Michaelmas Term
[2023] UKSC 45
On appeal from: [2022] EWCA Civ 601

JUDGMENT

R (on the application of Imam) (Respondent) *v* London Borough of Croydon (Appellant)

before

Lord Lloyd-Jones
Lord Sales
Lord Leggatt
Lord Richards
Lord Burnett

JUDGMENT GIVEN ON
28 November 2023

Heard on 3 and 4 May 2023

Appellant
Kelvin Rutledge KC
Riccardo Calzavara
(Instructed by Browne Jacobson LLP (Birmingham))

Respondent
Martin Westgate KC
Sarah Steinhardt
(Instructed by Deighton Pierce Glynn (Bowling Green Lane))

Intervener (Crisis) (written submissions only)
Justin Bates
Harriet Wakeman
Barney McCay
(Instructed by Anthony Gold Solicitors LLP (London Bridge))

LORD SALES (with whom Lord Lloyd-Jones, Lord Leggatt, Lord Richards and Lord Burnett agree):

1. This case concerns the approach which a court should adopt to granting a mandatory order as a remedy against a local housing authority which is in breach of its statutory duty under section 193(2) of the Housing Act 1996 ("the Act") to ensure that suitable housing is available to a person who is eligible for assistance. The appellant housing authority ("Croydon") admits that at the material time it was in breach of this duty owed to the respondent ("Ms Imam"), but contends that by reason of severe budgetary constraints and limits to the stock of properties available for housing assistance it ought not to be ordered to provide a property to Ms Imam, suitable for her complex needs, with immediate effect. Croydon says that at the very least it should be given a period of grace to allow it to find a suitable property out of its limited resources.

2. The central issue on the appeal is whether, and if so in what way, limits on the resources of a local housing authority should affect the exercise of a court's discretion as to the remedy to be granted when the authority is in breach of its duty under section 193(2) of the Act ("section 193(2)").

Factual background

3. Ms Imam is an applicant to Croydon for homelessness assistance pursuant to Part 7 of the Act and for allocation of accommodation under Part 6. She is a full-time wheelchair user and the mother of three children, currently aged 17, 16 and 12.

4. Ms Imam made her application to Croydon for assistance in about February 2014. Croydon assessed her application and accepted that it owed her a duty under section 193(2).

5. In September 2014 Croydon offered Ms Imam temporary accommodation comprising a three-bedroom house ("the Property"). Ms Imam visited the Property on 29 September and accepted it that day. She moved into the Property the following month. She and her children continue to reside there. Ms Imam's partner went to live with them there in 2017.

6. On 30 September 2014, however, Ms Imam requested a review of the suitability of the Property. On 5 June 2015 Croydon accepted that the Property was not suitable for Ms Imam, on the grounds that it lacked a level-access toilet on the first floor suitable for her to use during the night. However, Croydon did not offer Ms Imam alternative housing which was suitable.

7. Croydon accepts that from 5 June 2015 to date it has been in breach of its duty owed to Ms Imam under section 193(2) to provide her with suitable accommodation. Ms Imam maintains that the breach of this duty began at the commencement of her occupation of the Property. This point of difference as to the timing of the commencement of the breach of duty is not significant for present purposes and does not need to be resolved in this court.

8. On 5 March 2020 Ms Imam commenced the present claim for judicial review of Croydon's conduct in relation to her. She sought a mandatory order to compel Croydon to secure suitable accommodation for occupation by her and her household (ground 1); declaratory relief and damages for breach of the Equality Act 2010 (ground 2); and an order requiring Croydon to reassess her priority on its housing register (ground 3). The present appeal concerns the claim on ground 1 and whether a mandatory order should be made. Ms Imam did not file a witness statement in support of her claim.

9. Letters before claim written by Ms Imam's solicitors complained that the Property had not been sufficiently adapted for a wheelchair user, so that cupboards and windows were too high for her to use and the bathroom had not been fully adapted. An internal lift occupied much of Ms Imam's bedroom and the living room on the ground floor, which impeded her manoeuvrability. Access by wheelchair to her children's bedrooms was not possible. There was no upstairs toilet for Ms Imam to use at night, which was problematic because of difficulties to do with incontinence so that she suffered accidents which were humiliating and distressing.

10. Other than in relation to the absence of a level-access toilet on the first floor, the courts below proceeded on the footing that the Property is reasonably suited to meet Ms Imam's needs. It is adapted for wheelchair use, is of a size appropriate to accommodate her comparatively large family and is suitably located.

11. Croydon filed summary grounds of resistance in which it accepted that it was in breach of the duty owed to Ms Imam under section 193(2) but contended that mandatory relief should not be granted. Ms Imam was granted permission to proceed with her claim and Croydon then filed detailed grounds of resistance supported by a witness statement of Mr Simon Beasley, its Housing Operations Manager. Ms Imam filed a short witness statement in reply to say that, although she was offered two other properties, neither was suitable.

12. Mr Beasley explained that, like many local authorities, Croydon faces severe budgetary pressures. He summarised the position as follows:

> "… the defendant [Croydon] operates two housing allocations schemes which, together, set out how we determine priorities

and allocate accommodation to those in need of housing in the Borough. Ideally, we would of course like the scheme to operate so that applicants are provided with suitable accommodation shortly after the needs arises. Unfortunately, this simply is not always possible in practice. The Defendant faces significant difficulties as a result of acute budgetary pressures, very high demand for housing in the Borough and a limited pool of properties available to meet this demand. Funding from central government has decreased significantly over the years and the Defendant, like many authorities, is dealing with the difficult consequences of this. The projected budgetary overspend for 2020-21 is £67 million.

… the Defendant has continually considered the claimant [Ms Imam] for properties as they have become available but, unfortunately, there are many other housing applicants who are in either in higher priority need or who have the same priority need (under the Defendant's priority banding system) but have been waiting longer for suitable accommodation. While I can understand why the Claimant would argue that the Defendant should simply purchase a property for her, this isn't the silver bullet that she suggests that it is. This is because the Defendant would also need to purchase properties for everyone ahead of her on the Housing Register, otherwise it would be breaching its statutory duty to only allocate properties in accordance with its allocation schemes and the duties that it owes to other disabled applicants who are ahead of the Claimant on the Housing Register. The cost of this would be several million pounds, at a time when the Defendant is already tens of millions of pounds over budget for the current year. While the Defendant continues to explore the possibility of adapting her current property to make it suitable, in my view, it is unlikely to be practicable to carry out the level of adaptations that the Claimant has requested.

… The Defendant has a substantial pool of Council-owned properties. At the end of June 2020, the total number of Council-owned properties in the Borough stood at 13,433, but even this considerable supply of properties is far outweighed by the demand for housing in our local authority area. Some of these Council-owned properties are available to be allocated as temporary accommodation to homeless applicants under the Part 7 Scheme [in respect of duties arising under Part 7 of the Act] and some are available to be allocated as permanent accommodation under the Part 6 Scheme [in

> respect of duties arising under Part 6 of the Act]. The precise proportion of Council-owned properties available as temporary or permanent accommodation varies depending upon the length of the waiting lists for each type of accommodation, which are kept under constant review as the Defendant reviews its allocations against its target allocation policy and reallocates properties between temporary and permanent waiting lists and across the different priority bands throughout the year. However, as we were actively considering the Claimant for both temporary and permanent accommodation under both the Part 6 and Part 7 Schemes, the Claimant would have been considered for all Council-owned properties that have become available since June 2015."

