

Suitability of Accommodation



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INTRODUCTION

1. This seminar will examine the legal framework governing suitable accommodation under the homelessness legislation in England and Wales with a view to identifying likely challenges to decision-making in the area. This requires consideration of not only the physical characteristics of the property offered, but also its tenure and location.

DISCHARGE OF DUTY

2. If the authority are satisfied that an applicant is homeless, eligible for assistance and in priority need, and that he did not become homeless intentionally, they shall secure that accommodation is available for his occupation: s.193(2). The main housing duty is triggered as soon as an authority are satisfied that all four components required to activate the duty are in place.
3. Once an authority are under a full housing duty (as opposed to limited duty – e.g. s.190), that duty can only come to an end if one of the events set out in s.193(5)-(7F) occurs: *Griffiths v St Helens Council* [2006] EWCA Civ 160; [2006] H.L.R. 29. This includes the use of the private sector by permitting authorities to discharge the main homelessness duty by making a private rented sector offer (“PRSO”) which does not require an applicant’s consent: s.193(7AA). Further, an authority can, if it is not reasonably practicable to secure accommodation in their own district, discharge their duty owed by providing accommodation out-of-district: s.208(1).
4. Any accommodation secured in discharge of that duty, whether within an authority’s district or out-of-district, must be suitable: s.206(1). In determining whether accommodation is suitable, authorities are required to have regard to Parts 9 and 10, Housing Act 1985 (slum clearance and overcrowding) and to Parts 1-4, Housing Act 2004 (housing conditions, licensing of houses in multiple occupation, selective licensing of other residential accommodation and control provisions): s.210(1). This list of considerations is not exhaustive. There are also additional requirements if the offer is a PRSO and/or if it is out of the authority’s district.

HOUSING STANDARDS

5. In deciding whether accommodation is suitable, an authority must have regard to the provisions in the Housing Acts 1985 and 2004 on slum clearance, overcrowding and houses in multiple occupation: s.210(1).
6. Additionally, in Wales, regard must be had to Part 1, Housing (Wales) Act 2014 (landlord licencing).
7. An authority is not prevented from using overcrowded or hazardous property or an HMO which falls below standard: *Harouki v Kensington & Chelsea RLBC* [2007] EWCA Civ 1000, [2008] HLR 16. The English Code of Guidance para 17.15 recommends that, when determining the suitability of accommodation, authorities should, as a minimum, ensure that all accommodation is free of category 1 hazards under Housing Act 2004 Part 1.
8. A stark illustration of suitability in the context of overcrowding is to be found in *R v Camden LBC ex p Jibril* (1997) 29 HLR 785, QBD, where an offer of a five-bedroom house with only one toilet to a family of 12 was held to be within the 'margin of appreciation' of that which an authority could consider suitable.

SUITABILITY REGULATIONS

6. The Secretary of State has power to specify circumstances in which accommodation is (or is not) to be regarded as suitable and to specify other matters to be taken into account or disregarded: s.210(2), HA 1996. In Wales, the same power is given to the Welsh Ministers: s.59(3), H(W)A 2014.

AFFORDABILITY

England

7. In England, authorities are obliged to consider affordability when assessing suitability: Homelessness (Suitability of Accommodation) (England) Order 1996 SI No 3204.
8. This requires the authority to consider:
 - a) the financial resources available to the person;

- b) the costs of the accommodation;
 - c) payments being made under a court order to a spouse or former spouse;
 - d) any payments made to support children, whether under a court order or under the Child Support Act 1991; and
 - e) the applicant's other reasonable living expenses.
9. See the English Code of Guidance paras.17.45–17.46. The authority can take into account all forms of income (including social security benefits of all kinds, not just housing benefit/housing element of universal credit): *Samuels v Birmingham City Council* [2015] EWCA Civ 1051; [2015] HLR 47.
10. The English Code does not directly address the impact of the "benefit cap" (s.96, Welfare Reform Act 2012), although government policy is for Discretionary Housing Payments to be used to cover any shortfall between the contractual rent and the housing benefit/housing element of universal credit: see DWP Circular HB/CTB G6/12 – Annex A, June 2012.

Wales

11. Supplementing the requirement to consider affordability in s.59(2), H(W)A 2014, the Welsh Code para.19.26 provides a detailed list of factors to be taken into account when conducting that assessment consisting primarily of income from salary etc. and outgoings such as accommodation costs like utilities and council tax, but also including e.g. payments made to a spouse under a court order or the cost of special dietary requirements.

