005 the council wrote to Mr Maloba asking him, among other things, where Mrs Maloba and Bridget had been living before their arrival in the UK. On 29 June 2005 Mr Maloba replied that "they lived in my house back home at Kanyanya in Kampala". On 22 July 2005 he was interviewed by a council officer about the Kampala property. The notes of the interview recorded: "App said that the house in Kampala became the family house in 1993, when his father died. Any member of the family may live in the house." 8. On 26 July 2005 the officer wrote a "pre-decision" letter to Mr Maloba in the following terms: "I advise you that with the information that you have provided through interviews and letters, we are of the opinion that you This is based on that you have are not homeless. accommodation at Kanyanya Kampala. You have explained that the house in Kampala is a family house, where any member of the family may live. Therefore you are able to live at the house at Kanyanya Kampala. According to the Housing Act you are not homeless. The Housing Act states that you are homeless if you have no accommodation that you are not [sic] entitled to occupy. You have accommodation in Kampala that you are entitled to occupy. A person is homeless if they have accommodation that is available, however not reasonable to occupy [sic]. Your accommodation in Kampala is available and reasonable for you to occupy with your wife and daughter. You said that your wife lived in the annex of the house; therefore you are able to stay in the annex or the main part of the house in Kampala." 9. On 29 July 2005 Mr Maloba replied: "I reply to inform you that I am homeless. In your letter you stated that I am not

regarded homeless basing on the family house in Kanyanya in Kampala. But honestly I live here and work here. I hold a British passport, thus a British African. My future is here. I have been here for over fifteen years and because my future is here that's why I decided to invite my wife and daughter to join me here...I belong here, my future is here and not in Kanyanya, Kampala, Uganda.” 10. 11. 12. 13. On 11 August 2005 the council notified Mr Maloba of its decision that he was not homeless because he was entitled to occupy the accommodation in Kampala, which it had concluded was reasonable for him and his family to occupy since he had not identified any problem with living in it. On 23 August 2005 Mr Maloba requested a review of the decision, reiterating that he lived in England and not Uganda. On 4 November 2005 Mr Maloba met the review officer. He told her that he had learned that the property in Kampala was being repossessed by a finance company which had lent money on the security of the property to Mr Maloba's sisters and brother. The review officer asked him for documentary evidence. He subsequently provided her with copies of a number of documents apparently written by Uganda Microfinance Limited (“UML”) and signed by its chief executive officer, Mr Nalyaali. The review officer was sceptical about their authenticity, but she visited UML's website, from which it appeared to be a legitimate company. On 13 January 2006 the review officer sent an email to Mr Nalyaali asking whether the documents were genuine and what stage any repossession proceedings had reached. On 9 March 2006 Mr Nalyaali emailed the review officer confirming that the property had been pledged as collateral to secure a loan of 50 million Ugandan shillings and had been sold in order to recover arrears of 36 million schillings. The review officer immediately emailed Mr Nalyaali with a request for documentary evidence of the repossession of the property. On the following day Mr Nalyaali replied to the effect that he was busy and the matter was not his top priority, but that if she provided him with a list of specific requirements he would be happy to share them with her. 14. On 24 March 2006 the review officer wrote to Mr Maloba confirming the council's decision that he was not homeless because the accommodation in Kampala was “available and reasonable for you to continue to occupy”. The writer referred to Mr Maloba's letter of 29 July 2005 (see paragraph 9 above) and commented: “Unfortunately, that is not a valid reason for you to be entitled to housing in the UK. The law requires that we consider whether you have accommodation anywhere in the UK or elsewhere. Since we have identified that you do have an interest in your family home in Kanyanya, Kampala, Uganda, we are under an obligation to investigate if it is available and reasonable for you to remain.” 15. The letter continued: “I have considered whether you are homeless from an address “elsewhere” that is reasonable and available for your continued occupation, as required by the homelessness legislation. You have informed [the council] that your father had left the property at Kanyanya, Kampala, Uganda to you and your siblings after his death in 1993. You also informed us that the property consists of three bedrooms with an annex called “the boys quarters”. Your wife resided in the annex from 2002 to 2004 before she came to join you in the UK. You have stated that the annex comprises of one bedroom, one living room and one bathroom. Your wife shared the kitchen facilities in the main house. You have not stated any other reason why this accommodation might be considered unreasonable for your continued use. I

therefore consider this accommodation reasonable for your family to continue to occupy. ”