Despite this, Croydon had been unable to find a suitable property for Ms Imam and had therefore left her to be accommodated in the Property. It was assessed that it was not cost-effective to adapt the Property to make it suitable for Ms Imam's needs.

13. The claim was heard by a deputy High Court judge, Mr Mathew Gullick KC ("the judge"), who allowed it in part on ground 3 but dismissed it on grounds 1 and 2 ([2021] EWHC 739 (Admin); [2021] HLR 44).

14. The Court of Appeal granted Ms Imam permission to appeal on ground 1, but refused Ms Imam permission to appeal on ground 2 and refused Croydon permission to appeal on ground 3. Ms Imam's appeal was directed to be heard with the appeal in another housing case, *R (Elkundi) v Birmingham City Council* [2021] EWHC 1024 (Admin); [2021] 1 WLR 4031.

15. The appeals were heard by Underhill, Peter Jackson and Lewis LJJ. Lewis LJ gave the principal judgment, with which Peter Jackson and Underhill LJJ agreed. Underhill LJ gave a short concurring judgment. The Court of Appeal allowed Ms Imam's appeal, set aside the judge's order dismissing her claim for a mandatory order, and remitted the matter to the High Court for rehearing, with liberty to both sides to adduce fresh evidence. The Court of Appeal ruled that Croydon should not be ordered to provide new accommodation to Ms Imam if it was not reasonably possible for it to do so; but, contrary to the view of the judge, the Court of Appeal held that a bald appeal to budgetary constraints as had been made in Mr Beasley's witness statement as an explanation for Croydon's non-compliance with its duty was not a sufficient justification to permit the court to decline to grant a mandatory order to require it to provide suitable accommodation.

16. Croydon now appeals to this court.

The legislative and policy framework

17. Part 7 of the Act makes provision for assistance to be provided to the homeless by local housing authorities. It sets out various definitions, including of when a person is "homeless" (section 175) and of when they have a priority need for accommodation (section 189), and various duties and powers of an authority, including duties to provide advisory services (section 179), make inquiries (section 184), secure the provision of accommodation on an interim basis in case of apparent priority need (section 188), and to provide certain limited forms of assistance to persons becoming homeless intentionally (section 190) and those who do not have a priority need (section 192).

18. Section 193 sets out the main housing duty owed to persons who have a priority need who are not homeless intentionally. This is the provision which applied in Ms Imam's case. It provides in relevant part as follows:

> "(1) This section applies where the local housing authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally.
>
> (2) … [The authority] shall secure that accommodation is available for occupation by the applicant.
>
> (3) The authority are subject to the duty under this section until it ceases by virtue of any of the following provisions of this section."

The duty may cease if, for example, the applicant refuses an offer of accommodation which the authority is satisfied is suitable for them (section 193(5)) or if the applicant accepts an offer of accommodation under Part 6 of the Act (section 195(6)(c)). Croydon accepts that the duty it owed Ms Imam under section 193(2) has not come to an end.

19. Section 206, within Part 7, headed "Discharge of functions by local housing authorities", provides as follows in subsection (1):

> "A local housing authority may discharge their housing functions under this Part only in the following ways-

(a) by securing that suitable accommodation provided by them is available,

(b) by securing that he obtains suitable accommodation from some other person, or

(c) by giving him such advice and assistance as will secure that suitable accommodation is available from some other person."

20. Part 6 of the Act is concerned with allocation of housing accommodation on a secure, non-temporary basis. It makes provision about the ways in which housing accommodation may be allocated (section 159). Allocation under Part 6 is by way of the grant of a secure tenancy (or by nomination to an assured tenancy with a social landlord), so that the property passes out of the immediate control of the housing authority. Section 166A imposes duties on an authority to put in place an allocation scheme to determine priorities and to allocate in accordance with it, as follows:

"(1) Every local housing authority in England must have a scheme (their 'allocation scheme') for determining priorities, and as to the procedure to be followed, in allocating housing accommodation. For this purpose 'procedure' includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken.

(2) The scheme must include a statement of the authority's policy on offering people who are to be allocated housing accommodation—

(a) a choice of housing accommodation; or

(b) the opportunity to express preferences about the housing accommodation to be allocated to them.

(3) As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to—

> (a) people who are homeless (within the meaning of Part 7);
>
> (b) people who are owed a duty by any local housing authority under section 190(2), 193(2) or 195(2) (or under section 65(2) or 68(2) of the Housing Act 1985) or who are occupying accommodation secured by any such authority under section 192(3);
>
> (c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions;
>
> (d) people who need to move on medical or welfare grounds (including any grounds relating to a disability); and
>
> (e) people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others).
>
> The scheme may also be framed so as to give additional preference to particular descriptions of people [as further specified in the subsection]. …"

A local housing authority is required to comply with its Part 6 allocation scheme: section 166A(14).

21. Parts 6 and 7 of the Act deal with different topics and it has been observed that the duty to secure that accommodation is available for a homeless family under section 193(2) is "quite separate from" the allocation of council housing under Part 6: *Birmingham City Council v Ali* [2009] UKHL 36, [2009] 1 WLR 1506 ("*Ali*"), paras 14 and 47 (Baroness Hale of Richmond). But they interact. So, for example, a person owed the main housing duty under Part 7 is included within the priority groups specified in Part 6 and, if that results in an allocation, the main duty ceases: section 193(6)(c) and section 166A(3)(b). An allocation under Part 6 is by way of the grant of a secure tenancy, but such a tenancy may not be granted when the local housing authority allocates accommodation in fulfilment of its duty under section 193(2): para 4 of Schedule 1 to the Housing Act 1985.

22. Croydon's current housing allocation scheme prepared under Part 6, entitled "Housing Allocation Scheme: Delivering for Croydon" (October 2019) ("the Part 6 scheme"), provides for three bands of priority depending on need, with band 1 being those with the greatest need and highest priority. Priority within bands is determined by the date order of application. Provision is made for moving between bands. There is a general discretion to place a person in band 1 in exceptional circumstances, such as where they have severe medical or disability problems which make it difficult for them to manage in their home. The scheme also provides for direct offers to be made of housing adapted for disabled people or which is wheelchair accessible, so that where such a property is available it will be offered on the basis of suitability alone and outside any strict date order.

23. Croydon also maintains a Part 7 accommodation allocations policy ("the Part 7 policy"). This provides that Croydon will allocate accommodation in a way that is fair to the households it is required to assist. It notes that due to the high level of homelessness demand, households are normally first accommodated in nightly let emergency accommodation (stage 1) and then moved into longer term accommodation or are offered accommodation in the private rented sector (stage 2). Priority for any move from stage 1 to stage 2 accommodation is afforded to those who have been in stage 1 accommodation for the longest time, except that Croydon's Director of Housing Needs and Strategy may afford greater priority depending on the circumstances of any particular case, and adapted property will only be offered to those who require it.