BED AND BREAKFAST

England

12. The Homelessness (Suitability of Accommodation) (England) Order 2003 SI No 3326 (appendix B), limits the use of bed and breakfast accommodation. Where it is provided to families (including pregnant women), it is not to be regarded as suitable, unless there is no other accommodation available and then only for a period not exceeding six weeks (or periods not exceeding six weeks in total).

13. Bed and breakfast accommodation is defined in Art.2 of the Suitability Order 2003 as accommodation (whether or not breakfast is provided) which is not separate and self-contained and in which more than one household share one or more of the following:

- a) a toilet;
- b) personal washing facilities; or
- c) cooking facilities.

14. Accommodation owned or managed by an authority, a registered provider of social housing or a voluntary organisation (meaning a body – other than a public or local authority – whose activities are not carried on for profit: s.180(3)) is exempt from the prohibition.

Wales

15. Similar restrictions apply in Wales: Homelessness (Suitability of Accommodation) (Wales) Order 2015, SI 2015/1268. Bed and breakfast or shared accommodation will be unsuitable for a person who is, or who may be, in priority need unless:

- a) offered in response to an emergency (e.g. fire, flood) and no other accommodation is reasonably available;
- b) the applicant has been offered other suitable accommodation but has chosen bed and breakfast; or
- c) it is used for less than a fixed period (two weeks, or six weeks if the accommodation meets a “higher standard”, as defined in the Schedule to the Order, taking into account, *inter alia*, room size, heating facilities, storage facilities, toilet and washing facilities).

LOCATION

England

16. The Homelessness (Suitability of Accommodation) (England) Order 2012 SI No 2601 art 2, requires the authority to consider the location of accommodation, including:

- a) where it is outside the authority’s own area, its distance from that area (an issue dealt with in the session on out-of-area placements);

- b) the significance of any disruption to employment, caring responsibilities or education;
 - c) proximity and accessibility to medical facilities and other support which is currently used by or provided to the applicant or a member of his or her household and which is essentially to that person's well-being; and,
 - d) proximity and accessibility to local services, amenities and transport.
17. Regard should be had to the Supplementary Suitability Guidance ("SSG") 2012, which provides considerable assistance in the proper approach to the categories above including possible relevant factors which need consideration: e.g. at para 47, it makes plain that the location of accommodation is judged from the point of view of all members of the household and at para 49 authorities are urged to seek accommodation as close as possible to previous accommodation.

Wales

18. The Homelessness (Suitability of Accommodation) (Wales) Order 2015 SI 2015/1268, requires Welsh authorities to take into account the following additional matters when considering suitability of accommodation for a person in priority need:
- a) the specific health needs of the person;
 - b) the proximity and accessibility of the support of the family or other support services; and
 - c) any disability of the person;
 - d) the proximity and accessibility of medical facilities, and other support services which—
 - i. are currently used by or provided to the person; and
 - ii. are essential to the well-being of the person;
 - e) where the accommodation is situated outside the area of the authority, the distance of the accommodation from the area of the authority;
 - f) the significance of any disruption which would be caused to the employment, caring responsibilities or education of the person by the location of the accommodation; and

- g) the proximity of alleged perpetrators and victims of domestic abuse.



PRIVATE RENTED SECTOR OFFERS

9. A PRSO is an offer of an assured shorthold tenancy with a minimum 12 month term. If the household becomes unintentionally homeless within two years of taking the tenancy then the reapplication duty applies, regardless of whether the applicant has a priority need: s.195A(1).
10. To end the main homelessness duty with a private rented sector offer, the applicant must be informed in writing of the following matters set out in s.193(7AB):
- a. the possible consequences of refusal or acceptance of the offer;
 - b. that the applicant has the right to request a review of the suitability of the accommodation; and
 - c. the effect under s.195A of a further application to the authority within two years of acceptance of the offer (the 'reapplication duty').
11. The discretion to arrange a private rented sector offer is a power, not a duty, and as such, authorities should not seek to rely on the power in all cases. Authorities should consider whether to arrange a private rented sector based on the individual circumstances of the household and undertake to develop clear policies around its use.
12. With regard to standards of accommodation and suitability for private rented sector offers, the Homelessness (Suitability of Accommodation) (England) Order 2012, SI No. 2601, sets out the circumstances a PRSO will not be regarded as suitable. Art.3 provides that accommodation shall not be regarded as suitable where one or more of the following apply:
- (a) the local housing authority are of the view that the accommodation is not in a reasonable physical condition;
 - (b) the local housing authority are of the view that any electrical equipment supplied with the accommodation does not meet the requirements of Schedule 1 to the Electrical Equipment (Safety) Regulations 2016;
 - (c) the local housing authority are of the view that the landlord has not taken reasonable fire safety precautions with the accommodation and any furnishings supplied with it;