16. The writer considered the evidence that the property had been sold by UML but rejected it on the grounds that the letters produced contained discrepancies and were lacking in the details which would be expected. She referred to her request to Mr Nalyaali for further information, which she had not received. Considering that repossession was a serious matter with legal implications, she concluded that the documents which had been provided did not show proof that the family home was no longer available to him. Appeal proceedings

17. Mr Maloba appealed against the review decision pursuant to s 204 of the Act, which provides a right of appeal from such a decision to the county court on a point of law. The appeal was heard by His Honour Judge Hornby in the Bow County Court on 12 October 2006. The transcript of the proceedings makes unhappy reading. The judge had clearly formed a strong view of the merits of the appeal. There was nothing wrong in that, and he was entitled to put his view to Ms Bretherton in order to test her response. But unfortunately on this occasion he overstepped the mark in the number and nature of his interruptions, which prevented either counsel, but particularly Ms Bretherton, from being able to present their arguments properly. She did her best in difficult circumstances, and with a small measure of success in that the judge did not accept all the grounds which were advanced on behalf of Mr Maloba. But he allowed the appeal on the ground that the council's decision that the accommodation in Kampala was reasonable for him to continue to occupy (assuming for this purpose that the accommodation was available) was Wednesbury unreasonable. He also said that, if it had been necessary to decide the point, he would have held that it was not open to the council to conclude on the material before it that the property was available to Mr Maloba. He did not direct that the council's decision should be varied in Mr Maloba's favour, but simply quashed the decision. 18. 19. The council appeals against the judge's order. It also appeals against his order for costs, but that raises separate issues. It is convenient to deal first with the substantive

issues.

As this court recognised in *Osmani v Camden London Borough Council* [2004] EWCA Civ 1706, [2005] HLR 22, per Auld LJ at [34], the main focus of attention on a second appeal such as this should be on the decision of the council rather than that of the county court judge on appeal from it. Arguments for the council

20. Ms Bretherton advanced three arguments regarding the reasonableness of the accommodation in Kampala. 21. 22. 23. 24. 25. First, she submitted that on the proper construction of the Act it was immaterial whether the accommodation was reasonable; all that mattered was its availability. For this proposition she relied on the judgments of the majority in *Nipa Begum*. Secondly, if it was necessary for the council to consider the reasonableness of the accommodation, she submitted that the council had only to consider its reasonableness in terms of its size and facilities; the council was not obliged to consider whether it was reasonable to expect Mr Maloba to go to live in Uganda. Thirdly, if it was

necessary for the council to consider not only the physical structure of the building but also its location and whether Mr Maloba could reasonably be expected to live there, Ms Bretherton submitted that the review officer in fact took into account all the relevant factors and reached a decision which was not *Wednesbury* unreasonable. The first two arguments raise questions of some general importance as to the proper interpretation of the Act. On the issue of availability, Ms Bretherton submitted that it was open to the review officer to decide as she did on the material available to her. Arguments for Mr Maloba