The decisions of the courts below

24. The judge held that Croydon was in breach of its statutory duty under section 193(2) and turned to consider whether he should make a mandatory order to require Croydon to provide suitable accommodation to Ms Imam within a specific period of time. The time mentioned in her claim form was six weeks. In the exercise of his discretion as to remedy he declined to make such an order: paras 81-82.

25. The factors emphasised by the judge were:

> (i) Ms Imam had not filed evidence regarding how severe the difficulties were which she experienced at the Property. The Property had a number of positive features, with no issue raised about its size or location. Access via a ramp was suitable for a wheelchair and it had an internal lift to give Ms Imam some accessibility between floors. The judge did not consider that Ms Imam's position at the Property was "intolerable" (to use the language of Lord Hope of Craighead in *Ali* at para 4), nor that it could be said that the situation had been going on so long that "enough is enough", in the phrase used by Baroness Hale at para 51.

(ii) Croydon had not refused to comply with its statutory duty: it acknowledged that it was in breach of its duty, had previously indicated that it would consider ways in which the identified deficiencies of the Property might be remedied (though in the event this had not proved possible) and continued to look for a suitable property for Ms Imam. It had offered her two other properties in 2020, albeit they proved not to be suitable either. The judge accepted Mr Beasley's evidence that Croydon had considered Ms Imam for all available properties across all the potential pools of properties available to it, including those in its stock available to meet its duties under Part 7, and that it was doing all it reasonably could, consistently with the proper application of its policies and the limited resources available to it, to fulfil its statutory duty.

(iii) Due to the general shortage of accommodation available to Croydon, it was unlikely that a suitable property would be provided in the near future. The judge considered that this enhanced, rather than diminished, Ms Imam's case for a mandatory order to be made.

(iv) Ms Imam had been waiting a very long time for a suitable property to be found. But the effluxion of time was not of itself determinative and had to be considered in the context of the evidence as to the ongoing consequences of the breach of duty.

(v) The judge accepted Croydon's submission that, when considering the question of relief, the court should consider the wider context. Croydon's resources were finite, and the evidence showed that its projected budgetary overspend in the current financial year was £67 million. The judge agreed that the resources available to Croydon were relevant to the question of mandatory relief, and that unchallenged budgetary decisions already taken by the authority should be the starting point for this: *R (Domb) v Hammersmith and Fulham London Borough Council* [2009] EWCA Civ 941; [2009] LGR 843, at paras 60-61 per Rix LJ (with whom Lord Clarke MR and Sedley LJ agreed). The judge observed (at para 81(v)): "In granting a mandatory order in terms which required the defendant [Croydon] to provide a property for the claimant [Ms Imam], the court would either be requiring the defendant to spend money which on the evidence it does not have, or to reallocate money from the provision of other public services in order to provide accommodation to the claimant."

(vi) Ms Imam did not contend that she should be granted mandatory relief which had the effect of requiring Croydon to provide permanent accommodation to her under Part 6 of the Act. Such an order would inevitably have an adverse impact on those higher on the waiting list for such housing. Out of 29 applicants on Croydon's books in need of re-housing in wheelchair adapted properties of similar size to the Property, Ms Imam was number 16 on the list; the others had

either been waiting longer or had a higher priority rating than her. Allocation of a property immediately to Ms Imam would have been unfair to those other applicants and would be inconsistent with Croydon's Part 6 scheme. On the other hand, to provide suitable properties to the applicants above Ms Imam in the housing list would have cost Croydon several million pounds which it did not have (or which it would have to divert from the budgets for other public services).

(vii) Ms Imam contended that Croydon could make provision of accommodation outside the operation of Part 6, by purchasing, building, leasing or adapting a property and allocating it to her as temporary accommodation under Part 7 of the Act. However, the judge accepted Croydon's submission that this would be inconsistent with the proper operation of its Part 7 policy. It would also be unfair to others on the waiting list for Part 6 accommodation who were currently being accommodated in unsuitable temporary accommodation under Part 7. The court was not in a position to "weigh the claims of the multitude who are not before the court against the claims of the few who are" (see *R (Ahmad) v Newham London Borough Council* [2009] UKHL 14; [2009] PTSR 632 – "*Ahmad*" – para 15, per Baroness Hale). It was significant that Ms Imam could not show that her situation had reached the level of seriousness described by Lord Hope and Baroness Hale in *Ali*.

(viii) Croydon had presented "detailed evidence regarding its limited resources and the position of those higher on its waiting list". The judge regarded this, along with the point at (i) above, as a particularly important aspect of the case, saying that Croydon was placed in an "impossible situation" (quoting Arden LJ in *R (Aweys) v Birmingham City Council* [2008] EWCA Civ 48; [2008] 1 WLR 2305 ("*Aweys*") at para 65).

26. The Court of Appeal allowed Ms Imam's appeal on this aspect of the case to a limited extent. Although Croydon had been in breach of its duty to Ms Imam under section 193(2) for more than five years, the court had a discretion whether to grant mandatory relief or not. Lord Hope and Baroness Hale in *Ali*, at paras 4 and 51, had not stated the test for the grant of a mandatory order: paras 135-137 and 140. Instead, Lewis LJ held (para 134) that the correct approach "is to consider whether the local housing authority has taken all reasonable steps to perform the duty"; if it has done so and has still not been able to secure suitable accommodation "that may be a good indication that it may not be appropriate to grant a mandatory order as it may not be possible to secure suitable accommodation within a specified time"; however, the authority should be expected to demonstrate what steps it has taken and what the difficulties are, and it is "unlikely to be sufficient to refer generally to the demand for housing or the shortage of accommodation"; he continued:

> "The authority may need to explain, for example, the number of properties of the particular type in question (such as houses with particular adaptations or with a particular number of bedrooms) it has available and why it is not possible or appropriate to use those for the grant of (unsecured and therefore non-permanent) accommodation under Part VII. It may, for example, have a number of properties that it would like to use for allocating to applicants on its waiting list for Part VI accommodation. It can be expected to explain why it is not using those properties to ensure that its Part VII duties are met. This is not to say that the local housing authority must make a final offer of a secure tenancy of accommodation to a homeless person. Rather, given that the duty under section 193(2) will continue and may be met by the provision of accommodation on a short or long term basis (until it comes to an end, for example, by the making a final offer of Part VI accommodation), an authority may need to explain why it is not using its housing stock to secure accommodation that is suitable on a non-permanent basis to meet its Part VII duties."

27. Whilst it had been legitimate for the judge to take into account a number of the factors to which he referred, he had erred in two respects: (i) he had gone wrong in having regard to general budgetary constraints upon Croydon, albeit limits upon the number of suitable properties available might be relevant: paras 141, 148 and 152; at para 141 Lewis LJ said, "constraints on resources are not a reason for not complying with a duty imposed by Parliament"; and (ii) the judge erred in his analysis of the steps taken by Croydon to comply with its duty: paras 142-145, 148 and 152. As Ms Imam had established that Croydon was in breach of its duty under section 193(2), it was for Croydon to demonstrate reasons why a mandatory order should not be granted to secure its compliance: para 140.

