Neutral Citation Number: [2021] EWHC 578 (Admin)

Case No: CO-3615-2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINSTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2021

Before:

MR JUSTICE FREEDMAN

- -

Between:

THE QUEEN
(ON THE APPLICATION OF TIMON NCUBE)

Claimant

- and –

BRIGHTON AND HOVE CITY COUNCIL

- and –

Defendant

THE SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT

Interested Party

- and –

SHELTER

Intervener

- -

Martin Westgate QC and Joshua Hitchens (instructed by **Lawstop Solicitors**) for the **Claimant**

Sian Davies (instructed by **Brighton and Hove City Council Legal Services**) for the **Defendant**

Liz Davies, Adrian Berry and Connor Johnston (instructed by **Freshfields Bruckhaus Deringer**) for the **Intervener**

The Interested Party did not appear, but served detailed grounds

Hearing date: 15 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 11th March 2021 at 12.00pm.

MR JUSTICE FREEDMAN:

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II Introduction

1. This case falls to be decided in the context of the COVID pandemic. The claim concerns the powers available to local authorities to provide accommodation for rough sleepers with no recourse to public funds ("NRPF"). At an early stage of the pandemic, there was rolled out the "Everyone In" scheme which was an initiative to get rough sleepers off the streets during the pandemic due to their vulnerability and the need to

prevent others from being infected. Later, there was a concern that in respect of NRPF persons, this was not permitted and was contrary to the law. The way in which the matter was summarised at the permission stage by Ms Heather Williams QC sitting as a Deputy Judge of the High Court was as follows:

> "The central issue of whether the Claimant's status as a person within Sch. 3, para 7, Nationality Immigration and Asylum Act 2002 and s.185 Housing Act 1996 precludes him from being accommodated under the Defendant's COVID-19 accommodation policy gives rise to arguable grounds and issues of public importance."

2. The case has been brought by the Claimant, a homeless failed asylum-seeker who sought accommodation from the Defendant local authority ("Brighton CC") in September 2020. This was refused. In these proceedings, he seeks to argue that the Claimant was required to accommodate him. The Defendant disputes this, contending that "there is no statutory provision empowering it to accommodate C" as "[h]is unlawful status disqualifies him from local authority support" (see detailed grounds at [54]) and that any policy of accommodating homeless persons "irrespective of immigration eligibility" would be unlawful (see detailed grounds at [41]).

3. The Claimant's circumstances have changed. On 30 November 2020, he was provided with, and moved to, Home Office accommodation in Swindon. Thus, he became accommodated. Further, he no longer lives in the area of the Defendant. It is submitted on behalf of the Defendant that the case is academic. The Defendant opposes the idea that this case has wider application, saying that it is fact sensitive such that it cannot be a case of wider significance beyond the facts of the particular case. Further, the Defendant objects also to what they say is an impermissible attempt to create a "rolling claim" in which objection is made to policies which came into existence after the issue of this claim for judicial review.

4. The Defendant relies especially on s.185 Housing Act 1996 which (together with the relevant secondary legislation) determines who is and is not eligible for homelessness assistance under Part VII Housing Act 1996, based on immigration status. The Defendant submits that persons such as the Claimant, who require leave to remain in the UK but do not have it, as well as a number of classes of persons in the UK lawfully, are ineligible for homelessness assistance as a result of s.185. The effect, says the Defendant, is that the Defendant did not have power to provide housing assistance to the Claimant because the claim is an impermissible attempt to circumvent these prohibitions and limitations.

5. The Claimant and Shelter as Intervener submit that local authorities such as the Defendant do have the power to intervene to mitigate the effect of the pandemic and to protect the human rights of those within their area. In particular, they submit that where there is a statutory scheme outside the Housing Act 1996, the ineligibility in s.185 does not apply. Further and in any event, they say that a reading of legislation to ensure that it is Convention compliant provides the power of the local authority to be able to respond to the pandemic. In the course of the judgment, there will be considered in particular s.138 Local Government Act 1972 (power to act in an emergency involving

danger to life), s.2B National Health Service Act 2006 (meeting public health functions), s.180 Housing Act 1996 (assistance to voluntary organisations) and Localism Act 2011 (general power subject to pre-commencement and post-commencement limitations).

6. The Court has had the advantage of written and oral submissions from the Claimant represented by Mr Martin Westgate QC and Mr Joshua Hitchens of Counsel and the Defendant represented by Ms Sian Davies of Counsel. Since the hearing, it has received further submissions from the Claimant and the Defendant, and a letter dated 30 December 2020 from the Ministry of Housing, Communities & Local Government to all Council Leaders in England. The Court has received evidence and had written and oral submissions from Shelter from Ms Liz Davies, Mr Adrian Berry and Mr Connor Johnston of Counsel. The Court has also received detailed grounds on behalf of the Interested Party dated 16 November 2021 signed by Mr Anderson of Counsel, which was of assistance, but save for that the Interested Party had no further part to play in the proceedings.

III History of the Claimant

7. The Claimant was street homeless. He is a former asylum seeker, who at the time of the claim being issued was living in the Defendant's district and spending most nights at Brighton and Hove Railway Station. The Claimant's evidence contained in his statement of 7 October 2020 is that he fled Zimbabwe having been threatened by the Zimbabwean Government. He says that his eyes have been a problem for around five years. He was given a course of medicine then, but he has not been back to the doctor since. His vision is blurrier and there are flashes in his eyes. He says that his mental health has deteriorated, feeling increasingly low and upset.

8. In the claim, it is said that the claimant has diabetes (which is not mentioned in his witness statement), he is visually impaired due to diabetes and he suffers from symptoms of depression and anxiety, but he has no formal diagnosis due to being unable to access appropriate services and a GP. It was said that he is at a higher risk of having complications from coronavirus due to his age and ethnicity. The Claimant claimed that he was destitute and had no alternative means of accommodation.

9. The following appears in the skeleton argument of the Claimant, and it does not appear to be contentious:

> "10. Until the beginning of September 2020, the Claimant lived with his sister, Sithembiso Manzinni and her family. Ms Manzinni has provided a witness statement in these proceedings setting out that at [sic] on around the start of September 2020, she asked the Claimant to leave the property due to overcrowding, Covid-19 and cultural concerns."
>
> 11. On 02 September 2020, the Claimant approached the Defendant for homelessness assistance. A s.184 decision was

made on 03 September 2020 that the Claimant was not eligible for assistance under Pt VII Housing Act 1996.

12. The Claimant was, during this period, street homeless and sleeping outside a railway station in the Defendant's district. On 28 September 2020, the Claimant contacted Migrant Help, the Home Office's delivery partner for Asylum Support and was advised that he was not eligible for s.4 [Immigration and Asylum Act] 1999 support.

13. On 30 September 2020, a letter before action was sent to the Secretary of State for the Home Department in respect of Migrant Help's failure/refusal to accept and process an application.

14. On 05 October 2020, a letter before action was sent to the Defendant requesting accommodation pursuant to the "Everyone In" scheme. On 06 October 2020, the Defendant responded to the pre-action letter indicating that accommodation would not be provided.

15. On 06 October 2020 an out of hours application was made and Lavender J granted interim relief and added the Interested Party in light of the important public policy issues engaged.

16. On 09 October 2020, interim relief was discontinued by Margaret Obi, sitting as a Deputy Judge of the High Court. An urgent appeal was lodged with the Court of Appeal by the Claimant in respect of this decision.

17. On 13 October 2020, the Defendant evicted the Claimant from the accommodation provided pursuant to the order of Lavender J. The Claimant was then, almost immediately re-accommodated in "Everyone In" accommodation provided by the Defendant via St Mungo's.

18. On 13 October 2020, following the intervention of Voices in Exile, a formal application for s.4 support was made by Migrant Help.

19. On 14 October 2020, Migrant Help responded to a complaint lodged on behalf of the Claimant stating the call made by the Claimant on 28 September 2020 ought to have led to further steps being taken in respect of an application for s.4 support.

20. On 21 October 2020, the Secretary of State refused the Claimant's application for s.4 support. On 05 November 2020, this decision was upheld on appeal by the Asylum Support Tribunal.

21. On Tuesday 10 November 2020, FtT Judge Gill Carter, sitting in the Asylum Support Tribunal reconsidered her earlier order and the Claimant's appeal against the decision of the Secretary of State that the Claimant did not qualify for asylum support. She accepted that the Claimant was destitute and that because of the national lockdown since 5 November 2020, he could not alleviate his destitution by leaving the UK. That was to remain in place until at least 2 December 2020. At para 32 the decision concluded:

> *"The appellant is put on notice that, in the event that he is no longer accommodated in a location subject to a national lockdown (or Tier 3 restrictions), his eligibility for support may be reviewed by the respondent as he does not currently qualify for Section 4 support for any other reason."*

That reflected a different approach of the Principal Judge (from which FtT Judge Carter had no reason to depart) to the generality of failed asylum seekers living in tier 1 and tier 2 who might be expected to leave the UK: see paras. 26-29."

10. The Claimant received an offer of accommodation under s.4 of the Immigration and Asylum Act 1999 on 28 November 2020 and moved to it on 30 November 2020. The accommodation is not in Brighton's area: it is Home Office accommodation in Swindon. In these circumstances, the Defendant argues that the claim is academic.

11. The national lockdown ended on 2 December 2020 and Brighton went to tier 2. However, the number of new cases rose rapidly in December 2020. On 26 December 2020, Brighton went into tier 4 which was almost equivalent to the rules of a national lockdown. The new national lockdown started on 4 January 2021 and continues to today. There has been an abandonment for now of the tier system with more stringent restrictions and a concern about a new strain of the virus, particularly in the South East of England. The duration of the lockdown is currently unknown, albeit that in the last few days, there has been announced a phased exit from lockdown, but over a period of several months, and then subject to constant review.

IV The background to the current dispute: the "Everyone In" policy.

12. On 23 March 2020, the first national lockdown was announced in response to the pandemic. On 26 March 2020, as part of the national measures adopted by the government to counter the pandemic, Luke Hall MP, Minister for Local Government and Homelessness, wrote to all local authorities stating that "it is now imperative that rough sleepers and other vulnerable homeless are supported into appropriate accommodation by the end of the week". He referred to the need to "bring in those on the streets to protect their health and stop wider transmission".

13. This marked the start of what has become known as the "Everyone In" initiative. The object of this public health initiative was to provide accommodation for rough sleepers as a matter of urgency. It recognised a heightened risk arising from homelessness. There is an annexe to the skeleton argument of the Claimant which outlined the relevant government initiatives and the policy adopted by the Defendant in response to it. In the Defendant's local Covid-19 outbreak plan, rough sleeping and the high level of homelessness in Brighton and Hove were identified as specific public health risks during the pandemic.

14. The House of Commons Communities and Local Government Select Committee interim report on 'Protecting rough sleepers and renters" dated 22 May 2020 stated that in London alone, there were 900 people with no recourse to public funds being accommodated under the "Everyone In" scheme at the date of the report. In Brighton, there have been at least thirty people with no recourse accommodated. Across the country, the Claimant submitted in December 2020 that it was then likely that there are thousands of people currently deprived of accommodation.

15. Subsequent letters from the Minister, dated 28 May 2020 and 22 September 2020, stated the following:

(1) the 28 May 2020 letter states:

> "I do recognise that there are challenging times and that you may have accommodated people who would normally and otherwise be ineligible for support, making judgments based on risk to life. I wanted to take this opportunity to restate the government's position on eligibility relating to immigration status, including for those with No Recourse to Public Funds. The law regarding that status remains in place. Local authorities must use their judgment in assessing what support they may lawfully give to each person on an individual basis, considering that person's specific circumstances and support needs. You will already be making such judgments on accommodating individuals who might otherwise be ineligible, during extreme weather, for example, where there is a risk to life."

(2) the 22 September 2020 letter states:

> "Local authorities must ensure that any support offered to non-UK nationals who are not eligible for homelessness assistance complies with legal restrictions (for example, the restrictions contained in Schedule 3 to the Nationality, Immigration and Asylum Act 2002)."

16. University College London's Lancet Article of 23 September 2020 considered the impact of the "Everyone In" scheme and measures to protect those who are homeless between February and May 2020. The conclusions of the study were that in just three months, the measures may have avoided:

(a) 21,092 infections of Covid-19;
(b) 1,164 hospital admissions;
(c) 338 ICU admissions;
(d) 266 deaths.

V Academic claim?

(i) The submissions

17. The Defendant submits that the claim is academic. Since the Claimant moved on 30 November 2020 away from Brighton to be accommodated in Swindon, he is (a) now accommodated, and (b) no longer in Brighton's area. Further, before that on 10 November 2020, his successful appeal had as its effect that he was entitled to support for the duration of the pandemic (then until 2 December 2020). In response to a suggestion that the Claimant's accommodation may cease, and he may return to Brighton, the Defendant said that this was speculative, and one would expect that his remedy would lie against the Home Office.

18. The Claimant also submits that the claim includes an issue of wider importance based on an alleged error of law. Given the nature of the pandemic and its grave implications particularly to the homeless, the question of powers of local authorities to implement public health measures to take those with no recourse off the streets is matter of great importance. At the time that the issue arose there was a lockdown until 2 December 2020. Although that was lifted and Brighton went into tier 2, as noted above by 26 December 2020, Brighton went into tier 4 until the current national lockdown which began on 4 January 2021.