(d) the local housing authority are of the view that the landlord has not taken reasonable precautions to prevent the possibility of carbon monoxide poisoning in the accommodation;

(e) the local housing authority are of the view that the landlord is not a fit and proper person to act in the capacity of landlord, having considered if the person has:

(i) committed any offence involving fraud or other dishonesty, or violence or illegal drugs, or any offence listed in Schedule 3 to the Sexual Offences Act 2003 (offences attracting notification requirements);

(ii) practised unlawful discrimination on grounds of sex, race, age, disability, marriage or civil partnership, pregnancy or maternity, religion or belief, sexual orientation, gender identity or gender reassignment in, or in connection with, the carrying on of any business;

(iii) contravened any provision of the law relating to housing (including landlord or tenant law); or

(iv) acted otherwise than in accordance with any applicable code of practice for the management of a house in multiple occupation, approved under section 233 of the Housing Act 2004;

(f) the accommodation is a house in multiple occupation subject to licensing under section 55 of the Housing Act 2004 and is not licensed;

(g) the accommodation is a house in multiple occupation subject to additional licensing under section 56 of the Housing Act 2004 and is not licensed;

(h) the accommodation is or forms part of residential property which does not have a valid energy performance certificate as required by Energy Performance of Buildings (England and Wales) Regulations 2012

(i) the accommodation is or forms part of relevant premises which do not have a current gas safety record in accordance with regulation 36 of the Gas Safety (Installation and Use) Regulations 1998; or

(j) the landlord has not provided to the local housing authority a written tenancy agreement, which the landlord proposes to use for the purposes of a private

rented sector offer, and which the local housing authority considers to be adequate.



13. To determine whether or not accommodation meets the requirements set out in Article 3 housing authorities are advised to ensure it is visited by a local authority officer or someone acting on their behalf able to carry out an inspection. Attention should be paid to signs of damp or mould and indications that the property would be cold as well as to a visual check made of electrical installations and equipment (for example; looking for loose wiring, cracked or broken electrical sockets, light switches that do not work and appliances which do not appear to have been safety tested).

Wales

14. Additionally, under the Welsh Suitability Order, Part 3, the authority may not consider private rented sector accommodation as suitable if any of the following applies.
- a) The authority is of the view that the accommodation is not in a reasonable physical condition.
 - b) The authority is of the view that the accommodation does not comply with all statutory requirements (such as, where applicable, requirements relating to fire, gas, electrical, carbon monoxide and other safety; planning; and licences for houses in multiple occupation).
 - c) The authority is of the view that the landlord is not a fit and proper person within the meaning of s.20, H(W)A 2014, to act in the capacity of landlord.

OUT-OF-AREA PLACEMENT

15. So far as reasonably practicable local housing authorities are required to secure that accommodation is available to applicants within their own district: s.208(1), Housing Act 1996.
16. The Homelessness (Suitability of Accommodation) (England) Order 2012, SI No. 2601, Article 2 requires authorities, when determining whether accommodation is suitable, to take into account the location of the accommodation. This applies to all offers of accommodation, including any placement out of the authority's district.
17. This factors identified by Article 2 as relevant include:
- a. the distance of the accommodation from the district of the authority;

- b. the significance of any disruption which would be caused by the location of the accommodation to the employment, caring responsibilities or education of the applicant or members of his household;
- c. the proximity and accessibility of the accommodation to medical facilities and other support which are currently used by or provided to the applicant or his household and are essential to their well-being;
- d. the proximity and accessibility of the accommodation to local services, amenities and transport.