28. The evidence from Mr Beasley that Croydon had done all it reasonably could to seek to comply with its duty to Ms Imam was too general. He did not address the question whether there were any suitable properties available to Croydon that it could use to secure suitable accommodation for Ms Imam under Part 7 (that is, without her being offered a secure tenancy under Part 6), thereby seeking to ensure that she was not given an unfair advantage over others on Croydon's Part 6 list with superior priority. Mr Beasley had not explained why housing stock which might be suitable for her was being used for permanent allocation under Part 6 rather than being used to meet Croydon's statutory obligations under Part 7; he had not explained whether any of the wheelchair accessible properties available for allocation under Part 6 could have been used to provide non-permanent but suitable accommodation for a person such as Ms Imam to whom a duty was owed under section 193(2): para 143.

29. Croydon had to explain why it was not using housing stock which was available to be used under Part 6 to meet its different duties under Part 7: para 144. Mr Beasley explained that it would be prohibitively expensive to purchase properties for the 15 people ahead of Ms Imam on the housing register under the Part 6 scheme and for Ms Imam, which would be necessary to avoid a breach of that scheme (as would occur if Ms Imam were simply allowed to jump that queue), but he did not explain how many people needing wheelchair accessible accommodation are persons owed a duty under section 193(2) and currently in unsuitable accommodation: the number might be less and the evidence did not address specifically whether Croydon had tried to purchase or lease accommodation for that group and, if so, why that had not been possible (para 145).

30. On the other hand, in the view of the Court of Appeal several of the factors to which the judge had regard in exercising his discretion were valid considerations. The range of factors which could be relevant to the exercise of discretion whether to make a mandatory order include the nature of the accommodation and the extent to which it is unsuitable, the impact of the breach of duty on the living conditions of the homeless person and her family, and the length of time that the homeless person has been left in unsuitable accommodation: para 131. In line with this, Lewis LJ observed that if the living conditions were intolerable, that might be a powerful indication that a mandatory order is called for: para 135; conversely, the judge was entitled to take into account, as telling against the making of an order, the positive features of the Property: paras 138 and 140. The judge was entitled to have regard to the fact that it was unlikely a suitable property would be forthcoming and to treat that as a factor pointing in favour of making a mandatory order: para 138. It is also relevant that there are a limited number of satisfactory properties available of the type needed (for example, houses capable of accommodating large families or persons with disabilities), where the housing authority has done all it reasonably can to secure suitable accommodation: para 137. This was so even though, as Lewis LJ emphasised, financial constraints cannot justify non-compliance with the duty and would not of themselves justify refusing to make a mandatory order: paras 131, 137 and 141.

31. The Court of Appeal also considered that the judge had been entitled to put to one side the fact that Croydon had not considered securing accommodation outside its area, as it could have done, since Ms Imam wished to stay in the area and a local housing authority is required to secure accommodation within its area so far as reasonably practicable: para 146. However, Lewis LJ also said that if it really were the case that it was not reasonably practicable to secure suitable accommodation within its area, Croydon might have to consider whether a suitable property could be sourced elsewhere, since compliance with its statutory duty might outweigh considerations such as that Ms Imam's children attend local schools or that she and her family have a local network of support: para 146.

32. Similarly, the judge had not erred in giving weight to his view that Croydon could not be expected to acquire a property with a view to allocating it to her under Part 7; he was entitled to consider that it would not be appropriate for Croydon to depart from its Part 7 policy on the allocation of properties: para 147.

33. Both parties had applied to the Court of Appeal to adduce fresh evidence and considerable time had passed since Ms Imam's claim was issued so the situation might have changed. In these circumstances, having allowed Ms Imam's appeal in relation to ground 1 to set aside the judge's order refusing the grant of a mandatory order, the Court of Appeal decided that the appropriate course was to remit the case to the High Court for further consideration with the benefit of such additional evidence as might be adduced: para 149.

The submissions of the parties

34. Croydon submits that the judge was entitled to reach the decision he did. It also submits that the Court of Appeal was wrong to hold that Croydon's reliance on its budgetary position could not be relied upon as part of its answer to Ms Imam's claim for a mandatory order and, further, that the evidence of Mr Beasley sufficiently explained Croydon's position and why it would not be appropriate to make such an order. Croydon relies in particular on *R v Bristol Corpn, Ex p Hendy* [1974] 1 WLR 498 ("*Hendy*"). It submits that the Court of Appeal erred in holding that Croydon should have considered, or explained in more detail, whether properties available for its Part 6 scheme could be made available instead for persons requiring temporary accommodation pursuant to the duty under section 193(2). It was not an issue before the judge; a court should not engage in questions about how housing stock should be allocated; and the step which the Court of Appeal proposed would have been unlawful, irrational and administratively unworkable.

35. Although Ms Imam is the respondent to the appeal, she also is not satisfied with the judgment of the Court of Appeal. As explained above, it adopted something of a middle position on the question of the relevance of resources for the exercise of the court's discretion whether to grant mandatory relief. In Ms Imam's submission, however, the discretion for a court to refuse a mandatory order where there is a breach of the duty under section 193(2) is a narrow one and, other than possibly in exceptional marginal cases, the absence of resources even in the sense of the means immediately available to a housing authority is irrelevant.

Analysis

(i) The statutory duty

36. The duty under section 193(2) is owed personally to the individual applicant and gives rise to a correlative right enforceable in judicial review proceedings: *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430, para 4 (Lord Bingham of Cornhill); *Ahmad,* para 13 (Baroness Hale); *Nzolameso v Westminster City Council* [2015] PTSR 549, para 13 (Baroness Hale). There are various questions calling for the exercise of judgment on the part of the local housing authority which can arise en route to deciding that a duty under section 193(2) is owed, such as whether accommodation available to an applicant is reasonable for them to continue to occupy (the issue considered in *Ali*); and see *Holmes-Moorhouse v Richmond upon Thames London Borough Council* [2009] UKHL 7; [2009] 1 WLR 413, paras 13-14, per Lord Hoffmann. As Lord Wilberforce said in *Din v Wandsworth London Borough Council* [1983] 1 AC 657, 663, "every allocation of priority housing to homeless persons must have the effect of deferring the hopes of persons in other categories, some of whom may have been waiting for a long time"; and generally, the choices to be made in balancing the competing interests are for the local housing authority. A local housing authority should seek to establish transparent policies as to how it plans to achieve this in a structured way and should also seek to make allowance for possible future demands on its housing stock which may be particularly pressing in nature: see the *Nzolameso* case, paras 38-41. Croydon has established the Part 6 scheme and the Part 7 policy to comply with the guidance given there. But the position arrived at in the present case is that it has been established that Ms Imam is owed the duty under section 193(2). All questions of discretionary judgment prior to that conclusion have been resolved in her favour.

37. As Lewis LJ observed (para 77), the duty owed is immediate, non-deferrable and unqualified. The precise steps to be taken to comply with the duty were not the subject of detailed submissions in the present appeal. The nature of the duty is such that it calls for the authority to go through a process of giving due consideration to the applicant's case and forming a judgment about what should be done to satisfy the obligation which has arisen. The duty under section 193(2) is to "secure" that accommodation is available for occupation by the applicant. Section 206(1) provides that this may be done by "securing" that suitable accommodation provided by the authority is available or that the applicant obtains suitable accommodation from some other person, or by giving the applicant advice and assistance such as will secure that suitable accommodation is available from some other person. All three processes, and choosing between them, may involve a period of time to allow consideration of how the "securing" of suitable accommodation may be achieved and then carrying that project into effect (for example, by giving an applicant the means or advice to secure accommodation in the private rental market).