19. The Defendant draws attention to the fact that the circumstances must be exceptional for the Court to decide to proceed to determine a claim even though its outcome has become academic. In *R (Zoolife International Ltd) v The Secretary of State for Environment, Food and Rural Affairs* [2008] A.C.D. 44 at para. 36:

> "In my view, these statements show clearly that academic issues cannot and should not be determined by courts unless there are *exceptional* circumstances such as where two conditions are satisfied in the type of application now before the court. The first condition is in the words of Lord Slynn in Salem (supra) that "*a large number of similar cases exist or anticipated"* or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive. If the courts entertained academic disputes in the type of application now before the court but which did not satisfy each of these two conditions, the consequence would be a regrettable waste of valuable court time and the incurring by one or more parties of unnecessary costs."

20. The applicable principle was recently cited in *Dolan v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 at para. 40:

> "The principle which governs the exercise of the Court's jurisdiction to hear judicial review cases which have become academic was set out by Lord Slynn of Hadley in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, at 456 to 457. There is a discretion to hear disputes which have become academic but the discretion, even in the area of public law, must be exercised with caution; appeals which are academic between the parties should not be heard "unless there is a good reason in the public interest for doing so". By way of example (but stressing that this was only by way of example) Lord Slynn said:
>
> > "When a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

21. Attention is drawn to the Administrative Court Judicial Review Guide which states that where a claim has become academic since being issued, that is that it will no longer affect the rights and obligations of the parties to the claim, it is not generally appropriate to pursue the claim. It states, mirroring the language used by Silber J in *R (Zoolife International Ltd) v The Secretary of State for Environment, Food and Rural Affairs* at [2008] ACD 44 at para. 36:

> "In exceptional circumstances the Court may decide to proceed to determine a claim even though the outcome has become academic. The Court may do so if, for example: a large number of similar cases exist or are anticipated, or at least other similar cases exist or are anticipated and the decision in a judicial review will not be fact-sensitive."

(ii) Discussion

22. I accept the submission of the Defendant that upon the Claimant being accommodated in Swindon by the Home Office, the claim of the Claimant became speculative, depending upon that accommodation being withdrawn and that he might return to Brighton. If that were the only basis for the case to continue, the Court ought to refuse to hear the claim since it would have become academic.

23. However, there is a question which arises out of the position of the Defendant. As the Grounds of Defence dated 16 November 2020 state:

> (1) "Brighton does not have, and has never had, a policy that it will accommodate all those who are homeless irrespective of immigration eligibility for accommodation. Such a policy would in any event be unlawful." (para.41);
>
> (2) "Brighton's position is that there is no statutory provision empowering it to accommodate C. His unlawful status disqualifies him from local authority support. The division between central and local government support is clear, and any entitlement C has to support falls on the central government side of the line." (para.54).

24. This was affirmed in a report of the Defendant's housing committee of 18 November 2020 which stated that despite the accommodation made available to all rough sleepers in response to the Covid-19 emergency, the Government had repeatedly made clear that it would not suspend legal requirements around rough sleepers who have no recourse to public funds. Thus, no support would be offered where there were legal restrictions preventing the same (for example, restrictions contained in Schedule 3 to the Nationality, Immigration and Asylum Act 2002). Support would not be given to persons with no recourse to public funds ("NRPF") other than those to whom a statutory duty was owed. The "Everyone In" direction of the Government had to yield to the law prohibiting support to NRPF persons with very limited powers to accommodate.

25. The Defendant says that there are other safety nets to accommodate persons who have leave to remain but subject to a NRPF condition such as under the Care Act 2014, the Children Act 1989 or, as in the case of the Claimant, by his qualifying for s.4 accommodation as above. Despite this, those who do not come under these other ways of being accommodated still face the problem of the submission that the local authority has no power to provide accommodation to NRPF persons not falling within those safety nets.

26. In my judgment, the question whether this is correct is of public importance. Its effect would be that local authorities are unable to accommodate persons subject to a NRPF condition. If correct, this would affect their ability to respond to the "Everyone In" scheme or any successor initiative. It might also affect the ability to protect the human rights of person who is at risk of destitution and be potentially in breach of Article 3 of the European Convention of Human Rights.

27. The Defendant submits that the challenge is of a fact sensitive nature. It submits that the Defendant is reviewing its local infection rates and its response. No doubt this is the case. However, it does not affect the fact that these proceedings challenge a discrete point of law which is maintained by the Defendant. It is significant that the claim has been reduced in its ambit to ground 2 (the mistake as to law identified above), ground 4 (irrationality in the refusal to accommodate, that is Wednesbury unreasonableness or failing to have due regard to the risk posed to wider public of those forced to sleep street homeless spreading the disease, the heighted risk to the Claimant of his difficulties and the Minister's own policy) and ground 8 (failure to consider relevant considerations and in particular whether the provision of accommodation was necessary to avoid a breach of the homeless person's Convention rights). Some of the other abandoned

grounds relate specifically to the particular circumstances of the Claimant, and to that extent would, if continued, have been laid open to challenge on the basis of an academic challenge. Ground 2 is a discrete point of law not specific to the circumstances of the Claimant.

28. In my judgment, the Ground 2 challenge is one which the Court can and ought to consider despite the situation of the Claimant being resolved. Applying the above law to the facts:

(1) Although the court generally will not determine cases where the outcome of the claim may no longer affect the rights and obligations of the parties to the claim, there are good reasons to proceed with the claim. It raises an issue of law which has ramifications of public importance concerning the power of local authorities to implement public health measures to take NRPF persons off the streets.

(2) The issue of law is applicable to potentially a large number of other similar cases present or future, bearing in mind the evidence before the Court about the potentially critical need to protect those who are homeless during the pandemic. This affects the ability of the local authority to join in the initiatives promoted by central government to take the homeless off the streets during the pandemic. It is important that the ability or lack of ability of the local authorities to assist is considered in this challenge rather than ignored because the Claimant has now been housed elsewhere.

(3) Whilst that suffices, other similar cases may be anticipated in Brighton. Brighton may not have another current case, but if they continue to adopt this policy, it is highly likely that there will be other such cases. Further, Brighton's view of the law is unlikely to exist in a vacuum. On the basis that other local authorities would interpret the law in the same way, there are likely to be many other such cases elsewhere;

(4) Provided that the issue is to be seen in general terms and not by reference to the facts of any case, the issue is not fact sensitive. It rests on whether there was a mistake of law. Where matters in contention are very specific to the case of the Claimant and which are not matters of general application, this will be indicated, and to that extent the Court is not required to decide those matters.

29. The Defendant says that the claim is an impermissible attempt at "rolling" judicial review. It draws attention to paragraph 89 of the Claimant's skeleton argument which referred to the latest policy of the Defendant on 18 November 2020 not to accommodate persons subject to a NRPF condition. This is not a rolling judicial review referred to in *Dolan v Secretary of State of Health and Social Care* above at [118] in that it does not involve circumstances which have emerged after the initial challenge, but it all comes within the same target of the original challenge. The policy document of 18 November 2020 is the latest iteration of the Defendant's policy which lies at the heart of this claim for judicial review, namely ground 2 of the Statement of Facts and Grounds comprising a mistake of law of the Defendant proceeding on the basis that it has no power to

accommodate those who have no recourse to public funds under the "Everyone In" scheme.

VI Legal Framework: Part VII Housing Act 1996

30. By way of introduction, the various legal provisions under which a homeless person may seek accommodation from the state are summarised below. It will start with Part VII Housing Act 1996 and especially s.185 and its prohibition or restriction. There will then be consideration of the various statutes which are said to provide ways of providing accommodation or other housing assistance which are alleged to be free of the prohibition or restriction under Part VII Housing Act 1996. The various submissions of the parties will be considered as to whether NRPF persons can be taken off the streets into accommodation during the current pandemic or whether the existing statutory structure renders initiatives such as the "Everyone In" scheme incapable of providing assistance to NRPF persons. In order to do this, in the section after this one, there will be consideration of the submissions of the parties relating to s.138 Local Government Act 1972, s.2B National Health Service Act 2006, s.180 Housing Act 1996 and the Localism Act 2011.

31. Part VII of the Housing Act 1996 contains the homelessness functions of a local housing authority in England. They include general functions which are not subject to any immigration status-based exclusions:

> (1) duty to provide advisory services at s.179;
> (2) power to give assistance by way of grant or loan to voluntary organisations concerned with homelessness or matters relating to homelessness, and to assist those organisations by permitting them to use the authority's premises, by making available furniture or other goods and by making available the services of the authority's staff: s.180.

32. Duties to secure accommodation are owed to individual applicants at s.188(1), 190(2)(a), 193(2), 193C (4), 199(2) and 200(1). There are also various powers to secure accommodation (s.188(3), 199(6), 200(5) and 204(4)). There are also duties to help the applicant in securing his or her own accommodation (s.189B(2), 190(2)(b), 195(2)).

33. None of the above duties or powers are available where an applicant is a person from abroad who is not eligible for housing assistance. This is by virtue of s.185(1), which precludes the giving of "assistance under this Part" to a person who is "ineligible for housing assistance". "Assistance under this Part" is defined in s. 183(2) as "the benefit of any function under the following provisions of this Part [s.184 and following] relating to accommodation or assistance in obtaining accommodation".

34. The relevant parts of s.185 provide as follows:

> **"185 Persons from abroad not eligible for housing assistance.**

(1) A person is not eligible for assistance under this Part if he is a person from abroad who is ineligible for housing assistance.

(2)A person who is subject to immigration control within the meaning of the Asylum and Immigration Act 1996 is not eligible for housing assistance unless he is of a class prescribed by regulations made by the Secretary of State.

(2A) No person who is excluded from entitlement to universal credit or housing benefit by section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) shall be included in any class prescribed under subsection (2).

(3) The Secretary of State may make provision by regulations as to other descriptions of persons who are to be treated for the purposes of this Part as persons from abroad who are ineligible for housing assistance.

(4) A person from abroad who is not eligible for housing assistance shall be disregarded in determining for the purposes of this Part whether a person falling within subsection (5)—

(a) is homeless or threatened with homelessness, or

(b) has a priority need for accommodation.

(5) A person falls within this subsection if the person—

(a) falls within a class prescribed by regulations made under subsection (2); but

(b) is not a national of an EEA State or Switzerland."

35. A person is subject to immigration control if they require leave to enter or remain in the UK, regardless of whether leave has been granted. Section 115 Immigration and Asylum Act 1999 provides that persons who are subject to immigration control are to be excluded from entitlement to the vast majority of benefits, including housing benefit and universal credit.

36. The persons referred to in s.185(2A), who are excluded from benefit entitlement by s.115 of the Immigration and Asylum Act 1999 and cannot be prescribed as eligible for homelessness assistance comprise non-EEA nationals who:

    (1) require leave to enter or remain in the UK but do not have it;
    (2) have leave to enter or remain in the UK subject to a no recourse to public funds condition;
    (3) have leave to enter or remain in the UK given as a result of a maintenance undertaking:
    (4) have leave to enter or remain in the UK only as a result of para. 17 of Schedule 4 [which has no application to the instant case]: see s.115(3) and 115(9) Immigration and Asylum Act 1999.

37. The Secretary of State has prescribed classes of eligible and ineligible persons under s.185(2) and (3) in accordance with these principles, in Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, SI 2006/1294, regs 5 and 6.

38. Regulation 5 of the Allocation of Homelessness (Eligibility) (England) Regulations 2006 set out the classes of people who are subject to immigration control but still entitled to assistance under Part VII of the 1996 Act:

    (a) refugees;
    (b) those with exceptional leave to remain not subject to a NRPF condition;
    (c) those with indefinite leave to remain;
    (d) those with humanitarian protection;
    and
    (e) six other specified classes

39. All those with no recourse to public funds, whatever their immigration status, shall be subject to s.185 Housing Act 1996 unless they fall into one of the categories of person set out in Article 5 of the Regulations. It follows that on the Defendant's reading of the law, the overwhelming majority of those with no recourse to public funds shall be excluded from the "Everyone In" scheme.

40. In the skeleton argument of Shelter, there has been set out helpfully the consequences of the above in terms of the classes affected by s.185 and the Regulation 5 and (and also Regulation 6). In practical terms, the main groups (not being an exhaustive list) who are ineligible for homelessness assistance are:

    (i) asylum-seekers;
    (ii) failed asylum-seekers;
    (iii) people who entered the UK without leave;
    (iv) people who entered the UK with leave, but whose leave has expired;
    (v) people who have leave to remain in the UK subject to a NRPF condition;
    (vi) EEA nationals, and/or their family members, who are not exercising any rights of residence, as contained in Immigration (European Economic Area) Regulations 2016;

(vii) EEA nationals, and/or their family members, whose only right of residence is derived from the EU initial right of residence (up to three months) or their status as a jobseeker, or as a family member of a jobseeker; as defined at Regs 6(1), 13, and 14 Immigration (European Economic Area) Regulations 2016;

(viii) people whose only right of residence is a derivative right of residence contained in Reg 16(5) Immigration (European Economic Area) Regulations 2016, e.g. "*Zambrano* carers".

41. Shelter's evidence indicates that all of these classes of person are found within the rough sleeping population, with EEA nationals of unknown status (who are believed principally to consist of those who are not exercising EU Treaty rights and so lack a right to reside) comprising the largest cohort: see Polly Neate at [30]-[43]. Some of these people may have other forms of support such as under s.17(1) Children Act 1989 and interim support under ss. 95 and 98 of the Immigration and Asylum Act 1999. It was submitted by Shelter (para. 44 of its skeleton argument) that those who are eligible for assistance may encounter very considerable delays or may have remedies against the Home Office by way of judicial review which may be more theoretical than real.