26. Mr Latham disputed each of Ms Bretherton's arguments. First, he submitted that it was necessary for the council to consider not only whether the property in Kampala was available to Mr Maloba but also whether it was reasonable to expect him to occupy it. Secondly, he submitted that the factors relevant to that issue were not limited to the size and amenities of the property but also included its location and Mr Maloba's personal circumstances. Thirdly, he submitted that the review officer did not take those wider factors into account in reaching her decision, but that, if she did so, the decision was *Wednesbury* unreasonable. On availability, he submitted that it was not properly open to the review officer to decide as she did. The Act 27. Part VII of the Act contains various provisions relating to persons who are homeless or threatened with homelessness. 28. Section 175 defines homelessness and threatened homelessness as follows: "(1) A person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere, which he— (a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court,
- (b) has an express or implied licence to occupy, or (c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession. (2) A person is also homeless if he has accommodation but— (a) he cannot secure entry to it, or (b) it consists of a moveable structure, vehicle or vessel designed or adapted for human habitation and there is no place where he is entitled or permitted both to place it and to reside in it. (3) (4) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy. A person is threatened with homelessness if it is likely that he will become homeless within 28 days." 29. 30. 31. 32. 33. Section 176 provides that accommodation is available for a person's occupation only if it is available for occupation by him together with any other person who normally resides with him as a member of his family or who might reasonably be expected to reside with him. Section 177 contains non-exhaustive provisions about determining whether it is reasonable for a person to continue to occupy accommodation. Among other things, it is not reasonable for a person to continue to occupy accommodation if it is probable that this would result in the person concerned suffering domestic violence. Section 177(2) provides that in determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation, regard may be had to the general circumstances prevailing in relation to housing in the area of the housing authority to whom he has applied for accommodation or assistance. If a housing authority has reason to believe that an applicant may be homeless or

threatened with homelessness, s 184 imposes on it a duty to make inquiries to satisfy itself whether he is eligible for assistance and what, if any, duty is owed to him under the Act. On completion of its inquiries the authority must notify the applicant of its decision and of his right to request a review of it. Sections 185 and 186 contain provisions about eligibility. Pending a decision under s 184, the housing authority has a duty under s 188 to secure interim accommodation for an applicant if it has reason to believe that he may be homeless, eligible for assistance and have a priority need. It was under this provision that the council provided interim accommodation for Mr Maloba.

34. Where a housing authority is satisfied that an applicant is homeless, eligible for assistance and has a priority need, and is not satisfied that he became homeless intentionally, s 193 imposes on it a duty (subject to immaterial exceptions) to secure that accommodation is available for him. 35. Priority need is defined by s 189 and subordinate legislation made under it. A person has a priority need if he is someone with whom dependant children reside or might reasonably be expected to reside. 36. Section 191 defines “becoming homeless intentionally”. Subsection (1) provides: “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 accommodation and which it would have been reasonable for him to continue to occupy.” The construction of s 175(3) – the first issue 37. 38. On the assumption that the council was entitled to decide that the property in Kampala was available to Mr Maloba, did it follow that he was not to be treated as homeless or threatened with homelessness within the meaning of s 175, regardless of whether it was reasonable to expect him to occupy it? On first impression, it would be surprising if the answer were yes. This would seem to go against the grain of Parliament’s intention in providing that a person is not to be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy. However, in *Nipa Begum* a majority of the court considered that the inclusion of the words “to continue” in s 175(3) had the effect that the subsection could only apply if the person was in actual occupation of the relevant accommodation. On this reading, if at the time of the council’s decision a person was in occupation of accommodation which it would not be reasonable for him to continue to occupy, the fact that he was living there would not prevent him from being homeless within the meaning of the Act; but the opposite would apply if he had left the property, so long as it remained available for his occupation. In the latter case, in order to qualify for help under the Act he would have to take up the accommodation which it would not be reasonable for him to continue to occupy, whereupon he would become statutorily homeless. 39. In reaching this conclusion Sedley LJ referred, at pages 325-326, to the history of the legislation, which led him to the view that s 175(3) stood apart from s 175(1) and (2), and that they could not be read together. He considered that the theoretical possibility of an applicant being required to move into accommodation available to him, but which was unfit, could properly be regarded as unreal, since no responsible local authority would ever contemplate expecting an applicant to act in that way. 40. Auld LJ took a different approach. He interpreted the words “to continue to occupy” in s 175(3) as follows (at p 319):

“In my view, it is plain that Parliament was not using continued occupation in the sense of continuance of an actual occupation at the time of the application, but of continuance stemming from one of the entitlements to occupy specified in section 175(1).” 41. On the facts of *Nipa Begum*, the difference between Auld and Sedley LJ on this point made no difference to the outcome. The appeal was originally heard by them as a two judge court, but it was adjourned for further argument before a three judge court on an unrelated point. On the adjourned hearing, presided over by Stuart-Smith LJ, the argument was limited to that other point, but in his judgment Stuart-Smith LJ expressed his agreement with Sedley LJ’s analysis of s 175. He added that in his view it made no practical difference because no responsible authority would be likely to take the point that an applicant was homeless where the only accommodation available to him was not reasonable for him to occupy.