38. Lewis LJ considered (para 77) that suitable accommodation is to be available from the time when the duty is owed. I reserve my opinion whether that way of putting it is exactly right. As I have said, we did not hear submissions on that point. But it is clear that the duty is directed towards achieving an end result (the provision of suitable accommodation) and, even if some time is required for consideration how ultimately to achieve this, it would be implicit that the end result would have to be achieved within a

reasonable time. Moreover, since the end result is intended to satisfy an urgent and important need (the provision of suitable living accommodation), a reasonable time to allow for consideration of the appropriate means to secure it would be short. It may be that a local authority has an obligation to proceed in stages, by accommodating someone with an urgent need as best can be achieved at very short notice, while taking somewhat longer to consider how better accommodation which could be regarded as suitable can be secured thereafter. It is not necessary for us to examine this issue. In the present case, Croydon has failed to fulfil its duty over almost six years. It breached its duty at a very early stage. The question, therefore, is what remedy the court should grant in relation to that breach of duty.

(ii) The court's discretion regarding relief: impossibility of complying with a mandatory order and the relevance of resources

39. The starting point is that Croydon is subject to a public law duty imposed by Parliament by statute which is not qualified in any relevant way by reference to the resources available to Croydon. In principle, if resources are inadequate to comply with a statutory duty it is for the authority to use whatever powers it has to raise money or for central government to adjust the grant given to the authority to furnish it with the necessary resources, or for Parliament to legislate to remove the duty or to qualify it by reference to the resources available. Ward LJ observed in *Aweys*, at para 52, that if local authorities are finding that fulfilment of their duties to accommodate the homeless is providing impossible, "it is for the legislature to consider whether their position can be ameliorated."

40. When it is established that there has been a breach of such a duty, it is not for a court to modify or moderate its substance by routinely declining to grant relief to compel performance of it on the grounds of absence of sufficient resources. That would involve a violation of the principle of the rule of law and an improper undermining of Parliament's legislative instruction.

41. However, remedies in public law are discretionary: see, eg, *R (Edwards) v Environment Agency* [2008] 1 WLR 1587, para 64; *De Smith's Judicial Review*, 8th ed (2018), para 18-047. The existence of a discretion as to the relief to be granted allows a court which finds that there has been a breach of a public law duty to decide, in the light of all the circumstances as appear to the court at the time it applies the law, how individual rights and any countervailing public interests should be reconciled. Although Parliament lays down a duty in statute, it does so whilst appreciating that it is a general feature of public law that some degree of adjustment might be called for by the court which decides that there has been a breach of the statute. When it legislates to lay down a public law duty, Parliament cannot be expected to anticipate with precision every factor which might bear upon the justice of a particular case which arises under it. It is a common feature of public law duties that they stipulate how a public authority should

act in circumstances where what it does will affect the interests of a range of people, not just the person bringing the claim against them.

42. Private law claims are different, since usually a remedy in that sphere in the form of damages is granted as of right. It is partly for this reason that, in the private law sphere, mandatory orders granted in equity in the form of injunctions or specific performance are also discretionary.

43. Where a remedy is discretionary, it is incumbent on a court to exercise its discretion in accordance with principle and to avoid arbitrariness. Otherwise, the rule of law would be undermined to an unacceptable degree. Where a breach of the law is established, the ordinary position is that a remedy should be granted. A court should proceed cautiously in exercising its discretion to refuse to make an order and should take care to ensure that it does so only where that course is clearly justified. But different types of order are available, and it may be that due enforcement of the law can be sufficiently vindicated by some order other than a mandatory order.

44. Different remedies have different degrees of impact on the capacity of a public authority to carry out its functions. A quashing order is the usual remedy in public law, which obliges the authority to re-take a decision in a lawful way. Such an order allows the authority to exercise its own judgment in re-taking a decision, having regard to all relevant interests affected thereby. On the other hand, a mandatory order takes a matter out of the hands of the authority and, to that extent, makes the court the primary actor. Accordingly, when deciding in the exercise of its discretion to grant a mandatory order to require the authority to do a particular thing, the court has to have regard to the way in which an order of that character might undermine to an unjustified degree the ability of the authority to fulfil functions conferred on it by Parliament and act in the public interest. The proper separation of powers may be in issue as well as enforcement of the law. The effect of this is that the ambit of the court's discretion whether to grant a mandatory order as opposed to a quashing order may be somewhat greater. If the court makes a quashing order or issues a declaration, but declines to grant a mandatory order, the matter remains in the hands of the public authority which may be best placed to take account of all interests with full relevant information about them. Having said that, the nature of a breach of a legal duty on the authority may be such as to call for the grant of mandatory relief in order to compel the authority to do what it has a clear legal duty to do.

45. Croydon relied on *Re The Bristol and North Somerset Railway Co* (1877) 3 QBD 10 as authority for the proposition that a court will not make a mandatory order to compel compliance with a statutory duty where that is impossible. In that case the defendant railway company was subject to a statutory duty to build a bridge over its track, but the company was virtually defunct, with no power of raising money to build the bridge. Cockburn CJ, at p 12, gave two reasons for declining to make a mandatory

order (mandamus): (i) it "would be idle to make this rule [for mandamus] absolute if in the end there would be no possibility of obedience to mandamus", in other words a court will not allow its process to be invoked in vain; and (ii) it could only be enforced by proceedings for contempt of court against the company's officers, but "[t]his court cannot put people in prison for not complying with an order when they have no means of doing so", that is to say, it would be unfair for the court to subject them to the possibility of punishment in this way. The latter point is illustrative of the fact that where a court issues a mandatory order, that order produces legal consequences of its own over and above those inherent in the underlying statutory duty: the order does not simply replicate the effect of the underlying duty. It is appropriate that, when deciding whether to issue a mandatory order, the court should consider whether it is right to create those additional effects in all the circumstances of the case as it presents itself to the court.

46. The process of punishment for contempt of court is a feature of the way in which a mandatory order is enforced in the private law sphere as well, and also affects the exercise of remedial discretion in that sphere. For example, in deciding whether to make an order for specific performance, a court will have regard to the additional effects which such a mandatory order may produce upon relations between the parties, by giving access to the possibility of punishment for contempt, and the order will be refused if those effects mean it would distort the underlying bargain they have made: *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 13H-14D and 15B-G per Lord Hoffmann.

47. Alongside this point of similarity, there are also significant differences between the remedial contexts in private law and public law which bear upon the approach to the exercise of the discretion whether to grant a mandatory order. In private law, damages may be available as of right in default of the grant of a mandatory order, whereas damages are not usually available in respect of breach of a public law duty and the alternative is either a quashing order or a declaration. These may not serve so well to meet the justice of the case. On the other hand, in private law one is generally only concerned about the rights and obligations of the parties inter se, whereas in public law the interests of other persons and the public interest may be in issue as well.