18. The Code of Guidance provides:

- a. where accommodation which is otherwise suitable and affordable is available nearer to the authority's district than the accommodation which it has secured, the accommodation which it has secured is not likely to be suitable unless the authority has a justifiable reason or the applicant has specified a preference (para.17.49);
- b. generally, where possible, authorities should try to secure accommodation that is as close as possible to where an applicant was previously living. Securing accommodation for an applicant in a different location can cause difficulties for some applicants. Local authorities are required to take into account the significance of any disruption with specific regard to employment, caring responsibilities or education of the applicant or members of their household. Where possible the authority should seek to retain established links with schools, doctors, social workers and other key services and support (para.17.50);
- c. in assessing the significance of disruption to employment, account will need to be taken of their need to reach their normal workplace from the accommodation secured (para.17.51);
- d. in assessing the significance of disruption to caring responsibilities, account should be taken of the type and importance of the care household members provide and the likely impact the withdrawal would cause. Authorities may want to consider the cost implications of providing care where an existing care arrangement becomes unsustainable due to a change of location (para.17.51);

- e. authorities should also take into account the need to minimise disruption to the education of young people, particularly at critical points in time such as leading up to taking GCSE (or their equivalent) examinations (para.17.52);
 - f. regard must be had to whether an applicant can receive the same level of medical care or support away from the district. Support includes support provided by relatives or groups that could not be replicated in another location (para.17.54);
 - g. where possible, authorities should avoid placing applicants in accommodation away from public transport, shops and other facilities (para.17.55).
19. In *Nzolameso v City of Westminster* [2015] UKSC 22; [2015] H.L.R. 22 Baroness Hale, in giving guidance on how local authorities discharge their duty to secure provision of accommodation under Part 7, stated:

‘39 Ideally, each local authority should have, and keep up to date, a policy for procuring sufficient units of temporary accommodation to meet the anticipated demand during the coming year. That policy should, of course, reflect the authority’s statutory obligations under both the 1996 Act and the Children Act 2004. It should be approved by the democratically accountable members of the council and, ideally, it should be made publicly available. Secondly, each local authority should have, and keep up to date, a policy for allocating those units to individual homeless households. Where there was an anticipated shortfall of “in borough” units, that policy would explain the factors which would be taken into account in offering households those units, the factors which would be taken into account in offering units close to home, and if there was a shortage of such units, the factors which would make it suitable to accommodate a household further away. That policy too should be made publicly available.’

20. Such a procurement and allocation policy for temporary accommodation under Part 7 enables applicants to understand how such accommodation is allocated and what factors are taken into account when an authority make their decision. The absence of adopting these policies results in the level of demand being unknown and how any such accommodation is allocated lacking transparency. Openness and transparency is the purpose for adopting such policies, so that any homeless applicant knows what is available and how it is allocated. It is simply no longer sufficient for an authority to rely upon the unspecified ‘general housing circumstances in their district’ as justification for a decision.

21. In *Alibkhiat v Brent LBC* [2018] EWCA Civ 2742; [2019] HLR 15 the Court held that an authority are not under a duty to explain why an applicant is being offered accommodation outside their district at the time the offer is made. In some cases, consideration of the timescale for making an offer of accommodation outside an authority's district is relevant. If, for example, an authority are aware that a development of affordable housing in their district is nearing completion, it may be relevant to whether they should make an offer of accommodation outside their district or wait until the development has been completed; in the respondent authority's case, there was a constant shortage of housing; if an authority decide to discharge their duty by making a private rented sector offer, they do not have to wait in the hope that accommodation in their district, or nearby, might become available.

OTHER CONSIDERATIONS

22. In *R v Brent LBC ex p Awua* [1996] 1 AC 55, (1995) 27 HLR 453, HL, it was said that suitability is primarily a matter of space and arrangement, but that other matters, such as whether the applicant can afford the rent may also be material. In practical terms, the use of the phrase "primarily" is probably redundant – suitability is decided on the facts and the weight to be attached to them is for the authority. These considerations must be considered compositely: *R v Lewisham LBC ex p Dolan* (1992) 25 HLR 68, QBD.

23. *Personal circumstances* - In deciding the question of suitability, the authority must consider the individual needs of the applicant and his or her family, including needs as to work, education and health: *R v Newham LBC ex p Sacupima* (2000) 33 HLR 1, QBD and (2000) 33 HLR 2, CA.

24. *Fleeing abuse* – The applicant's fears of domestic violence are also relevant: *R v Haringey LBC ex p Karaman* (1996) 29 HLR 366, QBD; *Slater v Lewisham LBC* [2006] EWCA Civ 394, [2006] HLR 37 at [30]. In assessing the suitability of any accommodation the Code advises: "Account will need to be taken of any social considerations relating to the applicant and their household that might affect the suitability of accommodation, including any risk of violence, racial or other harassment in a particular locality. Where domestic violence or abuse is involved and the applicant is not able to stay in the current home, housing authorities may need to consider the need for alternative accommodation whose location can be kept a secret and which has security measures and staffing to protect the occupants."