42. Ms Bretherton relied on the opinions of the majority regarding the interpretation of s 175(3) as persuasive but not binding authority. The issue was academic in *Nipa Begum*, but it is not academic in this case. 43. 44. 45. 46. In my view the grammatical argument which found favour with the majority is outweighed by other factors which support Auld LJ’s approach. These relate to the coherence of the statute and the reasonableness of the result. The initial questions which arise for consideration when a homelessness application is made to a housing authority are whether the applicant is homeless (or threatened with homelessness) and whether he is eligible for assistance. Logically the question whether the applicant is homeless must precede consideration of the question whether, if so, he became homeless intentionally. Intentionally homeless persons are a subcategory of homeless persons, to whom housing authorities owe only limited obligations under the Act. (Under s 190 a housing authority may owe a duty to secure that accommodation is available for an intentionally homeless person on a temporary basis, and to provide or secure other advice and assistance, but the duty is of a strictly limited nature.) If a housing authority reaches the stage of considering whether a person became homeless intentionally, s 191 requires it to consider whether the applicant has ceased to occupy accommodation which was available for his occupation and which it would have been reasonable for him to continue to occupy. In addressing that question it will also have to take into account, so far as relevant, the provisions of s 177 (including those relating to victims or potential victims of domestic violence). The construction preferred by the majority in *Nipa Begum* leads to this paradox: a person who has left accommodation in circumstances which did not make him homeless intentionally under the provisions of s 191 and s 177, because it was unreasonable to expect him to remain there, is nevertheless not homeless at all if he is able to return to the property which he reasonably left. This would produce statutory incoherence and cannot have been Parliament’s intention. 47. Auld LJ made a similar point in *Nipa Begum* at page 319. Sedley LJ disagreed. He said at page 327: “For the reasons I have given, section 175(3) is relevant only to from extant a person whose application is made accommodation; in that event, but only then, does the reasonableness of continued occupation arise. Unlike Auld LJ, I see no discontinuity between this reading and the provision of section 177(1) that it is not reasonable to continue to occupy accommodation if it is probable that domestic violence

would ensue. The predicate of the provision is precisely that the applicant is housed in such a situation; if she is not, then she risks being treated as intentionally homeless under section 191 if “it would have been reasonable” for her to stay where she was – and this is why section 177(2) makes domestic violence determinative of reasonableness in relation both to present accommodation (section 175(3)) and past accommodation (section 191(1)). The same explains the language of section 177(3).”