42. The question is whether in the short term the local authority has power to assist rough sleepers in the above categories, particularly in the circumstances posed by the pandemic.

VII s.138 Local Government Act 1972

43. The Defendant is a statutory body and can only exercise those powers conferred on it by statute. It does not have any non-statutory or common law powers. The Defendant is a unitary authority and so has the powers of a housing authority and a social services authority.

44. The Claimant submits that the Defendant does have powers to assist rough sleepers, and that its powers are not restricted in the manner contended for by the Defendant. The Claimant draws attention in particular to powers to deal with an emergency and public health duties.

45. Section 138 of the Local Government Act 1972 provides as follows:

> **"138 Powers of principal councils with respect to emergencies or disasters.**
>
> (1) Where an emergency or disaster involving destruction of or danger to life or property occurs or is imminent or there is reasonable ground for apprehending such an emergency or disaster, and a principal council are of opinion that it is likely to

> affect the whole or part of their area or all or some of its inhabitants, the council may—
>
> (a) incur such expenditure as they consider necessary in taking action themselves (either alone or jointly with any other person or body and either in their area or elsewhere in or outside the United Kingdom) which is calculated to avert, alleviate or eradicate in their area or among its inhabitants the effects or potential effects of the event; and
>
> (b)make grants or loans to other persons or bodies on conditions determined by the council in respect of any such action taken by those persons or bodies…
>
> …
>
> (3) Nothing in this section authorises a local authority to execute—
>
> (a) any drainage or other works in any part of a main river, within the meaning of Part IV 'of the Water Resources Act 1991, or of any other watercourse which is treated for the purposes of any of the provisions of that Act as part of a main river, or
>
> (b) any works which local authorities have power to execute under sections 14 to 17, 62(2) and (3) and 66 of the Land Drainage Act 1991, but subject to those limitations, the powers conferred by subsections subsection (1) above are in addition to, and not in derogation of, any power conferred on a local authority by or under any other enactment, including any enactment contained in this Act."

(i) Claimant's submissions

46. The Claimant submits that there are four matters to consider, namely whether:

(a) there has been an emergency or disaster or it is imminent or there is reasonable ground for apprehending such an emergency or disaster;
(b) the type of disaster is one involving danger to life or property;
(c) if so, whether the Council is of opinion that it is likely to affect its area or some of its inhabitants;
(d) if so, the Council may incur such expenditure as they may consider necessary to avert, alleviate or eradicate its effects or potential effects.

(ii) The evidence

47. The World Health Organisation described the pandemic as "a public health emergency of international concern". Further, the Defendant's policy documents of 14 August

2020 identify Covid-19 as an emergency posing a danger to life: the word "emergency" occurs 29 times. It starts with "**In response to the Covid-19 emergency** and in line with government guidance we have made an accommodation offer available to all rough sleepers in the city and those at risk of sleeping rough (emphasis added)." It referred to "…we are accommodating around 287 of the above people in accommodation acquired under the current Covid-19 emergency provisions…" In a press release of the same date, there is a section entitled "Covid emergency accommodation to continue beyond September." It refers to "emergency housing put in place to help keep homeless people in the city safe through the Covid-19 pandemic will be available at least until the end of December." Councillor David Gibson, joint chair of the Housing Committee referred to a commitment "not to return rough sleepers to the streets. It is crucial that we monitor progress towards achieving this for everyone currently in the Covid emergency accommodation…. the threat of the virus has not gone away."

48. Agenda 52 was appended to the Defendant's policy documents and stated:

> "7.13 People sleeping rough are amongst the most vulnerable in the city. Many have compound and complex health needs and in addition are more vulnerable if exposed to Covid. Having suitable accommodation reduces the risks to the individuals and also reduces the public health risks in the event of localised outbreaks or a wider second wave, and also reduces the impact on health services in the winter which is generally a pressure time.
>
> …
>
> 7.16 Housing and ASC & Health have worked closely with Public Health in the response to the pandemic and on-going accommodation provision. Rough sleepers have been identified as a particularly vulnerable group which we need to provide accommodation for to protect them, manage infection control and outbreak prevention and management. The Brighton & Hove Local Outbreak Plan identifies that homeless communities and settings are high risk for Covid-19 outbreaks. This includes the provision of a pathway including integrated medical input to enable symptomatic people to self-isolate safely including a Care Hub. Maintaining the local joined up multiagency approach involving primary care, community health, mental health and substance misuse services is vital for this to be effective."

49. One of the two contact officers named on the Defendant's policy documents of 14 August 2020 is Sylvia Peckham, its head of housing needs. There is a stark contrast between the tenor of the above documents and paragraph 11 of the Ms Peckham's witness statement for the purpose of these proceedings which reads as follows:

> "By way of information I am told by public health officials within Brighton and Hove, and I believe, that the Defendant's area has consistently had an infection rate well below the national average. As a consequence, the area remained in Tier 1 up until the national lockdown. It has not been the position of Brighton and Hove that the infection rate in its area presents an emergency or disaster at local level."

(iii) Defendant's submissions

50. The Defendant submits by reference to *R(Bradic) v Bristol City Council* (1995) 27 HLR 584 that unlawful eviction may not amount to an emergency for the purposes of priority need under the (then) Housing Act 1985 homelessness provisions. The relevant provision then was s.59 (1) Housing Act 1985:

> "The following have a priority need for accommodation: (a) a pregnant woman or a person with whom a pregnant woman resides or might reasonably be expected to reside; (b) … (d) a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster."

51. The language of s.59(1)(d) (now replicated in s.189(1)(d) Housing Act 1996) has in common with s.138 reference to emergency or disaster. It was submitted that nothing in this provision overrides the prohibition on accommodating unlawfully present persons contained in the Housing Act 1985 and Schedule 3 to the Nationality, Immigration and Asylum Act 2002.

52. The Defendant also submitted that at the date of decision challenged, Brighton was not subject to any enhanced level of C-19 related restriction: it was at all material times in "tier 1" prior to the national restrictions on 5 November 2020. Its incidence of cases was comparatively low, as set out in the second witness statement of Sylvia Peckham.

(iv) Claimant's submissions

53. The statutory provision referred to in the case of *Bradic* was different because the Court of Appeal treated the word "emergency" as being qualified by the subsequent words "such as flood, fire or other disaster". There are no such qualifications in this case. Further, the submission of the Claimant is not that homelessness is the relevant emergency, nor that previously having a home is pre-requisite. The emergency is the international pandemic which had cost even before the second wave tens of thousands of lives and poses a danger to life.

54. The Claimant submits that Covid-19 is an emergency involving danger to life. The Claimant has drawn attention to the recent judgment of Hayden J in in the Court of Protection in *BP v Surrey County Council* [2020] EWCOP 17 who said the following

at para. 27 (giving judgment close to the outbreak of Covid-19 on 25 March 2020): "It strikes me as redundant of any contrary argument that we are facing "a public emergency" which is "threatening the life of the nation", to use the phraseology of Article 15. That is not a sentence that I or any other judge of my generation would ever have anticipated writing…. The spread of this insidious viral pandemic particularly, though not uniquely, threatening to the elderly with underlying comorbidity, establishes a solid foundation upon which a derogation becomes not merely justified but essential."

55. The judgment was considering whether an Article 15 derogation was permitted from rights under Articles 5 and 8 which applies in situations of public emergency. This is a different analysis from section 138 of the Local Government Act 2020, but it is a stark reflection of a High Court Judge of his appreciation of the current situation, and one of which the Court takes note.

(v) Discussion

56. In my judgment, even without the reasoning of Hayden J, the pandemic was rightly identified as an emergency by the Defendant in its above-mentioned publications. Further it identified a part of its inhabitants as being persons whose life was in danger. The first two of the four elements identified above are satisfied. Those conclusions are then made the stronger when taking into account the above quotation from Hayden J.

57. Even if the Defendant had not identified the problem, it would have been artificial to put Brighton as outside the pandemic emergency. The risk of transmission was so grave at all material times. There were identified "the public health risks in the event of localised outbreaks or a wider second wave". That was rather prescient bearing in mind what would occur shortly thereafter with the Kent virus (not that far from Brighton) and a second wave which would become more intense even than the first wave. Even if this had not been a current or imminent emergency, it was one where there was reasonable ground for apprehending it. In my judgment, based on the contemporaneous documents of the Defendant, it adopted an entirely responsible and conscientious approach to what it perceived to be an emergency affecting its area and it rightly identified its rough sleepers as particularly prone to a virus which clearly involved danger to life, especially to this section of its inhabitants.

58. As regards the extract quoted above from the second witness statement of Ms Peckham, the information in the first two sentences is correct, but the third sentence has to be looked at with caution. If it means that the pandemic was not considered to be an emergency in Brighton, that is inconsistent with the tenor of its own documents. It may be that there was a concentration on the infection rate generally, but not here on the effect of the pandemic in respect of "rough sleepers [who] have been identified as a particularly vulnerable group which we need to provide accommodation for to protect them, manage infection control and outbreak prevention and management."

59. Further and in any event, one of the reasons for managing rough sleepers in this way was not just for their own safety, but also "to manage infection control and outbreak prevention and management." On this basis, rough sleepers are not just a problem for themselves, but in transmitting infection to others. Hence, although tier 1 involved a lesser scale of risk than higher tiers, it was still a part of the risk of the pandemic. Social

distancing, wearing masks and not being part of groups over 6 persons were still a part of tier 1.

60. It is the position of the Defendant that at no stage since March 2020 has the pandemic given rise to an emergency for the purpose of section 138 powers. In my judgment, it is clear that the pandemic has given rise to emergency powers during periods of national lockdown when the restrictions have been particularly intense and when even a failed asylum seeker would have been unable to travel. The Court does not have to decide for the purpose of this case at each stage what is the state of affairs, particularly bearing in mind the academic nature of the claim. It suffices for the purpose of this claim to decide that the emergency powers under s.138 fall outside the restrictions of s.185 Housing Act 1996.

61. However, without seeking to give definitive guidance about periods of time when there were lesser restrictions, and without seeking to bind any Court hearing matters in another case, it does seem to the Court that in September and October 2020 in Brighton, the pandemic still gave rise to an emergency despite Brighton being in tier 1. The restrictions, reflecting the risks, even in tier 1 as referred to in the previous paragraph, remained very significant. There was still constant monitoring whether the applicable tier would have to be increased. By early November 2020 there was another national lockdown. As noted above, after that was lifted on 2 December 2020, Brighton was in tier 2 with significant restrictions. As a result of the infection rate increasing very significantly, Brighton went into tier 4 from 26 December 2020 and national lockdown from 4 January 2021. Whilst it is hoped that the pandemic will come to an end, it is not appropriate for this judgment to indicate how and when it will be decided when the emergency powers can no longer be used.

62. As regards the submission of the Defendant by reference to *Bradic*, this amounts to saying that the words of section 185 of the Housing Act 1996 cannot be overridden by section 138 of the Local Government Act 1972. There is no case of one overriding the other. The ineligibility for assistance is expressed in section 185(1) to be under that part of the Housing Act 1996. That is not to say that there cannot be an independent right to assistance not under that part, but under a different statutory provision. Here there is a power to incur expenditure in taking action themselves to avert the effects or potential effects of the event. That is cast in wide terms and it is not simply to incur expenditure, but also to take action. Further, section 138(3) provides that the power under section 138(1) is "in addition to, and not in derogation of, any power conferred on a local authority by or under any other enactment…". The expenditure and the action taken must be for the specific statutory purpose referred to in section 138.

63. This reading of the statute is realistic. Otherwise, the effect of the Defendant's argument is that in an emergency or disaster, it would be necessary to check the immigration status of the person before providing the very immediate assistance and quick action required to avert danger to life. In the context of the powers which are conferred by section 138, this is simply an unrealistic restriction of the plain meaning of the statute. Further, in the context of an emergency of a highly infectious disease and averting risk to life, the turning away of the failed asylum seekers would not only expose them to danger, but also others who may come into contact with them.

64. For all these reasons, in my judgment, there is a power of the local authority to provide temporary accommodation under section 138 where the four conditions set out in

paragraph 46 above are satisfied. The emergency and the danger to life give rise to a discretion to act. This is subject to the local authority being of opinion that the circumstances are likely to affect some of its inhabitants in which case it may incur expenditure "necessary to avert, alleviate or eradicate its effects or potential effects." The question for the purpose of this judgment is not how the local authority ought to exercise its discretion, but simply whether it has a power to accommodate even a NRPF person. In my judgment, this is provided that the power is not being used to circumvent the restrictions and prohibitions in section 185 of the Housing Act 1996 or Schedule 3 to the Nationality, Immigration and Asylum Act 2002. It is further to be noted that the discretion to provide temporary accommodation is not a duty which it owes to a street homeless person but is simply a part of its powers in a particular set of circumstances. If the person has other avenues of accommodation such that this emergency support is not required, then that is likely to be relevant to the exercise of the discretion.

VIII s.2B National Health Service Act 2006

(i) Claimant's submissions

65. The Claimant relies also on this section which provides an obligation on local authorities to take such steps as it considers appropriate for improving the health of the people in its area. The Claimant says that this section confers on a local authority the power to join the "Everyone In" scheme or successor initiatives in the context of the pandemic. In this way, the local authority would be improving health by removing rough sleepers in danger of death to a place where they would be in less danger and be of less danger to others. This is apparent from explanatory note to the Health and Social Care Act 2012 referring to the introduction of section B into the National Health Service Act 2006 in the following terms, namely:

> "The nature of the duty is that if a local authority considers a step appropriate to improve public health, they must take that step under the new provision, even if the activity had previously been carried out under other local authority powers."