48. The constraint that a court should not make a mandatory order to require compliance with a statutory duty where that is impossible has been recognised in judicial dicta in a number of cases in the context of the duty to secure accommodation for the homeless: *R v Newham London Borough Council, Ex p Begum (Mashuda)* [2000] 2 All ER 72; *Aweys*, at para 65 per Arden LJ; *Codona v Mid-Bedfordshire District Council* [2005] HLR 1; *R (M) v Newham London Borough Council* [2020] PTSR 1077; see also *Slattery v Basildon BC* [2014] HLR 16, in which Briggs LJ stated (para 32) that if no accommodation is immediately available which is suitable, "the court will give the housing authority a reasonable period of time in which to find it, by acquisition, conversion, repair or in any other suitable manner". So, for example, in the

Mashuda Begum case Collins J said that a court cannot order a local housing authority "to do the impossible", and this may mean that some delay in the provision of suitable accommodation may be tolerated while the authority makes arrangements which will put itself in a position to carry out its duty; but the court will not be persuaded that it is impossible to secure suitable accommodation "unless satisfied that all reasonable steps have been taken". This was the approach adopted by the Court of Appeal in the present proceedings.

49. The limitation on issuing a mandatory order with which it is impossible to comply is well established. However, this gives rise to the questions of what qualifies as impossibility of performance in the present context and what relevance resources have to that.

50. Plainly, in the *Bristol and North Somerset Railway* case resources, or the lack thereof, were a highly material factor. And in the present case, although the Court of Appeal said the general resources available to Croydon were not relevant regarding the question whether a mandatory order should be made, it paid close attention to whether there were resources immediately available to Croydon in the form of suitably adapted accommodation.

51. There is, moreover, force in the observation that the distinction drawn between general resources and resources which are immediately available is not entirely clear. The reason Croydon may not have resources immediately available to comply with a mandatory order will reflect choices it has made in the past regarding use of its general resources; and if it does not have suitable accommodation immediately available, why should it not be expected simply to call on its general resources (perhaps by borrowing money) to adapt an existing property or to rent or buy a suitable property without delay to add to its stock of immediately available resources and comply with the order in that way? Croydon is not so bereft of means to fund this sort of acquisition as was the railway company in the *Bristol and North Somerset Railway* case, for which the impossibility of compliance appeared absolute.

52. In my view, however, when examining the question of impossibility of compliance and whether it is appropriate to grant mandatory relief, it is relevant to have regard to the additional impact of a mandatory court order referred to above. It is not just a question of what resources are available to the housing authority immediately or after a period, but also of whether, and to what extent, it would be appropriate for a court order to be made which may have the effect of disrupting existing plans for the allocation of the authority's resources. At the same time, it is the court's role to enforce the law. The issue is how to balance these various considerations.

53. It is appropriate to start with the requirements that effect be given to the will of Parliament and that the law be enforced in an appropriate manner. The Court of Appeal was right to hold that where the housing authority is in breach of its duty under section 193(2) the onus is on the authority to explain to the court why a mandatory order should not be made to ensure that it complies with its duty. In order to provide the court with reasons to justify the exercise of its discretion not to make such an order, the authority has to provide a detailed explanation of the situation in which it finds itself and why this would make it impossible to comply with an order.

54. As the Court of Appeal said, the authority has to show that it has taken all reasonable steps to perform its duty. Since it is the court which has to be satisfied that it is not appropriate to grant a mandatory order, the question whether the authority has taken all reasonable steps is an objective one for the court to determine, not a matter of application of the test of reasonableness or rationality in the *Wednesbury* sense from the perspective of the authority itself.

55. This is the point on which the Court of Appeal held that Croydon had not provided it with full assistance, specifically with regard to the properties currently available to Croydon which have been modified for wheelchair users and are suitable for middle to large-sized families such as Ms Imam's, which could be designated either for allocation pursuant to the authority's Part 6 scheme or its Part 7 policy. As the court observed, Croydon had a choice whether to assign such properties (in so far as they existed) for allocation under Part 6 or under Part 7. The court was right to emphasise that in making that choice it is relevant that allocation under Part 7 in a case like that of Ms Imam is a matter of binding legal obligation, whereas to assign a property for allocation under Part 6 is a matter of discretion (albeit, if a property is so assigned and falls to be allocated under Part 6, such allocation has to be in accordance with Croydon's Part 6 scheme).

56. A public authority which has limited resources available for use to meet its statutory duties and to fulfil functions which are merely discretionary is obliged to give priority to using them to meet its duties. This point was explained in *R v East Sussex County Council, Ex p Tandy* [1998] AC 714. The case involved a complaint that a local authority had failed to comply with its statutory duty under section 298 of the Education Act 1993 to provide a suitable education for a child with disabilities. The point in issue concerned the extent of the statutory duty to which the authority was subject rather than the form of order to be made, but similar issues arose. The authority sought to contend that the diminished provision which it made for the child was justified by the limits on its resources available to carry out all the functions imposed on it by legislation. The House of Lords, however, held that on proper construction of the statute the duty was not qualified by reference to the resources available and that it had been breached. Lord Browne-Wilkinson, giving the sole substantive judgment, said (p 749):

> "First, the county council has as a matter of strict legality the resources necessary to perform its statutory duty under section 298. Very understandably it does not wish to bleed its other functions of resources so as to enable it to perform the statutory duty under section 298. But it can, if it wishes, divert money from other educational, or other, applications which are merely discretionary so as to apply such diverted moneys to discharge the statutory duty laid down by section 298. The argument is not one of insufficient resources to discharge the duty but of a preference for using the money for other purposes. To permit a local authority to avoid performing a statutory duty on the grounds that it prefers to spend the money in other ways is to downgrade a statutory duty to a discretionary power. A similar argument was put forward in the *Barry* case [*R v Gloucestershire County Council, Ex p Barry* [1997] AC 584] but dismissed by Lord Nicholls (at p 605G-H) apparently on the ground that the complainant could control the failure of a local authority to carry out its statutory duty by showing that it was acting in a way which was *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) in failing to allocate the necessary resources. But with respect this is a very doubtful form of protection. Once the reasonableness of the actions of a local authority depends upon its decision how to apply scarce financial resources, the local authority's decision becomes extremely difficult to review. The court cannot second-guess the local authority in the way in which it spends its limited resources: see also *R v Cambridge Health Authority, Ex p B* [1995] 1 WLR 898, especially at p 906D-F. Parliament has chosen to impose a statutory duty, as opposed to a power, requiring the local authority to do certain things. In my judgment the courts should be slow to downgrade such duties into what are, in effect, mere discretions over which the court would have very little real control. If Parliament wishes to reduce public expenditure on meeting the needs of sick children then it is up to Parliament so to provide. It is not for the courts to adjust the order of priorities as between statutory duties and statutory discretions."

57. In line with this reasoning, the Court of Appeal was right to focus on the fact that Croydon owed a duty to Ms Imam which it had breached. In light of this, the Court of Appeal was also right to find that Croydon had not sufficiently explained its situation in its evidence, if it wished to avoid a mandatory order being made against it. Mr Beasley spoke only in generalities on the critical question of what suitably adapted properties

were available to Croydon and, in so far as his evidence suggested that designation of such properties for allocation under the Part 6 scheme was equivalent to designating them for use to meet Croydon's obligations under Part 7, that reflected a legal error in Croydon's approach to the use of its resources. Croydon has a discretion whether to make properties available for the purposes of allocation under its Part 6 scheme, but a duty under Part 7 of the Act to provide suitable properties to persons such as Ms Imam.