48. My difficulty with this passage is that if one takes as the starting point the proposition that s 175(3) is relevant only to a person whose application is made from extant accommodation, it must follow that a person is not homeless within the definition of s 175 if he has other accommodation which he is able to occupy, whether or not it would be reasonable to expect him to do so. There the matter ends and the question of intentional homelessness does not arise. Conversely, if s 177 is to provide protection for a person who has left accommodation through fear of domestic violence and for whom the accommodation remains available (as the second part of the passage cited might be taken to suggest), then it is not right to say that s 175(3) can only apply in relation to accommodation in which the applicant is currently living. 49. 50. 51. Linked with the question of coherence is the question of reasonableness. In general terms, the provision of ss 175, 177, and 191 point towards a policy that in deciding whether a person is homeless or, if homeless, has become homeless intentionally, no regard should be had to property available or previously available to the applicant if it would not be reasonable to expect the applicant to occupy it or to have occupied it for a continuing period. As Sedley LJ noted, the provision now contained in s 175(3) was introduced by the Housing and Planning Act 1986 by amendment to the Housing (Homeless Persons) Act 1977 following the decision in *R v Hillingdon London Borough Council, ex parte Puhlhofer* [1986] AC 484 (together with the provision now contained in s 177(2)). The 1977 Act contained no definition of accommodation. The 1977 Act introduced the statutory scheme of which Part VII of the 1996 Act is the latest version, but it contained no definition of accommodation. In *Puhlhofer* the applicants were a married couple with two young children living in one room at a guest house with no cooking or laundry facilities, except that they were allowed to use the kitchen to warm the baby’s milk. Ackner LJ (supporting the judgment of Hodgson J) would have held that to treat the word “accommodation” as being totally unqualified did not give effect to the intention of Parliament as evinced by the statute considered as a whole. He said (at p 493): “It cannot mean simply premises in which the applicant and his family are presently lodging. In my judgment the accommodation must be such that it is reasonable for the applicant and his family to continue to occupy it, having regard to the general circumstances prevailing in relation to housing in the area of the housing authority to whom he has applied.” 52. The majority of the Court of Appeal and all the members of the House of Lords considered otherwise. They preferred the argument advanced on behalf of the council by Mr Schiemann QC, which Ackner LJ summarised as follows at p 490: “So long as there is a roof over the head of the applicant and his family, and no doubt four walls to support that roof, it does not matter how unsuitable that accommodation is. Thus, an applicant and his family will not become homeless under the Act of 1977 unless and until they walk out of the

53. 54. 55. 56. 57. 58. accommodation or are threatened with being deprived of that accommodation.” Lord Brightman, who gave the sole judgment in the House of Lords, held that accommodation did not cease to be accommodation simply because it might be unfit for habitation. The only question was whether it could properly be considered to be accommodation at all, that is, capable of accommodating the applicant together with other persons who normally resided with him as members of his family. This restrictive approach was overturned by Parliament. It is striking that the language of the amendments followed closely the interpretation of accommodation advanced by Ackner LJ in the Court of Appeal. It is inconceivable that he could have intended by his choice of language to construe the Act in such a way that if Mr and Mrs Puhlhofer had left the guesthouse because of its unsuitability, but had been able to return, they would not have been homeless. This would have turned his reasoning on its head. I do not believe that Parliament can have positively intended by the language used in the amendments to create a distinction between a person with unfit accommodation available to him who was living in it and one who was not - a distinction so unreasonable that the majority in *Nipa Begum* did not consider that any responsible authority could properly take the point. It is impossible to see any policy reason for such a distinction. Indeed, if there were a policy reason and Parliament positively intended to create such a distinction, then a responsible council could not be criticised for following it. There remains the question whether the language used by Parliament nevertheless has the unavoidable effect for which the council contends. I would reach that result only if the words used were incapable of any other construction. In my view they are not. Good sense can be made of s 175(3) by construing the words “reasonable for him to continue to occupy” as synonymous with “reasonable for him to occupy for a continuing period”, ie for the future, whether or not he is in occupation at the moment of the application or the decision. This construction also “produces symmetry between the key concept of homeless and intentional homelessness”, to which Lord Hoffmann referred in *R v Brent London Borough Council, ex parte Awua* [1996] 1 AC 55 at 67-68. He observed that if accommodation is so bad that leaving it for that reason would not make one intentionally homeless, then one is in law already homeless. Logic and justice suggests that the same should apply if a person has for the same reason not occupied accommodation which is physically available to him. The construction of s 175(3) – the second issue 59. 60. On the basis that the council had to consider whether it was reasonable to expect the applicant to occupy the accommodation which was available to him, was the council entitled to consider reasonableness solely in terms of the size and structural quality of the accommodation and its amenities? In my judgment the answer is no. I can see no good reason for importing such a limitation. There may be other reasons why it would not be reasonable to expect a person to occupy accommodation which was available to him. If so, I can see no ground to suppose that Parliament intended such reasons to be ignored. Suppose that the accommodation in question was a bed-sitting room in a house where another room was occupied by a drunken ex-partner of the applicant who had attempted to murder her in the past and had threatened more than once to do so in future. The applicant would not come within the terms of s 177(1), because the ex-partner would not be a person who normally resided or might

reasonably be expected to reside with her. But it cannot be right that the council would be entitled to ignore the question of risk to the applicant in deciding whether it was reasonable to expect her to occupy the property.