66. Section 2B of the National Health Service Act 2006 reads as follows:

> **"2BFunctions of local authorities and Secretary of State as to improvement of public health**
>
> (1) Each local authority must take such steps as it considers appropriate for improving the health of the people in its area.
>
> (2) The Secretary of State may take such steps as the Secretary of State considers appropriate for improving the health of the people of England.

(3) The steps that may be taken under subsection (1) or (2) include—

(a) providing information and advice;

(b) providing services or facilities designed to promote healthy living (whether by helping individuals to address behaviour that is detrimental to health or in any other way);

(c) providing services or facilities for the prevention, diagnosis or treatment of illness;

(d) providing financial incentives to encourage individuals to adopt healthier lifestyles;

(e) providing assistance (including financial assistance) to help individuals to minimise any risks to health arising from their accommodation or environment;

(f) providing or participating in the provision of training for persons working or seeking to work in the field of health improvement;

(g) making available the services of any person or any facilities.

(4) The steps that may be taken under subsection (1) also include providing grants or loans (on such terms as the local authority considers appropriate).

(5) In this section, "local authority" means—

(a) a county council in England;

(b) a district council in England, other than a council for a district in a county for which there is a county council;

(c) a London borough council;

(d) the Council of the Isles of Scilly;

(e) the Common Council of the City of London."

[Emphasis added]

67. In *National Aids Trust v National Health Service & ors* [2016] EWHC 2005 (Admin), Green J (as he then was) described how 'the "public health functions" of local authorities under s.2B are cast in… broad and all-encompassing terms'. Green J went on to find at para.56(2):

> 'the duty is a qualified one. Under Section 2B local authorities have a target duty imposed upon them to improve the health of people in their area but in fulfilment of that duty the authorities have a discretion (cf "may " in section 2B(3)) to take one or more of the steps identified there, which **includes the actual provision of any service.'**
>
> [Emphasis added]

68. Thus, the structure of the statutory regime is that the "target" of the Defendant's public health duties is set out, that is to improve the health of people in its area. The Local Authority then has the power to provide any service in furtherance of that aim. This analysis is consistent with the judgment of the Court of Appeal in *R (C and others) v Southwark London Borough Council* [2016] EWCA Civ 707 per Moore-Bick LJ at para.12 where the target duty was s.17 of the Children Act 1989 which "does not create a specific or mandatory duty owed to an individual child. It is a target duty which creates a discretion in a local authority to make a decision to meet an individual child's assessed need." The Claimant submits that the provision of accommodation under the "Everyone In" scheme falls within ss.2B(3)(c) and/or (e): even if it does not, since the list is non-exhaustive, it is not necessary to point to this to conclude that the Authority does have a statutory power to provide accommodation under the "Everyone In" scheme pursuant to s.2B subject to the "target" condition being met. This is because this provision is essential for public health and is accepted to prevent infections, hospital admissions, ICU admissions and deaths.

69. The Claimant's position is supported by Shelter, which notes that the duty on local authorities under s.2B National Health Service Act 2006 is to take such steps as they consider appropriate for improving the health of the people in their areas. This includes a power to provide assistance including financial assistance to help individuals to minimise any risks to health arising from their accommodation or environment (s.2B(1) and (3)(e)) as well as other potentially relevant steps and that the steps that may be taken can include providing grants or loan (s.2B(4)). Taking these powers together, Shelter submits that a local authority can provide assistance to a person who is ineligible for homelessness assistance and is sleeping rough by way of providing accommodation directly and/or providing financial assistance to third party organisations to provide that support.

(ii) Defendant's submissions

70. The Defendant submits that while the list of services is non-exhaustive, none relate to the provision of accommodation. Accommodation provision under the National Health Service Act 2006 is dependent upon there being a "primary health need" (see *R(Coughlan) v North East Devon Health Authority* [2001] Q.B. 213, reflected in the *National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care (2018)* which records at page 7 that:

> "Where an individual has a primary health need and is therefore eligible for NHS Continuing Healthcare, the NHS is responsible for providing for all of that individual's assessed health and associated social care needs, including accommodation, if that is part of the overall need."

The Defendant submits that there is a division of accommodation responsibility set out in *Coughlan* and the *National Framework*.

71. Section 2B National Health Service Act 2006 is headed "Functions of local authorities and Secretary of State as to improvement of public health". The type of functions a local authority may perform under that provision are set out in the Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2013. They relate to weighing and measuring children, health checks and sexual health services.

72. If it is the case that a local authority can accommodate under this provision, the same power would exist in the Secretary of State. That, however, would undermine the division of accommodation responsibility set out in *Coughlan* and the *National Framework*.

73. As noted in *National Aids Trust v National Health Service and others* [2016] EWHC 2005 (Admin) (at first instance) the duty is a target duty: as is the case for s.17 Children Act 1989, a target duty does not "…create a specific or mandatory duty owed to an individual…": *CTMU v Southwark* [2016] EWCA Civ 707 at [12]. The individually enforceable duty to accommodate is that within s.185 Housing Act 1996 and, where applicable, the Care Act 2014.

(iii) Discussion

74. In my judgment, despite accommodation not being expressly listed as a service in section 2B, provided that it comes within the target of the provision of public health functions and is not being used to circumvent the restrictions in the Housing Act 1996, it can be used as such. The above submission of Shelter is well made. The provision of examples of public health functions such as weighing and measuring children, health checks and sexual health services do not in any way help to define or limit the ambit of public health functions. Many of the services listed in Annexe C the Department of Health and Social Care's circular are not listed in the Statute. The Claimant refers to accommodation which is provided under the target of satisfying public health functions such as:

    (1) residential drug or alcohol treatment centres.
    (2) in-patient mental health facilities; or
    (3) residential death reduction initiatives such as the severe weather protocol accommodation.

75. There are no restrictions here in providing such assistance under section 2B of the 2006 Act to those with NRPF. Simply put, the prohibition under s.185 Housing Act 1996 does not apply to the 2006 Act. The prohibition under s.185 relates to homelessness functions under Part VII s.184 and following. The 2006 Act imposes a duty relating to public health functions, which is a separate statutory regime with distinct statutory purposes. In the section below, there will be reference to the case of *AR* in connection with the Localism Act 2011, but that case does not address public health powers, and does not answer the points of the Claimant as regards the possible application of section 2B.

76. The point is the stronger because there is no duty owed to an individual under s.2B of the National Health Service Act 2006. The question which is being addressed is whether the provision of accommodation, to the extent that it is for the purpose of satisfying a public health need, is prohibited by statute. Provided that this power is not being used to circumvent the limitations of the role of a local authority under s.185 of the Housing Act 1996 to individual applicants, then it would not be unlawful to fulfil public health functions by reference to s.2B of the National Health Service Act 2006.

77. The question in all cases is whether the particular exercise of powers by the provision of accommodation or other assistance is within the target of addressing public health functions. Thus, just as a residential death reduction initiative during extreme winter weather might be permitted under the 2006 Act if the target is met, so too in the context of the pandemic participation. This appears to be the logic underlying a response of the Government published on 25 June 2020 to the Select Committee Report[1], stating:

> "Local authorities have powers to use their judgment is assessing what support they may lawfully give to each person on an individual basis, considering that person's specific circumstances and support needs. Local authorities will already be used to make such judgments on accommodating individuals who might otherwise be ineligible, during extreme weather for example, where there is a risk to life. Local authorities also have powers to provide basic safety net support, regardless of immigration status, if it is established that there is a genuine care need that does not arise solely from destitution, for example, where there are community care needs, migrants with serious health problems or family cases.*"*

78. An initiative such as the accommodation under the "Everyone In" scheme or a successor initiative in order to save lives is capable of being an attempt to address its public health functions permitted under the 2006 Act. It is important to note that this part of the judgment is to the effect that there may be powers outside the Housing Act 1996 to justify accommodation under the "Everyone In" scheme or a successor scheme even of NRPF persons. It is not desirable in this judgment to outline theoretical examples of how this may work. It suffices if an initiative to remove rough sleepers

[1] Housing, Communities and Local Government Select Committee, Impact of Covid-19 on homelessness and the private rented sector, Interim Report, 22 May 2020.

from the streets during the pandemic to reduce the risk to life of the sleepers and the persons with whom they may have contact might be permitted under s.2B.

79. How far this may go is a question of fact and degree and intention in each case. The question would be whether it would be seeking to meet a public health need or a way of seeking to circumvent restrictions such as s.185 Housing Act 1996. Although section 2B (1) is couched as a duty on a local authority, it is in broad terms in that it is only in respect of "such steps as it considers appropriate". This leaves open the possibility that the local authority might rationally consider that certain steps were not appropriate e.g. since it was for central government or because its limited resources were better dedicated elsewhere. Nevertheless, the above recognises that the provision of accommodation under the "Everyone In" scheme or a successor initiative may be permitted even to NRPF persons provided that this was not an attempt to circumvent Part VII of the Housing Act 1996.

IX s. 180 Housing Act 1996

80. A further power available to the authority is Housing Act 1996 s. 180. This was not a part of the claim, but it is relied upon in the skeleton argument on behalf of the Claimant. This empowers the authority to provide assistance to voluntary organisations "concerned with homelessness or matters relating to homelessness". This is part of Part VII of the Act (homelessness) but is not affected by the exclusion in s.185 (because it is not part of the provisions "following" s.183). Its wording is wide enough to cover assistance provided to allow such organisations to provide accommodation. This provision contains no immigration-based exclusions and provides a means by which local authorities can provide funds to allow charities and night shelters, for example, to accommodate rough sleepers.

81. The Defendant submits that nothing in s.180 addresses the entitlement of an individual to housing from the local authority. This provision is concerned with assistance to voluntary organisations. It does not give rise to any specifically enforceable duty or power to assist directly an individual who is homeless. I agree.

IX Localism Act 2011

(i) Introduction

82. The Claimant also relies on the Localism Act 2011 sections 1 and 2, the successor provisions to sections 2 and 3 of the Local Government Act 2000. These contain very broad provisions.

83. By s.1(1) Localism Act 2011, there is set out the general power of competence: "A local authority has power to do anything that individuals generally may do". By s.2(2), it is stated that the general power does not enable a local authority to do anything which the authority is unable to do by virtue of a pre-commencement limitation, or by virtue of a

post-commencement limitation which is expressed to apply to the general power, to all the authority's powers or to all of the authority's powers but with exceptions that do not include the general power. These limitations are defined by s.2(4).

84. The relevant provisions set out more fully are as follows:

Localism Act 2011

Section 1

"**Local authority's general power of competence**

(1)A local authority has power to do anything that individuals generally may do.

(2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise—

(a) Unlike anything the authority may do apart from subsection (1), or

(b) Unlike anything that other public bodies may do.

(3) In this section "individual" means an individual with full capacity.

(4) Where subsection (1) confers power on the authority to do something, it confers power (subject to sections 2 to 4) to do it in any way whatever, including—

(a) power to do it anywhere in the United Kingdom or elsewhere,

(b) power to do it for a commercial purpose or otherwise for a charge, or without charge, and

(c) power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.

(5) The generality of the power conferred by subsection (1) ("the general power") is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.

(6) Any such other power is not limited by the existence of the general power (but see section 5(2))."

…

Section 2

"**Boundaries of the general power**

(1) If exercise of a pre-commencement power of a local authority is subject to restrictions, those restrictions apply also to exercise

of the general power so far as it is overlapped by the pre-commencement power.

(2) The general power does not enable a local authority to do—

(a) anything which the authority is unable to do by virtue of a pre-commencement limitation, or

(b) anything which the authority is unable to do by virtue of a post-commencement limitation which is expressed to apply—

(i) to the general power,

(ii) to all the authority's powers, or

(iii) to all the authority's powers but with exceptions that do not include the general power.

(3) …

(4) In this section—

"post-commencement limitation" means a prohibition, restriction or other limitation expressly imposed by a statutory provision that—

(a) is contained in an Act passed after the end of the Session in which this Act is passed, or
(b) is contained in an instrument made under an Act and comes into force on or after the commencement of section 1;

"pre-commencement limitation" means a prohibition, restriction or other limitation expressly imposed by a statutory provision that—

(a) is contained in this Act, or in any other Act passed no later than the end of the Session in which this Act is passed, or
(b) is contained in an instrument made under an Act and comes into force before the commencement of section 1;

"pre-commencement power" means power conferred by a statutory provision that—

(a) is contained in this Act, or in any other Act passed no later than the end of the Session in which this Act is passed, or
(b) is contained in an instrument made under an Act and comes into force before the commencement of section 1."

85. The statutory predecessor to s.1 Localism Act 2011 was s.2(1) Local Government Act 2000. As with Localism Act 2011, the power was circumscribed by s.3(1) Local Government Act 2000 which prevented a local authority from doing "anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made)."

86. The Claimant contends that there is a power to accommodate pursuant to the 2011 Act. This is said to arise in the following respects, namely:

(1) that upon a Convention compliant reading a local authority has the power to do anything which where inability to do the thing would amount to a Convention

breach. That includes a power to provide accommodation where failure to do would involve a breach of Convention rights (this is supported by Shelter);

(2) alternatively, even where there is no breach of Convention rights, the restrictions in s.185 of the Housing Act 1996 prevent the housing authority but do not prevent the provision of accommodation in some other capacity including as social services authority. Insofar as previous authorities say the contrary, they are wrong (Shelter reserves its position if this case should go further, but do not make submissions supporting or contradicting this).

