

The Supreme Court provides definitive guidance on the main housing duty, its performance and enforcement

28 November 2023

Today, 28 November 2023, the Supreme Court delivered its judgment in *R (on the application of Imam) v London Borough of Croydon* [2023] UKSC 45.

This landmark appeal concerns the main housing duty that is owed to those who are homeless and the circumstances in which the courts should step in, by making a mandatory order, to compel a local authority to perform the duty owed to a particular individual.

The Court of Appeal's judgment on this case in May 2022 had caused consternation among local authorities. Lewis LJ, who gave the leading judgment in the Court of Appeal, found that the main housing duty was immediate, non-deferrable and unqualified, and budgetary constraints were not relevant to the question of whether a mandatory order was appropriate, once a local authority had accepted a main housing duty was owed to an individual and that their current accommodation was unsuitable. While the limited number of suitable properties may be relevant when assessing whether a local authority had done all it reasonably could, constraints on resources were not a reason for non-compliance with a duty imposed by Parliament.

The Court of Appeal's judgment opened the floodgates to claims for judicial review from those seeking to enforce the main housing duty owed to them, or to challenge the suitability of accommodation provided for them (for which Parliament provides a statutory mechanism through the review and appeal procedures set down in the Housing Act 1996).

In a judgment that will be welcomed by local authorities, the Supreme Court has provided definitive guidance on how the courts should approach cases of this type.

Below, we provide a summary of the Supreme Court's key findings. We will be providing further analysis on each of these findings in a series of articles over the coming days.

The main housing duty: a reasonable period of time for performance

Lord Sales (with whom Lord Lloyd-Jones, Lord Leggatt, Lord Richards and Lord Burnett agreed) held that the main housing duty is immediate, non-deferrable and unqualified; however, it is not a duty to provide accommodation immediately.

The nature of the main housing duty is such that it requires local authorities to go through a process of considering an applicant's case and forming a judgement on what should be done to satisfy the duty owed. A local authority may perform the main housing duty by securing that suitable accommodation is provided by the authority, by securing that the applicant secures accommodation from someone else, or by providing advice and assistance to the applicant so that they may secure suitable accommodation from some other person. All three processes and choosing between them may involve a period of time, as the authority will need to consider how best to secure accommodation and then carry the best option into effect.

However, the provision of suitable accommodation must be achieved within a reasonable time and, as the duty is to secure suitable accommodation for those who have none, the reasonable period of time afforded to perform the duty will inevitably be short.

Relief in public law proceedings

The starting point is that local authorities are subject to a duty imposed by Parliament that is not qualified in any way. Where a breach of the duty is established, the ordinary position is that a remedy should be granted. However, remedies are discretionary and it may be that the courts can enforce the law by some order other than a mandatory order.

The most common remedies in public law proceedings are declarations and quashing orders. Orders of this type allow a public authority to reconsider an issue in light of guidance provided by the court and to retake their decision in a lawful way. Mandatory orders are fundamentally different in their nature and effect; they take the decision out of the hands of a public authority and require the court to act as the primary decision maker.

Before making a mandatory order, the courts must have regard to the way in which a mandatory order might undermine, to an unjustified degree, the ability of the authority to fulfil functions conferred on it by Parliament and to act in the public interest.

The courts should also have regard to the fact that a mandatory order gives a statutory duty 'super-added force'. A mandatory order does not merely replicate the effect of the underlying duty; it gives rise to the possibility of punishment for contempt if it cannot be complied with. The courts will need to carefully consider whether it is appropriate to make a mandatory order, which would open an authority up to contempt proceedings if they cannot comply within the time period specified in the order.

The relevance of resources

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.

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 will unduly disrupt the balancing exercise carried out by the local authority as regards the funding for due performance of its different functions.

Consequently, the courts must have regard to the disruptive effect of a mandatory order for an authority's plans for the allocation of its resources to meet all the functions and duties imposed on it by Parliament.

However, the courts are entitled to enquire whether, when settling its budget, the authority included a general contingency fund to deal with unexpected calls for expenditure; if it has, consideration should be given to using some of that contingency to perform the duty.

The claimant's submission that Croydon should be required to divert other resources, or borrow more, to purchase or adapt a property suitable for her needs was firmly rejected.

The test to be applied and relevant factors

Local authorities must provide a detailed explanation of the circumstances they find themselves in and why this would make it impossible to comply with a mandatory order. They must prove to a court that they have taken all reasonable steps to comply with their duty. The question of whether all reasonable steps have been taken is one for the court to determine, applying an objective standard.

Resources are relevant to whether a particular step is reasonable and, consequently, whether compliance with a mandatory order would be possible or impossible.

The extent of the impact on the individual to whom the duty is owed is highly relevant. Where the breach is very serious and their need is very pressing, a mandatory order may be justified, even if it would have a significant disruptive effect on the authority; conversely, the less serious the impact, the less compelling the grounds for making a mandatory order will be.

The impact of a mandatory order on those not before the court but who are also dependent upon the authority for accommodation, and who may have an equal or better claim to the authority's limited resources, is also relevant. The court should not make a mandatory order where it would give rise to unfairness or cause hardship to others.

Local authorities may be expected to explain in their evidence when they were put on notice of a problem in relation to non-performance of a duty, and the court may be more inclined to grant relief where they had an opportunity to respond in good time but failed to do so; similarly, whether the authority is moving to rectify the situation and satisfy the duty owed is relevant to the issue of relief.

The use of Part 6 stock to perform Part 7 duties

The Supreme Court affirmed the Court of Appeal's finding in *Elkundi* that local authorities should be expected to explain how they allocate their own stock for allocation pursuant to their Part 6 scheme or Part 7 policy, and whether they had properties which they had designated for allocation under Part 6 which could be used to perform their Part 7 duties.

The Supreme Court observed that allocation under Part 7 is a matter of binding legal obligation, whereas allocation under Part 6 is a matter of discretion.

The practical consequence of the Supreme Court's findings on this issue is that local authorities will need to consider, very carefully, whether they can justify reserving stock for allocation in accordance with their Part 6 scheme where they owe duties to Part 7 applicants which are not being performed.

Conclusion

While this judgment is undoubtedly good news for local authorities, it does require careful consideration and may necessitate changes to local authorities' Part 6 schemes and Part 7 policies (and the allocation decisions as between Part 6 and Part 7 that sit above those policies). We will be considering the practical implications of the court's judgment and publishing further commentary and advice for our clients over the coming few days.

Kelvin Rutledge KC and Riccardo Calzavara of Cornerstone Barristers appeared for London Borough of Croydon in this appeal, instructed by Victoria Searle and Matthew Alderton of Browne Jacobson.

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