61. Moving from the general to the particular, Ms Bretherton submitted that the fact that the property in question in this case happens to be in Uganda is an irrelevant consideration because of the wording of s 175(1) "A person is homeless if he has no accommodation available for his occupation in the United Kingdom or elsewhere..." But that argument is a non sequitur. It conflates two separate questions – first, whether accommodation was available for Mr Maloba's occupation and, secondly, whether it was reasonable to expect him to occupy it. There is no necessary reason why the answer to the second question should be the same as the answer to the first. Consider, for example, the case of a woman who was born in England and has lived all her life here. Her family originated in India, where she continues to have relatives. She marries or forms a relationship and has children. Her husband or partner subsequently dies or leaves her, and she finds herself homeless with dependant children. Her grandparents have always said that they would be happy for her and her children to live with them in India. She has never wished to do so and does not wish to do so now. Nor would anyone reasonably expect her to do so. It would mean uprooting the family from the country in which all the members were born, had lived their lives and had their cultural roots. It would also involve disruption of the children's education. It may be said that those would be unusual facts, but the question whether it would be reasonable to expect a person to occupy particular accommodation is necessarily a fact specific question. As a matter of statutory construction, I see no warrant for imposing the restrictions contended for by the council as to what may be relevant to that question. The review letter
62. Result 63. 64. Costs 65. Reading the review letter as a whole, it is clear in my judgment that the review officer adopted an over restrictive approach to the matters which had to be considered. The tenor of the letter was that she dismissed Mr Maloba's protestations about moving to Kampala on the basis that she had to consider whether he had accommodation anywhere in the UK or elsewhere. She then addressed herself to the property's amenities. Nowhere did she consider whether it was reasonable to expect Mr Maloba to relocate to Kampala after he had been living here since 1997 and had acquired British citizenship. In summary, her approach mirrored the legal argument advanced on the council's behalf on the second issue relating to the construction of s 175(3). In so doing she misdirected herself. I would therefore uphold the judge's order quashing the council's decision and dismiss this appeal. In those circumstances it is unnecessary to consider the further question whether it was open to the review officer to decide that the Kampala property was available to Mr Maloba. The judge ordered the council to pay two thirds of Mr Maloba's costs. Ms Bretherton applied unsuccessfully for a stay of the order until the council had made a fresh determination of his homelessness claim and, if the new decision went against him, until after the determination of any fresh appeal by him. The judge said that it was the first time that an application of this kind had been made to him, but that was not his reason for refusing it. He considered that each case must turn on its own facts, and that this was a case

which the council should never have contested. In the circumstances he did not think it right that he should stay the order for costs.