58. Against this, Croydon relies on the decision of the Court of Appeal in *Hendy*. In that case, a local authority made a closing order in relation to a flat where the applicant and his family lived which had the result that they lost Rent Act protection and were evicted and made homeless. The authority provided the family with temporary accommodation and placed them in the queue to be provided with permanent council housing when that became available. The applicant contended that temporary accommodation was not "suitable alternative residential accommodation", which was what the authority was under a duty to provide pursuant to section 39 of the Land Compensation Act 1973. He applied for a mandatory order (mandamus) directed to the authority ordering it to secure that he was provided with suitable accommodation as required by the statute. The Court of Appeal refused to grant any relief, holding that the authority had sufficiently complied with its duty under that provision by providing temporary accommodation with a view to later placement in permanent accommodation; the authority was not required to give the applicant priority in its housing list. In an obiter comment, Scarman LJ indicated that he would have refused mandamus even if the authority had been in breach of the statutory duty, saying (p 503):

> "In my judgment, if, in a situation such as this, there is evidence that a local authority is doing all that it honestly and honourably can to meet the statutory obligation, and that its failure, if there be failure, to meet that obligation arises really out of circumstances over which it has no control, then I would think it would be improper for the court to make an order of mandamus compelling it to do that which either it cannot do or which it can only do at the expense of other persons not before the court who may have equal rights with the applicant and some of whom would certainly have equal moral claims."

59. In my view, this observation by Scarman LJ does not assist Croydon in its appeal. For constitutional reasons to do with the authority of Parliament, the general position, as set out in *Aweys* and *Tandy*, is that where Parliament imposes a statutory duty on a public authority to provide a specific benefit or service, it does so on the footing that the authority must be taken to have the resources available to comply with that duty. It is not for the court to examine the position with a view to possibly arriving at a contrary conclusion. Nor is a court entitled to dilute a clear statutory duty by reference to its own view of the resources available; nor may it absolve an authority in

any general way from complying with such a duty by reason of the insufficiency (in the court's opinion) of the resources available to it. Although Scarman LJ expressed himself in general terms, to the extent that his observation is supportable as a matter of principle I think it should be read as being directed to the usual position in relation to the exercise of discretion by a court to decline to make a mandatory order by reason of unusual and unexpected constraints on the ability of the authority to act in the specific circumstances of the case before the court. Read in that way, it accords with the position adopted by the Court of Appeal in the present case.

(iii) Ms Imam's submission that the court's remedial discretion is more restricted

60. As I have explained, the Court of Appeal's approach was to examine whether Croydon had taken all reasonable steps to perform its duty, having regard to the stock of suitably adapted properties currently available to Croydon for allocation either under Part 6 or under Part 7 of the Act. But Ms Imam submits that Croydon could have diverted other resources available to it, or could have borrowed more, to buy or adapt a property suitable for her needs, and that it should be required to do this. A mandatory order should be made against Croydon whether or not it transpires it has a suitable property currently available for use.

61. In my view, however, this would be to go further than is justified, bearing in mind the appropriate balance between the role of the court and the role of a local authority. In setting the parameters within which the question of impossibility is to be assessed, one cannot wholly disentangle that issue from underlying considerations of what is the proper role of a court and what is the proper role of the authority in this context. Local authorities have many functions conferred on them, some in the form of statutory duties and others in the form of discretions (which may themselves shade into duties if circumstances arise which rationally require their exercise in particular ways). In planning its affairs and setting its budgets, an authority has to balance all the demands placed upon it by Parliament and match these with the sources of income available to it. A court cannot carry out that function itself, since it lacks the democratic authority, detailed knowledge of the range of demands and range of funding options available and the administrative expertise required for this. This was the point recognised in the statement by Lord Browne-Wilkinson in the *Tandy* case, set out above, where he noted the difficulty a court would face in reviewing a local authority's budgeting decisions.

62. Yet if a court makes a mandatory order which has the practical effect of requiring an authority to divert funding from allocations already made in its annual budget, it would unduly disrupt that balancing exercise carried out by the local authority as regards the funding for due performance of its different functions. The court cannot know with any confidence whether its order will cut across the performance of other statutory duties to which the authority is subject. The making of a mandatory order

gives the statutory duty which it reflects a super-added force, which means that the authority has to give priority to complying with it; but in circumstances where the authority might be struggling to accommodate and perform properly a range of statutory duties, this may have an unduly distorting effect upon the overall balance already struck by the authority in its previous budgeting process in an attempt to reconcile all the demands upon it. It is difficult to know whether by requiring, through the making of a mandatory order, an authority to give priority - after settling its overall budgetary allocations - to one out of the many statutory duties and functions imposed on it, the carrying out of the authority's other duties and functions will be unduly compromised. Unlike in the field of financial insolvency procedures, there is no process for imposing a moratorium on claims with a view to ensuring that they are all accommodated fairly and equally on a pari passu basis. The authority is the clearing house for meeting all the claims made upon it. A court should be careful not to exceed its own proper role by disrupting without good justification the authority's own attempt to reconcile those claims in a fair way through its ordinary budgeting process, once that has been finalised.

63. In *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1153, a mandatory order was refused on grounds which included a concern that to grant it would involve the court in dictating a result which ought properly to be left to the judgment of the public authority (in that case, the chief constable). As Lord Brightman said (p 1173F), the court should not, "under the guise of preventing the abuse of power, be itself guilty of usurping power" (see also p 1176B). Although the factual context was very different, I consider that this observation has relevance in working out the proper approach to be adopted in the present case. In *Hendy*, Stamp LJ made a similar point (p 501): "It is not, I hope and believe, every failure on the part of a local authority to carry out its duties that may be corrected by an order of mandamus. If it were so, the courts would, as I see it, be taking over the whole control of the government of this country."

64. Similarly, it is clear from other authorities that the effect which the grant of a particular form of relief might have on the due operation of an administrative process being carried on in the public interest may be relevant to the exercise of the court's remedial discretion, if it is likely to distort this to an unacceptable degree. Relevant factors include detriment to good administration (*R v Monopolies & Mergers Commission, Ex p Argyll Group plc* [1986] 1 WLR 763, 774 per Sir John Donaldson MR) and hardship and prejudice to others who have interests which ought to be taken into account by the authority (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Walters* (1997) 30 HLR 328, 381 per Judge LJ).

(iv) The proper approach to the exercise of the court's remedial discretion

65. The considerations set out above indicate that ordinarily, when judging whether particular conduct is possible or impossible for an authority for the purposes of deciding how the court's remedial discretion should be exercised, the court should refer to the

authority's position as it exists at the time of the proceedings. However, this is not an absolute rule and its application may have to be qualified in light of the specific circumstances of a particular case.

66. Five comments should be made which are relevant to the exercise of the court's discretion as to remedy in the present case. First, it may be that in setting its budget for the year Croydon has included a general contingency fund to deal with unexpected calls for expenditure. If so, consideration should be given to whether Ms Imam's need to be provided with suitable accommodation could be met out of that fund. This may be a way in which Croydon could meet its legal obligation to Ms Imam with minimal risk of disruption to the proper carrying out of its general functions. If there is such a contingency fund, Croydon should explain why it cannot be used.