87. The key point according to the Defendant is that these general words in the Localism Act do not enable a local authority to do anything which the authority is unable to do by virtue of a pre-commencement limitation. A key one is section 185 of the Housing Act 1996 which circumscribes the power of a local authority to provide accommodation to persons with NRPF.

(ii) Submission about Convention compliant reading of the Localism Act 2011

88. Shelter supports the first of the above arguments by submitting that, in a case where an applicant is facing a breach of his or her rights under the ECHR, ss.1 – 2 Localism Act 2011 must be read down in accordance with s.3 Human Rights Act 1998, to disapply the relevant limitation. Specifically, the underlined words below should be read into s.2:

> "(2) The general power does not enable a local authority to do—
>
> (a) anything which the authority is unable to do by virtue of a pre-commencement limitation, or
>
> (b) anything which the authority is unable to do by virtue of a post-commencement limitation…
>
> …
>
> <u>save to the extent necessary to avoid a breach of a person's rights under the European Convention on Human Rights."</u>

89. If these words were read into section 2, it has the potential of very wide-ranging consequences. It is capable of having application not simply in the context of accommodation to rough sleepers in the context of the pandemic. It would not depend necessarily on a pandemic. It would not be limited to the provision of accommodation. It is first necessary to consider whether the Court needs to make the finding contended for on the facts of this case, namely that a without a convention compliant reading, there will be a breach of Convention rights. The reason for this is that the Court should not entertain lightly a matter with such a wide-ranging consequence where it is unnecessary on the facts of this case so to do.

90. Shelter submits that this is likely to be of relevance where an individual is facing imminent destitution in breach of Article 3 ECHR (or a potential breach of Article 2 or Article 8 ECHR in the circumstances of the pandemic) because he or she lacks alternative support and faces a practical or legal impediment to returning to their country of origin. In those circumstances, the submission is that a local authority would be acting contrary to s.6 Human Rights Act 1998 were it to refuse to assist.

91. The submission of the Claimant arises in the context of a general power under the Localism Act 2011 to do that which an individual could do subject to limitations there set out. In my judgment, the Court only needs to rule on the question of the extent of the power if such interpretation on the facts of this case is necessary to avoid a breach of a person's rights under the Convention. If it is not necessary, then it is not necessary to rule on whether the wide-ranging submission is well made. The Court can test this by considering the position in favour of the Claimant if the inserted proviso exists. The question then is whether it is necessary to make an order under the Localism Act 2011 by the provision of accommodation. This would only be if this was necessary in order to avoid a breach of the Claimant's ECHR rights.

92. The answer to this is that the Claimant has an independent mechanism of support under section 4 of the Immigration and Asylum Act 1999. Part 6 Immigration and Asylum Act 1999 is a self-contained scheme by which the Home Office provides accommodation and support to asylum seekers, and their dependents, who appear to the Secretary of State to be destitute or likely to become destitute (s.95(1)). Destitution is defined at s.95(3). In this case, the relevant avenue of support is at s.4(2) Immigration and Asylum Act 1999:

> "(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if—
>
> (a) he was (but is no longer) an asylum-seeker, and
>
> (b) his claim for asylum was rejected.
>
> (3) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a dependant of a person for whom facilities may be provided under subsection (2)."

93. By s.96(1), the Secretary of State may provide s.95 support in a variety of prescribed ways, including by providing adequate accommodation and support to meet essential living needs. Accommodation and support can also be provided temporarily whilst the Secretary of State is making a determination as to whether to provide s.95 support (s.98). Asylum seeker is defined at s.94(1).

94. The eligibility criteria for support under s.4(2) are contained in the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, SI 2005/930. Regulation 3 provides as follows:

> **"Eligibility for and provision of accommodation to a failed asylum-seeker**
>
> (1) …the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act (1) are–
>
> (a)that he appears to the Secretary of State to be destitute, and
>
> (b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.
>
> (2) Those conditions are that–
>
> (a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain a travel document to facilitate his departure;
>
> (b)he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;
>
> (c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;
>
> (d) he has made an application for judicial review of a decision in relation to his asylum claim…[not relevant to this case]; or
>
> (e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998."

95. In broad terms, they mandate the provision of support to those who are taking all reasonable steps to return to their country of origin or face a practical or legal impediment to return. Under Reg. 3(2) (e) of the 2005 Regulations, an applicant is eligible for support if it "*is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998*".

96. This all gives rise to powers of the Home Office rather than of a local authority. It is informative to understand the context in which s.4(2) Immigration and Asylum Act 1999 was enacted. In *R (Westminster City Council) v National Support Asylum Service* [2002] UKHL 38; [2002] 1 WLR 2956, the House of Lords considered the respective responsibilities of local government and central government for the destitute failed asylum seeker. It was the case that a destitute asylum-seeker who was not entitled to welfare benefits was eligible for assistance under section 21(1)(a) National Assistance Act 1948, as a person in need of care and attention by reason of "other circumstances". This expression was given a wide meaning and was not limited "age, illness, disability" in the case of R. *v. Hammersmith & Fulham L.B.C., ex p. M (1997) 30 H.L.R. 10, CA*.

In *R (Westminster City Council) v National Asylum Support Service* above at para. 41, Lord Hoffmann said the following:

> "…The clear purpose of the 1999 Act was to take away an area of responsibility from the local authorities and give it to the Secretary of State. It did not intend to create overlapping responsibilities. Westminster complains that Parliament should have taken away the whole of the additional burden which fell upon local authorities as a result of the 1996 Act. It should not have confined itself to the able bodied destitute. But it seems to me inescapable that this is what the new section 21(1A) of the 1948 Act has done."

97. A distinction was drawn between those who were said to be "destitute plus" and those who were destitute without more. The "destitute plus" are persons whose needs do not arise "solely" from destitution but are more acute by some circumstance other than solely lack of accommodation or funds, such as age, illness or disability. In the case of the "destitute plus", the responsibility falls on the local authority because of the nature of their need. In the instant case, footnote 3 in the Claimant's skeleton argument says "for the sake of simplicity this discussion does not include the possibility of provision under the Care Act 2014 which would be available to a failed asylum seeker whose needs arise otherwise than solely because of destitution". It therefore follows that the way in which the case has been put is not about a responsibility of the Defendant under the Care Act 2014 for the "destitute plus", but it is that the responsibility is on central government, subject to destitution being proven. In respect of a failed asylum-seeker, it does not suffice to prove that the person is destitute, but there must also be established a qualifying condition under regulation 3(2) of the Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005. That might be (3)(2)(e), namely that "the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998."

98. According to Shelter in its skeleton argument at paras. 44.2-44.3, failed asylum-seekers such as the Claimant in this case may face delays in obtaining that support: see statement of Polly Neate at paras 54-57. They do not have a remedy for interim accommodation and support from the Home Office, but they may obtain an interim relief in judicial review (albeit that the Claimant and the Intervener say that this may be neither realistic nor quick). Likewise, they may have an entitlement to for the removal of their NRPF condition (but here too the Claimant and Intervener say that an application for judicial review may be neither realistic nor quick: see Polly Neate at paras 50-53).

99. In my judgment, this does not provide a basis to say that the general terms of the Localism Act 2011 provide a power of the local authority to accommodate the Claimant in order to avoid a breach of the Convention. Such a power of the local authority is unnecessary where the power is conferred by statute on the Home Office. It is not just unnecessary, but the statutory scheme transferred the responsibility from the local authority to central government.

100. If there are delays and difficulties in implementing the powers of the Home Office, this then gives rise to remedies against the Home Office. Section 4 was recently considered in a judgment of Knowles J in *R (DMA, AHK, BK and ELN) and R (AA) v Secretary of State for the Home Department* [2020] EWHC 3416 (Admin). That concerned systemic delays on the part of the Home Office in the provision of accommodation, and relief with a view to providing remedies. If and to the extent that the Home Office fails in this respect, it does not then require a local authority to do that which is entrusted to the Home Office in order to avoid a breach of the Convention. It is the Home Office which needs to act.

101. In the instant case, this is exactly what occurred. The Claimant made an application for section 4 support, applied to the First tier Tribunal, and received it. Thereafter, he went to Swindon housed by the Home Office. That is the statutory scheme. It therefore follows that even if there were scope for the inserted proviso, the intervention of the local authority would not be required in circumstances where the relevant powers were with the Home Office. As HH Judge Bidder QC sitting as a deputy judge of the High Court said in the case of *R(MK) v London Borough of Barking and Dagenham* [2013] EWHC 3486 (Admin) at para. 103 "…the statutory scheme [s.4 Immigration and Asylum Act 1999] gives the "safety net" power to accommodate to central rather than local government." That being the case, the local authority is not required to act and should not act as backstop for the Home Office.

102. Further and in any event, as is acknowledged by the Claimant, if there was otherwise a power to accommodate, there are provisions restricting such a power. The Claimant is a person unlawfully in the United Kingdom and no longer being an asylum seeker, he has no rights due to s.54 of and Schedule 3 to the Nationality, Immigration and Asylum Act 2002. This contains a general prohibition against providing support or assistance to various persons under a variety of statutory provisions including section 188(3) and 204(4) of the Housing Act 1996 (accommodation pending review or appeal); section 1 of the Localism Act 2011, Part 1 of the Care Act 2014 (paragraph 1(1)(j), (ka) and (n)).

103. Para. 1(2) of Schedule 3 provides:

> "(2) A power or duty under a provision referred to in sub-paragraph (1) may not be exercised or performed in respect of a person to whom this paragraph applies (whether or not the person has previously been in receipt of support or assistance under the provision)."

104. Paragraphs 4 – 7A set out the categories of person to whom the prohibition in paragraph 1 applies. Paragraph 6 provides that those categories include a person who was an asylum seeker and who has failed to cooperate with removal directions issued in respect of him. Paragraph 7 provides that they include a person unlawfully in the UK and is not an asylum seeker.

105. There is an exception under paragraph 3 which reads as follows:

> "Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of—

> (a) a person's Convention rights, or
>
> (b) a person's rights under the EU Treaties."

106. However, in my judgment, this exception does not apply here for the same reason, namely that the statutory scheme requires the Home Office and not the local authority to provide the accommodation or assistance. There is therefore no scope for it being necessary for a local authority to avoid a breach of a person's Convention rights.

107. If, contrary to the above, the power of the Home Office did not affect the power of the local authority, there would be another reason why the Court does not need to determine whether the inserted proviso argument is correct. Such a finding which might have ramifications beyond the facts of this case. It should only be undertaken if it is necessary in this case to do so. It is here that the argument returns to the general reluctance of the Administrative Court to determine an academic claim.

108. The Court was prepared to consider the questions whether there were powers of the local authority to provide accommodation particularly pursuant to section 138 of the Local Government Act 1972, but also section 2B of the National Health Service Act 2006 since they could be answered in general terms. This is then of assistance in defining for the purpose of the failed asylum seeker, but also the local authority, as to the rights. Thus, although the claim is academic in the sense that the Claimant has been accommodated, there is still a question of more general application capable of being considered.

109. However, the question as to whether it is necessary to act in order to avoid a breach of the Convention arises, if at all, case by case. If it is fact specific, then generally it ought not to be the subject of judicial review. The submissions of Shelter indicate the kind of considerations that might be undertaken on Shelter's case. If this were correct, it is not just fact specific, but on Shelter's case it would give rise to a multi-factorial inquiry which would arise for each applicant. At para. 61, it is stated:

> ""61. In practical terms, this interpretation of ss.1-2 Localism Act 2011 would require local authorities to take the following approach when considering whether to provide accommodation to homeless persons who are ineligible for homelessness assistance:
>
> 61.1. Consider whether the applicant is facing the imminent risk of destitution in breach of Article 3 ECHR or (particularly in the circumstances of the pandemic) the risk of death or serious ill-health, sufficient to engage Articles 2 or 8 ECHR.
>
> 61.2. Consider whether that risk can be alleviated by means of the applicant returning to his or her country of origin, or whether he or she faces a practical or legal impediment to return.

> 61.3. Consider whether the risk can be alleviated by means of the provision of third party support e.g. charitable support, support from friends or family or support from central government.
>
> 61.4. If support may be available at some unspecified point in the future this is unlikely to be sufficient.
>
> 61.5. Similarly, if support is only likely to become available within a reasonable timescale if legal action is taken by the applicant then (e.g. judicial review of the Home Office), that support is unlikely to be adequate unless the applicant is in a position to take that action before the breach manifests itself.
>
> 61.6. If the ECHR breach or potential ECHR breach cannot be avoided then the limitations in s.2(2) do not apply.
>
> 61.7. In these circumstances, the exclusion in paragraph 1, Schedule 3, Nationality Immigration and Asylum Act 2002 would also not apply, since the human rights exception in paragraph 3 would apply.
>
> 61.8. In such a case, support should be provided. Most likely as a short-term measure to enable the applicant to access other forms of charitable or state support, or make arrangements to return to his or her country of origin."

110. Now that the Claimant has been accommodated by the Home Office, it is not necessary or desirable to embark on this very fact specific enquiry. It would involve considering the facts in respect of the Claimant including whether or not the level of destitution was such that accommodation was required to be provided by the Defendant in order to avoid a breach of the Claimant's rights under the Convention. This would involve a consideration of his position and the options that were involved short of the Defendant providing accommodation. That should not be undertaken. This would not be of application to other cases because it would be specific to the circumstances of the Claimant.