66. Ms Bretherton submitted that there ought to be a general practice on appeals under s 204 of the Act that any order for costs made against the housing authority should be subject to a stay until after the re-determination of the homelessness application and any subsequent appeal from it; and that there was no good reason for the judge to make an exception in this case. In support of her argument Ms Bretherton submitted as follows: 1. 2. 3. Mr Maloba had been funded by the Legal Services Commission ("LSC") and was likely to be funded by it in any future appeal from a fresh determination. The vast majority of s 204 appeals are unsuccessful. Refusal of a stay would expose the council to the risk of being unable to set off any order for costs which might be made in its favour at the end of a future unsuccessful appeal by Mr Maloba against the council's costs liability in the present proceedings, and this would be unjust.
67. Ms Bretherton relied on *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492 and *R(Sonia Burkett) v London Borough of Hammersmith and Fulham* [2004] EWCA Civ 1342 to support the proposition that such a set off would in principle be just. 68. 69. 70. 71. Because of the broad nature of the argument, permission was given to the Law Society to intervene on this issue. We also admitted written evidence from Richard Clayton QC, the chair of the Bar Council's Sub-Committee on Civil Legal Aid and vice-chair of the Bar Council's Remuneration Committee. The authorities relied on by Ms Bretherton are distinguishable. In *Lockley* the defendant succeeded in an interlocutory application against a legally aided plaintiff and was awarded the costs of the application. The court directed that it should be entitled to set off those costs against any award of damages or costs which might subsequently be made in the plaintiff's favour in the action. In *Burkett* a publicly funded claimant applied for permission to bring judicial review proceedings against the defendant council. She was granted permission by the House of Lords, who made an order for costs in her favour in relation to the permission application. But her claim failed on the substantive hearing. The judge made an order for assessment of the council's costs of the substantive hearing and directed that they should be set off against the claimant's costs of the permission application. This order was upheld on appeal. The present case is different. The council has not won on any issue and does not have an order for costs in its favour. It has incurred a liability in costs, which it wants to stay because of the possibility that there will be another statutory appeal and that next time the council will be successful. I accept that the court's discretion is wide enough to enable it to grant such a stay if it considers it just to do so, but I am not persuaded 72. 73. that there should be a practice that such a stay should be granted in all such cases unless there is good reason for refusing it. The potential implications of such a rule of practice could be far reaching. Although Ms Bretherton stressed that her submissions were limited to cases arising under the particular statutory regime relating to homeless persons, it would be easily arguable that the same principle should generally apply to any statutory appeal or judicial review in which a publicly funded litigant succeeded in having a decision quashed and the matter remitted to the original

decision maker. The circumstances of individual cases may vary widely. The background to the Law Society's particular concern about the court establishing a general practice in these matters is that the maximum prescribed hourly rate payable by the LSC to solicitors under present regulations is £70, whereas regulation 15 of the Community Legal Service (Costs) Regulations 2000 permits a solicitor for a successful LSC funded client, in whose favour a costs order has been made, to recover his costs at "normal commercial" rates, which are much higher. The Law Society is concerned that if the form of order sought by the council in the present case became a matter of general practice, this could reduce the already diminishing number of firms willing to undertake publicly funded work and so impact on access to justice. I do not think that it is possible for the court properly to evaluate the extent to which such concerns may be well-founded on the present evidence, and I would be cautious about introducing a general practice with potential wider consequences which the court is unable properly to assess. 74. In the present case I can see no ground for criticising the way in which the judge exercised his discretion in relation to costs, and I would therefore dismiss the appeal on this issue. Lord Justice Carnwath: 75. 76. 77. I agree. However, since on the first point we are disagreeing with the majority view of this court (albeit obiter), I will add some brief comments of my own. The history of the provisions with which we are concerned provides a remarkable example of rapid intervention by Parliament to correct a House of Lords decision with which it disagreed. In February 1986, in Puhlhofer [1986] AC 484, the House decided that the word "accommodation" in the Housing (Homeless Persons) Act 1977 was to be read unqualified by any epithet such as "appropriate" or "reasonable". In November 1986 Parliament intervened by passing the Housing and Planning Act 1986 section 14. Puhlhofer had reversed a line of earlier decisions at first instance. For example, in *R v Preseli District Council* (1984) 17 HLR 147, a family living in a one-room boat, with no w.c., and minimal washing or cooking facilities, were held to be homeless, because they had no "appropriate" accommodation. Lord Brightman said that Parliament had "plainly, and wisely" placed no such qualifying adjective before the word "accommodation" and that none was to be implied. He accepted that it would be a misuse of language to treat Diogenes' barrel as accommodation within the meaning of the Act; but apart from such extreme examples: "What is properly to be regarded as accommodation is a question of fact to be decided by the local authority. There are no rules..." (p 517E-G) 78. 79. The purpose of the 1986 Act amendment was stated in Parliament to be to "restore homeless people's rights to the situation existing before the Puhlhofer judgment" (Baroness David, Hansard 28.10.86 Vol 481 col 648). The natural interpretation of the statute as so amended, in my view, is that accommodation which it is not reasonable for the particular family to occupy is disregarded for all purposes. It is true that section 175(3) uses the expression "reasonable to continue to occupy", thereby arguably implying that it does not apply to accommodation which the applicant has not yet occupied. However, so to construe it would lead to absurdity. The one-room boat which the Fisher family occupied would not have been "accommodation" within the amended Act, while they remained there (s 175(3)). Thus they would be technically "homeless"; and, if they left it deliberately, they would not be "intentionally homeless" (s 191(1)). But if they had originally owned the boat without living