67. Second, it is a factor relevant to the exercise of the court's discretion if it emerges that the authority was on notice in the past of a problem in relation to the non-performance of its duty but failed to take the opportunity to react to that in good time. The court cannot provide encouragement for what would amount to a settled position of the authority to act in disregard of the duty imposed on it by Parliament. The longer an authority with notice of the problem has sat on its hands, the more important it may be for the court to enforce the law by making a mandatory order rather than marking the unlawfulness of the authority's conduct by making a quashing order or declaration. However, since the critical decisions regarding budgeting for any necessary expenditure to meet a duty are likely to be taken at council level, an inquiry may be required to examine when the authority became aware of the problem at that level and, if they remained unaware of it at that level, why that happened.

68. Third, another relevant factor is the extent of the impact on the individual to whom the duty is owed. It is the vindication of their right which is being denied, and if the impact on them of the failure to comply with it is very serious and their need is very pressing, this may justify the court in issuing a mandatory order despite the wider potentially disruptive effects it may have. The courts below were right to consider this issue and in doing so were right to point to the fact that the degree of unsuitability of the Property was comparatively limited, though not to be disparaged: paras 25 and 30 above. The less the impact on the individual, the less compelling will be the grounds for making an immediate mandatory order with potentially disruptive effect. Instead, it may be more appropriate to make a mandatory order which is suspended for a period or a quashing order, to allow the authority time to consider its position and reflect on how best to order its affairs going forward. In cases of this nature a claimant should ordinarily adduce evidence about the impact on them, of which they have better knowledge than the authority. They have a responsibility to provide the court with relevant information to assist it in the exercise of its discretion.

69. Fourth, if there is no sign as things stand at the time the matter is before the court that the authority is moving to rectify the situation and satisfy the individual's rights, that is a factor pointing in favour of the making of a mandatory order. In such a case, the imperative to galvanise the authority into taking effective steps to meet its obligations more promptly will be stronger. Again, the courts below were right to have regard to this factor: paras 25 and 30 above.

70. Fifth, in deciding whether to make a mandatory order, a court should take care not to create a situation which is unfair to others, by giving a claimant undue priority over others who are also dependent on a local housing authority for provision of suitable accommodation and who may have an equal or better claim as compared to the claimant. In my view, the Court of Appeal was properly alert to this point. It rightly accepted that, in terms of provision of permanent council housing, Ms Imam could not be promoted above others higher up the queue for such accommodation according to the Part 6 scheme: see section 166A(14). But it also correctly relied on the distinction between the duty to provide suitable temporary accommodation to Ms Imam under section 193(2) and a mere discretion to make properties available to be used for the purposes of its Part 6 scheme. If it transpires on further investigation that Ms Imam's needs are in competition with those of others with disabilities who are also owed a duty to be accommodated in suitably adapted accommodation pursuant to section 193(2), Croydon should put proposals to the court as to how it ought to proceed and it will be for the court to decide what is the appropriate order in those circumstances.

(v) Croydon's further submissions

71. It remains to consider a number of other submissions made by Mr Kelvin Rutledge KC on behalf of Croydon. He argued that the Court of Appeal was wrong to interfere with the exercise of discretion by the judge on the basis of the resources point, as this had not been raised before him. However, in my view the Court of Appeal was right to approach the case on the basis that Croydon was in breach of duty, which it had admitted, and so the onus was on it to give reasons why it should not simply be ordered to comply with that duty. Croydon appreciated that this was a fundamental issue in the case. The Court of Appeal was entitled to examine with care the evidence Croydon put forward to answer that point and to find that the judge had not interrogated it with sufficient rigour as was required in the circumstances. In any event, the question whether Croydon had a sufficient answer to the making of a mandatory order was a question of law and the argument was fully ventilated in the Court of Appeal on the basis of the evidence filed. There has been no unfairness to Croydon.

72. Mr Rutledge complains that the Court of Appeal intruded in an inappropriate way into an area of economic and political decision-making for which Croydon, as the local housing authority, is democratically accountable. This complaint cannot be sustained. Croydon admits that it was in breach of its statutory duty under section

193(2), so the onus was on it to explain why a mandatory order should not be made. At this point, decision-making has passed from Croydon to the court. It is for the court to decide how its discretion regarding remedy should be exercised. I have explained above how the court should approach its task.

73. Mr Rutledge further submitted that for a court to make a mandatory order directed to Croydon would be unlawful, irrational or administratively unworkable. A secure tenancy cannot be granted when a property is allocated under Part 7 (see para 4 of Schedule 1 to the Housing Act 1985), and he contends that if Croydon grants Ms Imam a non-secure tenancy of the Property the effect would be to reduce her housing priority under the Part 6 scheme, with the result that Croydon and Ms Imam would be locked into a non-secure tenancy indefinitely, with disadvantages on both sides. I do not think Mr Rutledge made good his point about the effect on Ms Imam under the Part 6 scheme, but it is not necessary to reach a final view about that because in any event it does not provide an answer to Ms Imam's claim. The short point is that she is owed a duty under section 193(2) and she is entitled to call on Croydon to comply with that duty. If it does so, her present needs will be met. It is a matter of choice for her to decide whether she wishes to press for a mandatory order, taking account of whatever impact the grant of such an order in her favour might have on her prospects of being granted a secure tenancy in a suitable property allocated pursuant to Part 6 of the Act.

74. Finally, Mr Rutledge submits that even if there was an obligation on Croydon to explain why it was not using potentially suitable properties acquired or available to it for the purposes of Part 6 of the Act in order to comply with its statutory duty owed to Ms Imam under section 193(2), Mr Beasley gave a sufficient explanation in his witness statement. Mr Beasley said that in his experience temporary accommodation very rarely offers the kinds of adaptation which Ms Imam required to meet her complex needs, because it is not cost-effective to spend large sums to adapt properties for such needs when the applicant for accommodation might only live in that property for a short time.

75. In my view, this again is no answer to Ms Imam's claim. Croydon admits that it has failed to comply with its duty under section 193(2) to provide Ms Imam with suitable accommodation. Subject to the points made above, she is entitled to a remedy. It is not an answer for Croydon to say that it is expensive and not cost-effective to comply with its duty. It is legally obliged to comply. In any event, Croydon has explained that Ms Imam is some way from the head of the queue for allocation of a secure tenancy under Part 6 and the facts of the case show that she has had to be accommodated at the Property for about six years. It is by no means clear that if adaptations had been made to improve the toilet facilities at the outset that these could be described as not cost-effective. Further, it is likely that Croydon will, from time to time, have to accommodate others who need wheelchair access, including to toilet facilities on the first floor, and if the adaptations are made Croydon will be able to use the Property for them when it is vacated by Ms Imam.

Conclusion

76. For the reasons given above, I would dismiss Croydon's appeal. I would, however, also reject part of the submissions made on behalf of Ms Imam, to the effect that this court should depart from the approach adopted by the Court of Appeal regarding the grant of mandatory relief. It is common ground that the case should be remitted to the High Court for further consideration with fresh evidence. The further evidence to be filed by Ms Imam should address the matters mentioned in para 68 above. The proper approach for the court to adopt on such re-consideration of Ms Imam's claim for a mandatory order has been explained above.