(iii) Submission that a local authority may use the Localism Act 2011 to provide accommodation if it is not acting qua housing authority

111. What of the other limb of the argument, namely whether the prohibition under s.185 of the Housing Act as regards a local authority accommodating failed asylum seekers, is a prohibition of the local authority acting qua housing authority and not in other capacities such as qua social services authority? This is an argument pursued by the Claimant at this stage, but not by Shelter (which reserves its position if the case should go further).

112. The Claimant recognises that this would require the Court refusing to follow other cases, and in particular a recent High Court case, which has since been followed obiter.

It is convenient to refer to that case at the outset. In *R (AR) v Hammersmith & Fulham LBC* [2018] EWHC 3453 (Admin), (2019) CCLR 56, Upper Tribunal Judge Markus QC sitting as a Deputy Judge of the High Court held in relation to a destitute EEA national who was not eligible for homelessness assistance that s.185 Housing Act 1996 operated as a pre-commencement limitation on the provision of accommodation to him for the purpose of the Localism Act 2011.

113. It was submitted in *AR* that *R (GS) v Camden LBC* [2016] EWHC 1762 (Admin), [2017] PTSR 140 supported the proposition that a local authority could be required to secure accommodation under s.1 of the Localism Act 2011 in order to avoid a breach of her rights under Article 3 ECHR. The Care Act 2014, it was held, contained no post-commencement limitation for the purposes of s.2 Localism Act 2011. There was no discussion of s.185 Housing Act 1985 operating as a pre-commencement limitation.

114. In *AR*, UTJ Markus QC concluded that *GS* was wrongly decided as it was inconsistent with the decision in *R (J) (Ghanaian Citizen)) v Enfield LBC* [2002] EWHC 432 (Admin), [2002] HLR 38 and *R (Khan) v Oxfordshire County Council* [2004] EWCA Civ 309, [2004] H.L.R. 41. At para. 29, she said the following:

> "Mr Harrop-Griffiths submitted that *GS* was wrongly decided. He said that, following the decision in *J* and the analysis in *Khan*, section 185 of the Housing Act imposes a prohibition on provision of accommodation under *any* enactment and not merely under the Housing Act. I agree. Section 21(1A) of the National Assistance Act and section 185 of the Housing Act each state that the assistance to which the section relates may not be provided to a person to whom the specified conditions apply. **In the instant case there is no other legislation (disregarding the Localism Act) under which the claimant could be provided with accommodation, as was the position in *Khan* (disregarding the Local Government Act).** The reasoning of Dyson LJ at paragraph [41] of *Khan* applies to the present case. Section 2(2)(a) of the Localism Act prevents an authority from doing under section 1 "anything" which it is unable to do by virtue of a prohibition expressly imposed by a statutory provision. The "thing" which the claimant asks the authority to do is to secure accommodation for him. Section 185 of the Housing Act prevents the local authority for providing that "thing" to the claimant, and it cannot provide it by way of any other statutory power unless it can do so under section 1. **Section 2 of the Localism Act (like section 3 of the Local Government Act) prevents section 1 being used to do that which is prohibited by another statute.** The effect of Mr Presland's position is that, unless a statute expressly prohibits the exercise of section 1, that provision can be used to do anything which parliament has prohibited. That cannot have been the legislative intention of section 2 because it expressly applies to pre-commencement limitations, and pre-commencement limitations could not have expressly excluded the exercise of a statutory power which did not at that time exist. (emphasis added)"

115. The submission of the Claimant is that UTJ Markus QC erred in failing to recognise that s.185 Housing Act 1996 served a different function from the provisions under consideration in these cases (s.17 Children Act 1989 and s.21 National Assistance Act 1948). The Claimant submits that she ought instead to have found that s.185 Housing Act 1996 did not operate as a pre-commencement prohibition or limitation and did not prevent the provision of accommodation in some other capacity including as a social services authority.

116. In *R (J) (Ghanaian Citizen)) v Enfield LBC* above, the issue was whether the requirement of "*destitute plus*" at s.21(1A) National Assistance Act 1948 (now in s.21 Care Act 2014) which, on the facts, was said to prevent Enfield from assisting the claimant to live with her daughter and would thus breach Article 8, was incompatible with the Human Rights Act 1998. The Secretary of State for Health was joined and successfully submitted that the issue did not arise because the appropriate financial assistance for accommodation could be made under s.2 Local Government Act 2000. Elias J (as he then was) found that s.185 Housing Act 1996 constituted a limitation (as proscribed by s.3 LGA) on the power to provide accommodation but that it did not preclude the giving of financial assistance to obtain accommodation: see [53]-[57]. The Defendant seeks to say that the case of *J* is not significant because there was no issue about whether accommodation was prevented by s.3 Local Government Act 2000. In fact, even if it was obiter, there was very deliberate consideration of the statutory provisions as building blocks before deciding that there was a power to provide financial assistance to accommodation. At para. 53, Elias J said the following:

> "…The question is whether there is any "prohibition, restriction or limitation" on that power which is contained in any other enactment. Initially, Mr. Sales submitted that there was no such restriction even in relation to the provision of accommodation itself. However, he has resiled from that position and has recognised that there are certain statutory provisions which are to be found both in the Housing Act 1996 and in the Immigration and Asylum Act 1999 which would constitute limitations on the power on the authority to grant accommodation to the Claimant because she is an overstayer: see Housing Act section 159 to 161 and IAA section 118. The former provide that a local authority shall allocate housing accommodation only to those who are qualified to be allocated it; and the latter prevents accommodation being provided to those subjects to immigration control save in special circumstances not applicable here. In addition, in my view section 185 of the Housing Act falls into the same category, (which I have considered in paragraph 9 above.)"

It is a bold submission on behalf of the Claimant that Mr Sales (as he then was) fell into error in making the above concession and that Elias J (as he then was) failed to analyse the position correctly. There is no compelling reason given for this submission: the reference to the relevant provisions being confined to the disposal of the authority's stock does not provide an obvious reason, even if it is correct.

117. In *R (Khan) v Oxfordshire County Council*, the Court of Appeal (Dyson LJ as he then was, giving the lead judgment) referred to the exclusion at s.21(1A) National Assistance Act 1948 (now replaced by section 21(1) of the Care Act 2014 with the language of meeting the needs of care and support). The 1948 Act provided that:

> "A person to whom section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) applies may not be provided with residential accommodation under subsection (1)(a) if his need for care and attention has arisen solely—
>
> (a) because he is destitute; or
>
> (b) because of the physical effects, or anticipated physical effects, of his being destitute."

118. This was a prohibition which prevented the local authority from providing accommodation, or assistance in order to obtain accommodation, under s.2 Local Government Act 2000. It 'was clear from s.3 that Parliament did not intend to override legislative schemes that already existed': see para. [43]. However, financial assistance for things other than accommodation could be provided as that lay outside the scope of s.21.

119. Notwithstanding the contexts in which they arose, both the cases of *J* and *Khan* have application to the instant case. In the case of *J*, Elias J did rely upon s. 185 Housing Act 1996 as a relevant limitation to the provision of accommodation. In the case of *Khan*, the relevant prohibition was section 21(1A) National Assistance Act 1948 (now s.21 of the Care Act 2014). Dyson LJ at paras. 40-43 said the following:

> 40. **In my view, section 3 has the effect of preventing an authority from exercising the power in section 2 of the LGA to do that which is prohibited by section 21(1A). It is true that the phrase "under subsection (1)(a)" in section 21(1A) makes it clear that what is prohibited is the provision of residential accommodation** ***under section 21(1)(a)*** **for persons who satisfy the section 21(1)(a) conditions, but who are subject to immigration control, and whose need for care and attention arises solely because of destitution. Thus if (leaving section 2 of the LGA out of account for the moment) there were some other statutory power than section 21(1)(a) by which accommodation could be provided to persons who satisfy the section 21(1)(a) conditions, then the exercise of that power would not be prohibited by section 21(1A). But it is agreed that there is no other such power.** Indeed, if there were, the section 21(1)(a) power could not be exercised in any event, since the condition that care and attention is not available otherwise than by the provision of residential accommodation under that particular power would not be satisfied.

41. The effect of section 3(1) is to prohibit the doing of "anything" which a local authority is unable to do by virtue of any prohibition on its powers contained in any enactment. In the present context, the "thing" which is under consideration is the provision of residential accommodation to persons who, but for the prohibition in section 21(1A), would be entitled to accommodation under section 21(1)(a). It is that "thing" which the local authority is prohibited from providing by section 21(1A), and which it cannot provide under any other statutory power, unless it can do so under section 2. But the very reason why section 3(1) was enacted was to prevent section 2 being used to do that which is prohibited by another statute. If Mr Jay were right, it would seem that no statutory prohibition would trump section 2 of the LGA unless it stated expressly that it was a prohibition for the purposes of section 3 of the LGA. An example of such a provision is to be found in para 1(2) to Schedule 3 to the Nationality and Asylum Act 2002. This provides that "a power or duty under a provision referred to in subparagraph (1) may not be exercised or performed in respect of a person to whom this paragraph applies". One of the provisions referred to in sub-paragraph (1) is section 2 of the LGA.

42. But as Mr Swift points out, to interpret section 3 in this way is inconsistent with the language of section 3(1) itself, which refers to any prohibition etc which is contained in any enactment *whenever* passed.

43. So far as the policy consideration is concerned, I accept that section 2 has a broad purpose. The scope of the powers given by section 2 should not be narrowly construed. **The local authority is given a wide discretion to exercise its powers to promote well-being. But the fact that section 2 should be construed broadly does not help in deciding the meaning and scope of a prohibition, restriction or limitation on the exercise of powers which is contained in *another* enactment whenever passed or made. It is clear from section 3 that Parliament did not intend to override legislative schemes that already existed. The prohibition contained in section 21(1A) of the NAA must be given its natural meaning. For the reasons that I have given, it cannot be circumvented by section 2 of the LGA. If the prohibition in section 21(1A) were trumped by section 2, the prohibition in section 3(1) would be severely emasculated and, at any rate in relation to pre-existing legislative schemes, of no practical effect, since they do not (and could not) refer to the LGA."**

(emphasis added)

120. The equivalent provision to s.21A of the National Assistance Act 1948 is under s.21(1) of the Care Act is as follows:

> "A local authority may not meet the needs for care and support of an adult to whom section 115 of the Immigration and Asylum Act 1999 ("the 1999 Act") (exclusion from benefits) applies and whose needs for care and support have arisen solely—
>
> (a) because the adult is destitute, or
>
> (b) because of the physical effects, or anticipated physical effects, of being destitute."

121. In *R (Westminster City Council) v National Asylum Support Service* above, the House of Lords held that s.21A of the National Assistance Act 1948, excluded the able-bodied destitute from support but not the "infirm" destitute, whose need for care and support did not arise solely from the fact of destitution itself.

122. The suggestion that section 185 Housing Act 1996 is restricted to the local authority acting qua housing authority and does not apply to the local authority acting in some other capacity ignores, in my judgment, that the local authority can only provide accommodation where it has power to do so. There are circumstances in which the local authority is able to provide accommodation other than under the Housing Act 1996, but it is necessary to be able to find a power. Hence, there are powers by way of example under the Children Act 1989 and the Care Act 2014: there are also restrictions in those statutes. Likewise, as noted above, there are powers under s.138 of the Local Government Act 1972 and s.2B of the National Health Service Act 2006. The accommodation may be provided within the parameters and targets there provided pursuant to express powers without being subject to the prohibition of s.185 Housing Act 1996, provided that the other statutes are not being used to circumvent the prohibition of s.185. *Khan* establishes that a general section (in that case s.2 Local Government Act 2000, but now s. 1 Localism Act 2011) does not provide a basis to accommodate without reference to pre-commencement and post-commencement limitations in other statutes (in that case s.3 Local Government Act, but now s.2 Localism Act 2011).

123. In *AR*, UTJ Markus QC then considered whether, if her conclusion in relation to the pre-commencement limitation was wrong, AR was excluded from support by virtue of Schedule 3 Nationality Immigration & Asylum Act 1999. The starting point was that, as he was a national of an EEA state other than the UK (Lithuania), he was excluded from support. The Judge held that the evidence did not establish that the Article 3 ECHR threshold was met and so para 3, Schedule 3 did not operate so as to permit support in order to prevent a breach of Convention rights. Further, any potential breach could be avoided by him returning to Lithuania to seek State support.

124. The case of *AR* has since been followed obiter. In *R (Aburas) v Southwark LBC* [2019] EWHC 2754 (Admin), (2019) 22 CLR 537, the claimant was a failed asylum-seeker who faced barriers to removal to Kuwait. The principal issue was whether he had eligible needs for care and support under Care Act 2014. It was accepted that, in

principle, he would be eligible for support from the Home Office under s.4 Immigration & Asylum Act 1999. In this regard, Mr Michael Fordham QC sitting as a deputy judge of the High Court (as then was) said that in that case the local authority considered that the availability of human rights-compatible protection in relation to destitution from the Home Office provided the answer insofar as accommodation and subsistence was concerned, and that Counsel for the applicant considered that this would be the legally legitimate answer if this case were solely about accommodation and subsistence needs and about protection from destitution: see para. 3(viii).