in it, and had, say, been evicted from an ordinary house or flat, then they would not have been homeless, because the boat was available; and they would not become homeless until they had first occupied the boat, so as to come within section 175(3). That cannot have been the intention of Parliament. To avoid it, in my view, a purposive construction requires “continue to occupy” to be read as “occupy or continue to occupy”. The argument to the contrary is based on the judgments of the majority in *Nipa Begum v Tower Hamlets LBC* [2001] 1 WLR 306. However, the passage quoted by Toulson LJ should be read in the context of the reasons given earlier in the judgment of Sedley LJ. He had referred to the apparently awkward relationship between the three subsections of section 175, including the phrase “continue to occupy” in section 175(3). It had been submitted (surprisingly, by the local authority) that the effect of the provisions was - “to make a person eligible for Part VII housing notwithstanding that they have accommodation available, so long as it is not accommodation which they have previously occupied (section 175(3)), and so long as it is not located in the district of the local authority to which application is made (section 197)” (p 327) 80. It was the “capricious” effects of this submission that Sedley LJ sought to avoid by reference to the history of the provisions, which explained in his view why section 175(3) “stands apart from section 175(1) and (2)”. He concluded this passage: “The upshot, in paraphrase, is that a person who has accommodation which nevertheless it would not be reasonable for him to occupy is to be regarded as having no accommodation. It does not mean that an applicant who has accommodation available to him is (unless it happens to be in the respondent authority's own district) entitled to have it disregarded if he has not previously lived there...” (s 27) He then briefly considered the present issue, as one of two “unanswered questions”: “The first, which does not affect this appeal, is what happens where unfit accommodation is available in which the applicant has not previously lived: does *Reg. v. Hillingdon London Borough Council, Ex parte Puhlhofer* [1986] A. C 484 continue to apply so as to force them to go into occupation, only to be rescued by section 175(3)? In my view no responsible local authority would ever contemplate testing the point, and the issue can properly be regarded as unreal.” 81. Stuart Smith LJ's agreement was subject to a similar qualification. He regarded Sedley LJ's analysis as correct, but added: “... in my view it makes no practical difference because, as he points out, no responsible authority would be likely to take the point that an applicant is homeless where the accommodation available is not reasonable for them to occupy, but it is not accommodation currently occupied. In the result it seems to me that the approach of the local authority should be to consider whether the accommodation is reasonable for the applicant to occupy, even if he has not previously occupied it.” (p 332) 82. 83. Thus, the comments of the majority in *Nipa Begum* were directed to a different issue. The absurdity of the present suggestion was not lost on them, but they did not anticipate a responsible authority seeking to advance it. However, like Toulson LJ, I think we are able to rely on ordinary principles of construction of the statute, rather than on the discretion of local authorities, to avoid a result which Parliament cannot sensibly have intended. On the second issue, I agree that the tenor of the passage from the review letter (including in particular the passage cited by Toulson LJ at paragraph 14) shows clearly that the writer considered that the reasonableness

of expecting the applicant to live in Uganda was not a material issue. For the reasons given by him I see no basis in the Act for excluding such personal considerations in assessing the “reasonableness” of the available accommodation. I recognise that the judgment may involve very difficult questions, in both human and policy terms. Provided the authority has properly and rationally considered the issues, its decision will not be open to challenge in law. However, in this case I agree that it has proceeded on too narrow a basis in law, and the matter must be remitted for reconsideration. The President of the Queen’s Bench Division: 84. I agree with both judgments.

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Prepared on 27 October 2026 · Esheria