125. The Judge then considered that the need for accommodation or subsistence is not a "need for care and support" for the purposes of the Care Act 2014 (see AR at paras. 18 and 19). However, accommodation may be provided appropriately pursuant to the Care Act 2014 where the person has a "looked-after need" of care and support whose effective delivery requires the provision of accommodation. He went on to say the following at para. 6(iv):

> "iv) Maintaining a disciplined focus on 'looked-after needs' makes sense. There is a distinct statutory scheme for the principled and orderly approach to local authority housing, including local authority duties owed to those who are homeless. That distinct scheme is to be found in the Housing Act 1996 (HA96), and there are boundaries between the statutory schemes (see too CA14 section 23). It would undermine the integrity of a coherent statutory framework if CA14 became a 'back-door' route to claims based on accommodation needs, circumventing the scheme of HA96 and jumping the homelessness queue. As Lady Hale said of the predecessor legislation in the *M (Slough)* case at §33, the local authority function of addressing 'looked-after needs' for care and support:
>
> > "… is not a general power to provide housing. That is dealt with by other legislation entirely, with its own criteria for eligibility … [Otherwise,] every homeless person who did not qualify for housing under the Housing Act 1996 would be able to turn to the local social services authority instead. That was definitely not what Parliament intended …"

126. The Judge in *Aburas* applied this at para. 21 as follows:

> "In my judgment, the highest it can be put is that these materials would support the view that Mr Aburas may be facing circumstances of destitution and need of support and subsistence, depending on what other support is available to him, and especially with the onset of winter. These are matters for the Home Secretary and Asylum Support, as Southwark has consistently pointed out. What the evidence does not support is the conclusion that there is a 'looked-after need' for social worker support, requiring the provision of accommodation, the refusal

> of which is a breach of Mr Aburas's Convention rights. and especially with the onset of winter. These are matters for the Home Secretary and Asylum Support, as Southwark has consistently pointed out."

127. Earlier in his judgment at para. 11, the Judge considered how the Care Act 2014 deals with someone who has irregular immigration status. He said the following:

> "…how does CA14 deal with those who, like Mr Aburas, have irregular immigration status? The answer is that, leaving aside destitution-based situations because those are for the Home Secretary and Asylum Support, compatibility with Convention rights in relation to 'looked-after needs' is secured by an exception to an immigration exclusion. In its essentials, the position is as follows.
>
> i) In the case of a 'person subject to immigration control' whose needs have arisen *solely* from destitution or *solely* from the actual or anticipated physical effects of destitution the authority is statutorily prohibited from performing its statutory duty to meet eligible care and support needs, and from performing its statutory duty to meet non-eligible care and support needs (CA14 section 21). The legislation includes no express Convention rights proviso for this situation. That indicates that Parliament proceeded on the basis that the Home Secretary's functions, such as those which for which provision was made in IAA99 sections 4 and 95, would cater for Convention rights in these destitution-based cases.
>
> ii) A 'person present in breach of immigration control' is barred on grounds of statutory ineligibility from receiving any support or assistance under Part I of CA14 (NIAA02 Schedule 3 paragraphs 1(1)(n) and 7), as is a failed asylum-seeker (paragraph 6). However, here there is an express human rights proviso. Schedule 3 paragraph 3 (to which I have referred above) operates so that the bar is disapplied in any case where the performance of a statutory duty or the exercise of a statutory power is necessary to avoid a Convention rights breach. This is the statutory human-rights compliant route relied on by Ms Mallick in this case as being applicable to Mr Aburas as a 'person present in breach of immigration control', albeit that he is a failed asylum-seeker."

128. The Judge than considered the duties under ss.18-19 of the Care Act, applying the human rights proviso. Having reached a conclusion on the facts that the evidence did not establish a claim under Article 3 of the Convention (paras. 16 and 21), he referred to the Localism Act 2011. This was obiter because it was not required for his decision:

the case was argued as a 'looked-after need' case under the Care Act 2014 and not as an accommodation case. It is nevertheless rather than more than a passing observation. It is closely connected to the ratio in the case, and the Judge had received argument about the point and gave it consideration. He said the following at para. 23(ii)-(iii):

> "ii)…As I read *GS*, the Judge there treated the need as being for accommodation alone (§49), which he held was required to be provided under section 1 of the 2011 Act (§78). As I read *AR*, the Judge there concluded that the 2011 Act could not be invoked in respect of accommodation needs (§§29, 43), having regard in particular to HA96 section 185 and relevant case-law. The Judge in *AR* went on to explain why there was in any event – *"even if"* the 2011 Act had been available to meet an accommodation need – no breach of Convention rights in refusing accommodation (§§31, 41). I was not shown any convincing reason why the analysis in *AR* at §29 was wrong, in doubting *GS*. If this case had been put forward as an accommodation need case, invoking the 2011 Act, I would have followed *AR* and rejected such a claim.
>
> iii) I am conscious that the 2011 Act is one statute within a long list of provisions included within NIAA02 Schedule 3 paragraph 3, which can be relevant to secure Convention compatible action in the case of a person excluded under Schedule 3 paragraph 7. That can be seen to raise the question in what circumstances could the 2011 Act perform that human rights compliance function. It is not necessary or appropriate for me to resolve this point. I am not saying that the 2011 Act never has a role to play in securing Convention rights. Whether and when it has such a role will fall to be analysed as and when an appropriate case arises. It would, in my judgment, be a case concerning neither a need for accommodation, nor a 'looked-after need', but something else. As I have explained, this case was squarely one about a 'looked-after need' and falls to be analysed under CA14 read with HRA98."

129. The argument of the Claimant was that the decision of *AR*, and the approval of *AR* in *Aburas*, albeit obiter, were wrong. It was contended that in *R(W) v London Borough of Lambeth* [2002] HLR 41, the Court did not accept that the language of among other things section 185 of the Housing Act 1996 was not a prohibition, restriction or limitation on the powers of the local authority to provide accommodation, and even if they were, there was nothing in s.3(1) of the Local Government Act 2000 (the precursor to s.2 of the Localism Act 2011) which precluded a social service authority from providing temporary accommodation: see para. 75.

130. This does not impact on the decision in *Khan* regarding the Local Government Act 2000. At para.38, Dyson LJ stated that what the Court of Appeal said at para.74-75 of W were "plainly obiter dicta". It is apparent from the language in those paragraphs that

there was no or no detailed consideration of the wording of s.159-161 and 185 of the Housing Act 1985, and instead the attention was on s.190(3) (as then existed) in respect of a more limited duty in cases where an applicant is not found to have a priority need. That analysis does not answer the submission of Mr Goudie at least in respect of s.185 that it was a "prohibition, restriction or limitation" on a power to provide accommodation. It is question of construction whether a prohibition in a particular statute bars the exercise of a power conferred by section 2 of the Local Government Act 2011 (the precursor to s.1 Localism Act 2011). It was in this context that the above-mentioned paras. 40-43 of the judgment of Dyson LJ quoted extensively above fall to be considered. As Dyson LJ said at para. 36, the question which he was considering was whether s.21(1)(A) prohibited the provision of residential accommodation under s.21(1)(a) of the National Assistance Act 1948 or whether it prevented residential accommodation under any statutory power. More specifically, he considered whether it precluded the provision of accommodation under s.2 of the Local Government Act 2000 (specifically s.2(4)(f)) to persons to whom it could not be provided under s.21(1)(a) of the National Assistance Act 1948.

131. The same logic would apply if it were the case that accommodation could be provided simply under the Localism Act 2011. It would also drive a coach and horses around the restriction in section 185(2) of the Housing Act 1996. As I have stated earlier in this judgment, it is right that accommodation can be provided in other contexts. Specifically, the possibility of this has been addressed in the context of s.138 Local Government Act 1972 and s.2B of the National Health Service Act 2006. Its possibility is referred to specifically in respect of provisions of the Children Act 1989 and the Care Act 2014. In other words, accommodation can be provided by a local authority in various statutory contexts subject to the prohibitions, restrictions or other limitations in the statutes. Those prohibitions, restrictions and limitations cannot be circumvented by the use of the power in the Localism Act 2011.

132. In respect of the provision of accommodation, the Court follows the decision of UTJ Markus QC in *AR* and the obiter dicta in *Aburas* to the effect that the 2011 Act could not be invoked in respect of accommodation needs. There remains a question as to whether the 2011 Act could be invoked to perform a human rights compliance function. As was said in Aburas, that question remains to be resolved in other cases, but for the moment it suffices to say that if it is a case simply about the need for accommodation without a substantive statutory context other than the 2011 Act, the 2011 Act does not have a role to play in the provision of accommodation.

133. Seen in this context, and where the determination was central to *Khan*, there is no reason to treat the obiter dicta in *R(W) v London Borough of Lambeth* as in any way undermining the decision in *Khan*, which this Court is bound to follow. Further, to the extent that *Khan* was about the effect of s.21(1)A National Assistance Act 1948 and not s.185 Housing Act 1996, nothing at paras. 74-75 in *R(W) v London Borough of Lambeth* bears out the submission that any of the above cases would have been decided differently in the light of those obiter dicta.

(iv) Attempts to distinguish AR

134. It is now necessary to consider the arguments of the Claimant to the effect that the decision in *AR,* approved in *Aburas*, should not be followed. The Claimant says that the decision of UTJ Markus QC is distinguishable because she did not consider whether

as a matter of interpretation, the relevant provision could be subject to a Convention compliant reading where failure to do so would involve a breach of the Convention rights. This is in effect the inserted proviso argument to restrict the exclusion in section 2(2) of the 2011 Act so that a local authority cannot be treated as unable to do anything where the effect would be a breach of the Convention. However, it is narrower in that it is only considering it in the context of the particular circumstances of this case, and especially by reference to the restriction in s.185 Housing Act 1996.

135. In the alternative, the Claimant says that the Court in *AR* ought to have held that at most s.185 Housing Act 1996 was limited to the powers of the housing authority and did not prevent the provision of accommodation in some other capacity including as social services authority. The case of *J* arose in the context of accommodation under section 17 of the Children Act 1989. *Khan* concerned accessing accommodation under s.21(1)(a) of the National Assistance Act 1948.

136. As regards the first of the above arguments of reading the Localism Act 2011 in a human rights' compliant manner, that has been considered above in the context of the inserted proviso argument of Shelter. It is not something which requires determination in this case for the reasons there given. That is because the responsibility under statute lies with the Home Office, which is precisely what has happened in the instant case. Further, if and to the extent that there are outstanding human rights issues, these need to be considered case by case, and they do not arise for consideration in the instant case because the Claimant has been provided with accommodation.

137. Although not required for this judgment, I still make brief comment since there have been arguments raised on the point. I follow the obiter remarks of Mr Fordham QC (as he then was) in *Aburas* who asked in para.23 (iii) quoted above in what circumstances could the 2011 Act perform a human rights compliance function to secure Convention compatible action. As noted above, the Judge in that case took the view that although it was not necessary or appropriate to resolve that point, he would not say that the 2011 Act never had such a role, and whether it did, it fell to be analysed when an appropriate case arose. However, it would not be in a need for accommodation case. In the context of his approval of *AR* and what he said at para. 23(ii) quoted above, this was because of the operation of s.185 Housing Act 1996 and the prohibition, limitation or restriction there which prevented s.1 Localism Act 2011 providing a power to accommodate without there being some other free-standing statutory context.

138. There are some other relevant indicators which show that it is not appropriate or necessary to create a Convention compliant reading of the Localism Act 2011 including:

(1) The Court should be particularly careful about implying the inserted proviso in a statute conferring general powers where it is capable of having application in contexts far removed from the facts of the instant case. In my judgment, that would operate as a complete answer to a providing such a general proviso.
(2) The ability to imply such a proviso would contradict the express words of s.2 Localism Act 2011. That is generally impermissible.
(3) Where in other statutes and there is a provision to restrict application to the extent necessary to avoid a breach of a person's rights under the European Convention on Human Rights, this is written into the provision, examples of which appear above.

(4) The absence of such a provision here suggests that the general provision of the 2011 Act was not intended to have a wide-ranging meaning, and especially in the face of a prohibition, restriction or limitation. Otherwise, the relevant prohibition, restriction or limitation might be emasculated. It also suggests that the responsibility may have been intended to have been elsewhere e.g. under ss.4, 95 Immigration and Asylum Act 1999: see *Aburas* at para. 11(i) as quoted at para. 127 above.

(5) To similar effect, by reference to the Local Government Act 2000 (the precursor to the Localism Act 2011, in *R(Badu) v London Borough of Lambeth* [2006] 1 WLR at para. 72, Sedley LJ said "The local authority (a) is not obliged but (b) is permitted to use its alternative powers, so long as (c) it does not exercise them with the object simply of circumventing restrictions – even restrictions which are incompatible with Convention rights - built into the impugned power." In those circumstances, the Court has to give effect to those restrictions unless it was a case where a declaration of incompatibility would be appropriate.

139. As regards the submission that the prohibition in s.185 Housing Act 1996 only applies to a local authority acting qua housing authority but not qua social services authority, that is not a reason to distinguish the above cases. The issue is whether the local authority can provide accommodation. The local authority is a unitary authority. It is too loose to refer to the capacity in which the local authority is acting. It is necessary to consider in each case the power under which accommodation is provided or other assistance is provided. This submission of the Claimant appears to be derived from a passing remark at the end of para. 75 in the obiter dicta in *R(W) v Lambeth LBC* above to the powers of social services authority to assist the family of a child in need, being distinguished from the powers of the housing authority. It is difficult without more to assume that this is to give an unlimited meaning to s.2 Local Government Act 2000 (now s.1 Localism Act 2011), rather than reflecting the statutory powers conferred on a local authority dealing with children in need. This passing remark does not alter the analysis of the above cases which depend on finding the source of powers and analysing what are the relevant restrictions, and in particular whether the Housing Act 1996 is an operative prohibition or restriction.

140. Following the authorities set out above not limited to *AR*, the attempt to invoke s.1 Localism Act 2011 does not have that result. The reason is that in the absence of any other statutory scheme to accommodate, the accommodation is then being provided pursuant to the Housing Act 1996 (if there is no other substantive source of that power). It would then follow that s.185 operates as a relevant prohibition, restriction or limitation. The effect is that the Localism Act 2011 has no application because of the operation of section 2(2) of the Localism Act 2011. In these circumstances, this would involve the 2011 Act being used to circumvent a pre-commencement prohibition, restriction or limitation. In my judgment, when the cases are analysed as a whole, the burden of the authorities as a whole both before the Localism Act 2011 and thereafter is clear. It is that any power to accommodate in s.1 Localism Act 2011 without any other specific statutory power elsewhere is restricted by s.185 Housing Act 1996 as regards NPRF persons.

XI Issues

141. The parties have agreed a list of issues. These matters have been dealt with above to the extent necessary and appropriate. As a matter of convenience, and in the light of the analysis, the matters set out above are brought together in the order of the agreed list of issues.

Issue 1: Is the claim academic?

142. The first three issues are considered in the discussion in section V above at paras. 17-29. The claim is academic in the sense that the Claimant has received accommodation from the Home Office in the Swindon area. It is speculative that he would ever return to Brighton. If he did, he would be required to make a new claim because the circumstances would have changed, and the decision would be a different one.

Issue 2: If so, are the conditions for hearing an academic claim met?

143. The conditions for hearing an academic claim are met. There is a question of law of importance beyond this case and potentially affecting many other applicants for accommodation. This refers to rough sleepers who are NRPF persons where the argument goes that it is unlawful for a local authority to provide even temporary accommodation due to statutory prohibitions about providing accommodation or assistance to such persons: see Housing Act 1996 s.185 paragraph 3 of Schedule 3 to the Nationality and Immigration Act 2002.

Issue 3: What is the decision which is impugned by way of this claim?

144. It is the decision that the Defendant had no power to accommodate those such as the Claimant with no recourse to public funds under the "Everyone In" scheme. That Defendant refused to provide accommodation to the Claimant particularly by a decision made or communicated by the Defendant to the Claimant on or about 2 September 2020. This refusal was subsequently maintained in particular on the ground that the Defendant was not permitted to provide housing help to a person from abroad who is not eligible for help under section 185 of the Housing Act 1996. The Court does not have to decide all aspects of that decision as it applied to the circumstances of the Claimant, but the question as to whether as a matter of law his being a NRPF person was a bar to his receiving accommodation.

Issue 4: In respect of the definition of 'emergency' under s.138 Local Government Act 1972:

(a) The Claimant invites the Court to determine whether as a matter of fact, Covid-19 amounts to an emergency under the Act; and

(b) Did the Defendant err in failing to consider whether the pandemic does amount to an emergency under s.138 of the Act?

145. These two questions are answered as follows:

(a) For the reasons set out at 47-61 above and especially at paras.56-61, in the context of a national lockdown, as a matter of fact, Covid-19 does amount to an emergency under s.138 Local Government Act 1972. Although it does not form a necessary part of this judgment (see paras. 61- 62 above), where there was less than a national lockdown, there was still an emergency involving danger to life or reasonable ground for apprehending such an emergency, and a local authority such as the Defendant was to consider whether it was of opinion that it is likely to affect the whole or part of its area or all or some of its inhabitants. The Defendant's publications at the time show that whilst Brighton was in a lesser tier, the situation was regarded as an emergency, and in my judgment that was a rational response. The relevance of this is that this gives a local authority the power to operate the "Everyone In" scheme or a successor initiative during the pandemic.

(b) The Defendant's contention that even a full lockdown is not an emergency is in my judgment not a conclusion which is available to a local authority. Such a contention is inconsistent with the Defendant's publications which make numerous references to "emergency". As regards the time when the Brighton area has been on a low tier, I refer to the matters set out in sub-paragraph (a) above. It is not necessary or appropriate to go further than this for the reasons referred to below in the conclusory section XII above in connection with the scope of the declaration.

Issue 5: Can the Defendant provide or assist in the provision of accommodation under any of the following provisions:

(a) Section 138 Local Government Act 1972

146. Yes, for the reasons set out at paras. 56-64 above, subject to its four elements set out at para. 46 above being satisfied. It is also subject to the power to provide accommodation being used to address the elements of s.138 and not to circumvent the prohibition in s.185 of the Housing Act 1996.

(b) section 2B National Health Service Act 2006

147. Yes, for the reasons set out at paras. 67-79 above and especially at paras. 75-79. This is subject to a local authority using this provision to address public health functions in general under s.2B and not to circumvent the prohibition in s.185 of the Housing Act 1996.

(c) section 180 Housing Act 1996 by way of providing assistance to a voluntary organisation such as St Mungo's

148. Yes, but as set out in paras. 80-81 above, this is only the provision of assistance to a third party, such as St Mungo's, and so does not assist in connection with whether a local authority can provide accommodation directly.

(d) section 1 Localism Act 2011.

149. This has entailed a long discussion at paras. 82-140 above. The short answer is that the Localism Act 2011 does not give rise to a free-standing power to accommodate.

Issue 6: Does s. 185 Housing Act 1996 preclude the provision of accommodation or assistance in providing accommodation pursuant to the Defendant's Covid-19 accommodation policy?

150. To the extent that accommodation is provided under a statutory scheme separate from Part VII of the Housing Act 1996 (e.g. s.138 or s.2B), and the power pursuant to that scheme is not used to circumvent s.185 Housing Act 1996, no.

Issue 7: Does s. 185 restrict or limit the ability of the Defendant to lawfully provide assistance in a capacity other than as housing authority. Accordingly, does it affect D's ability, if any, to provide accommodation under s. 138 or s. 2B?

151. To the specific question as to whether it affects the ability to provide accommodation under s.138 or s.2B, see the answers to issues 5(a) and 5(b) above. The key is not whether the Defendant is acting as a housing authority: see para.139 above. The Defendant is a unitary authority. If it is providing accommodation under the Housing Act 1996, then the prohibition in s.185 applies. What must be considered is the precise statutory scheme under which the local authority is acting and the target of its assistance: other powers cannot be used to circumvent s.185, but if they are used properly, then the accommodation will be provided under those other statutes and not under part VII of the Housing Act 1996.

Issue 8: As regards to s. 1 Localism Act 2011:

(a) Is s. 185 a pre-commencement limitation preventing the use of the s. 1 power to provide any kind of accommodation to non-eligible persons?

152. Where there is a specific statutory scheme in specific terms (as opposed to the general terms of the Localism Act 2011), there is a power to provide accommodation within the target of that legislation. In those circumstances, s.185 does not affect that power provided that it is not being used to circumvent the restriction in s.185. However, where there is no other statutory basis, the general terms of section 1 of the Localism Act 2011 cannot be used to provide accommodation. This would be using this general provision simply to circumvent the restriction or limitation in s.185 Housing Act 1996.

(b) if so, then do ss.1 and or 2 Localism Act 2011, read with s.3 Human Rights Act 1998, require local authorities to secure accommodation for homeless people where necessary to avoid a breach of a person's ECHR rights or their EU rights?

153. The question does not arise directly for consideration in this case for the reasons set out at paras. 92-110 above. This is because this is not a case about homeless people in general but about homeless persons who are NRPF. The statutory scheme imposes a burden on the Home Office under section 4 of the Immigration and Nationality Act 1999 where the homeless person is not "destitute plus". It is therefore not necessary for the local authority to act here to avoid a breach of a person's ECHR or EU rights because it is for the Home Office to act where appropriate. If there are faults in that system, they need to be addressed, but that does not make it necessary for a local authority to do that which statute has been entrusted to the Home Office.

154. If, contrary to the above, it were still necessary for a local authority to act to avoid such a breach, this would have to be considered not in abstract but against the facts of a particular case. This is not such a case because the Claimant has been accommodated by the Home Office whose responsibility it was. The case would be fact specific and for the reasons set out above, it would be inappropriate and unnecessary to consider it in view of the accommodation of the Claimant. Despite this, the question as to whether a Convention compliant reading should be given has been considered at paras. 88-92 and 136-138 above.

155. In any event, s.1 of the Localism Act 2011 does not require local authorities to do anything. Insofar as it gives rise to powers, to the extent that no other statutory scheme is in place as regards accommodation, the 2011 Act is not intended to override or circumvent the prohibition in s.185 Housing Act 1996.

Issue 9: Did the Defendant proceed on a mistake as to law when deciding it had no power to accommodate the Claimant?

156. Insofar as the Defendant proceeded on the basis that it had no power to accommodate the Claimant in the context of the "Everyone In" scheme and did so because it had no power in law, that was a mistake as to law. As noted above, there are statutory schemes other than Part VII of the Housing Act 1996 under which there is or may be a power to provide accommodation. In particular, this includes s.138 Local Government Act 1972 and, to the extent identified above, s.2B of the National Health Service Act 2006. As regards the Localism Act 2011, the answer to issue 8 is repeated. It is not necessary or appropriate to go further than this for the reasons referred to below in connection with the scope of the declaration in the conclusory section XII below.

Issue 10: Did the Defendant err in failing to consider whether Paragraph 3 of Schedule 3 of the Nationality and Immigration Act 2002 apply to the instant case?

157. The first question is not whether para. 3 of Schedule 3 of the Nationality and Immigration Act 2002 applies, but whether there would be an eligibility for support or assistance in the first place but for the ineligibility provided in para. 1 of Schedule 3, and in particular to NRPF persons.

158. Para. 3 is an exception to the powers and duties listed under para. 1 where there would otherwise be eligibility for support or assistance, and none is to be provided in particular to NRPF persons. Despite that ineligibility, the exercise of a power or the performance of a duty is not prevented if this is necessary for the purpose of avoiding a breach of a person's Convention rights or a person's rights under the EU Treaties. Although that list includes s.1 Localism Act 2011, that is subject, as noted above, to s.2 Localism Act 2011. There is no relevant free-standing duty to take action to prevent a breach of a person's Convention or EU rights.

159. The Defendant did not err because it was not necessary for the Defendant to exercise a power or perform a duty for the purpose of avoiding a breach of a person's Convention rights or under the EU Treaties. The statutory scheme provided for the Home Office to provide the required accommodation as occurred. It was not for the Defendant to fulfil the role of the Home Office: see paras. 103-106 above.

XII Conclusion

160. This judgment started by reference to the academic nature of the claim since the Claimant received accommodation under section 4 of the Immigration and Asylum Act 1999 from the Home Office. Any declaration must be by reference to the basis on which the Court heard this claim, namely that it raised a question of law as to whether the prohibition in s.185 Housing Act 1996 in particular precluded the Defendant from accommodating a failed asylum seeker under the Defendant's COVID-19 accommodation policy. The context in which this arises is whether the "Everyone In" scheme or any successor initiative is unlawful to the extent that it does not exclude failed asylum seekers. This is a specific question which is not fact sensitive and is capable of having application to many people other than the Claimant in the context of the current pandemic.

161. There ought to be a declaration in limited terms which answers that question of law to reflect this judgment. It is important that the declaration is not widened to the particular details of this case because it is intended to address the question of law, which since the accommodation of the Claimant elsewhere, still lies at the heart of the argument and is not fact specific to the Claimant.

162. Subject to finalising the terms in an order, and any further submissions as to the precise terms of the declaration in order to reflect this judgment, the Court has in mind the following:

    (1) It is declared as regards the provision of temporary accommodation pursuant to the "Everyone In" scheme or a successor initiative to street homeless persons in order to save lives alleviating the effect of the Covid-19 pandemic:

(a) the Defendant has powers under s.138 Local Government Act 1972 in the context of an emergency involving danger to life affecting the street homeless, to take action to provide accommodation or secure assistance for them to avert, alleviate or eradicate the effect of Covid-19;

(b) the duty under s.2B National Health Service Act 2006 is capable of permitting the provision of temporary accommodation by the Defendant as a step for improving the health of the people in the area;

notwithstanding that some of the recipients may be persons who are ineligible for assistance under s.185 Housing Act 1996, provided that the foregoing is not used to circumvent the restrictions of s.185 Housing Act 1996 or schedule 3 to the Nationality and Immigration Act 2002.

(2) There is no need for a declaration in respect of s.180 Housing Act 1996 which does not advance matters since it is only about assisting third parties and not about providing accommodation directly.

(3) Likewise, a declaration that the Defendant acted in error in failing to consider the above provisions might not do justice to the multi-factorial nature of the considerations in this case. Some of the argument was that whether there was power to apply the "Everyone In" scheme to NRPF persons, but a part of the objection was also that it was for central government and not the local authority. A part of the argument may have been facts and circumstances relating to the Claimant. The problem then becomes that that the matter does not lend itself to a declaration in respect of the Defendant's conduct without widening the matter from an error of law into how the Defendant acted in respect of then dispute as a whole. How the Defendant acted in a broader sense was not determined due to the accommodation of the Claimant by the Home Office.

(4) Likewise, there is no need for a declaration about the Localism Act 2011. As in *Aburas* (para. 23(iii)), it is not necessary or appropriate for this Court to resolve whether there are other circumstances where the 2011 Act may have a role to play in securing Convention rights. For the moment, the specific use of the Localism Act 2011 on the facts of this case has not taken the Claimant's case further.

163. To this extent, there should be declaratory relief. It is important for this to be seen in the context of the issue with which this judgment opened. It must not go further than is necessary or appropriate having regard to the specific findings in this case.

164. It remains to thank all counsel for the quality of their written and oral submissions and for all the assistance which they have given to the Court.