25. *Refugees* – In *R v Brent LBC ex p Omar* (1991) 23 HLR 446, QBD a political refugee was offered accommodation in a basement flat in an estate. The condition of the premises and the layout of the estate strongly reminded the applicant of the prisons in which she had been held and abused, to such an extent that she maintained that she would rather commit suicide than live there. The court held that the accommodation must be suitable for the person to whom the duty was owed, in determining which the authority should have regard to the relevant circumstances of the applicant as well as to the matters set out in s.210, HA 1996.
26. *Public sector equality duty* – In *Poshteh v RB Kensington & Chelsea* [2015] EWCA Civ 711; [2015] H.L.R. 36 (upheld on appeal to the Supreme Court on different grounds), McCombe LJ observed that the reviewing decision-maker:
- “...conscientiously recognised the public sector equality duty ... and was at pains to acquire all information that appeared to him to be necessary for that purpose. In particular, he considered the important question of the likely effect of Ms Poshteh’s particular disability on whether it was reasonable for her to accept this offer of accommodation that had been made.”
27. In *Haque v Hackney LBC* [2017] EWCA Civ 4; [2017] HLR 14 it was held where a person has a disability (or other protected characteristic under the Equality Act 2010), then the "public sector equality duty" in s.149 of that Act requires the authority: (i) to recognise that the appellant has a disability; (ii) to focus on specific aspects of his impairments to the extent that they are relevant to the suitability of the accommodation; (iii) to focus on the disadvantages he might suffer when compared to a person without those impairments; (iv) to focus on his accommodation needs arising from those impairments and the extent to which the accommodation meets those needs; (v) to recognise that the appellant’s particular needs might require him to be treated more favourably than a person without a disability; and, (vi) to review the suitability of the accommodation, paying due regard to those matters.
28. One issue that consistently arises in the context of suitability and the PSED is the extent to which the need to consider treating a disabled person more favourably forms an inherent part of the statutory scheme. The role of the PSED in a priority need case is plainly of less import than in a non-priority case precisely because the scheme looks to treat those with a disability more favourably. The same simply cannot be said of suitability of accommodation where all those owed a duty are on an equal footing when it comes to their needs being met.

29. *Family* – An authority has a wide discretion to determine who is within an applicant’s household: *R (Ariemuguvbe) v London Borough of Islington* [2009] EWCA Civ 1308. A local authority must take an integrated approach to the assessment of the housing needs and risks of a disabled child living in unsuitable private rented accommodation. The housing department must take into account the recommendations of a child and family assessment carried out by social services, and actively promote the welfare of a child in need as required by the Children Act 2004 s.11. The s.11 duty applies to the local authority as a whole, and not just to the social services department: *R. (J) v Hillingdon LBC* [2017] EWHC 3411 (Admin); (2018) 21 C.C.L. Rep. 144.
30. *Racial harassment* – Issues of racial harassment and violence are also relevant: see e.g. *R v Tower Hamlets LBC ex p Abdul Subhan* (1992) 24 HLR 541, QBD; see also *R v Southwark LBC ex p Solomon* (1994) 26 HLR 693, QBD.
31. *Separating households* – Accommodation which split a family between two hostels was held not to be suitable in *R v Ealing LBC ex p Surdonja* (1998) 31 HLR 686, QBD cf. *Camden LBC v Sharif* [2013] UKSC 10; [2013] HLR 16 where the accommodation was two separate flats in the same building.
32. *Adaptations* – The suitability of accommodation offered by an authority pursuant to s.193(2), HA 1996 is not to be judged exclusively by reference to the condition of the accommodation at the time of the offer, so regard may be had to proposed adaptations or alterations provided that the proposals can fairly be regarded as certain, binding and enforceable; adaptations that are proposed after the date of the offer are, however, irrelevant to the question of suitability: *Boreh v Ealing LBC* [2008] EWCA Civ 1176, [2009] HLR 22 at [31].

ENQUIRIES

33. Although there is no explicit statutory duty to enquire into questions of suitability, it is implicit and the principles applicable to enquiries under s.184, HA 1996 also apply to enquiries as to suitability: *R v Islington LBC ex p Thomas* (1997) 30 HLR 111, QBD.
34. Of particular relevance in this context will be enquiries where issues of disability under s.149, Equality Act 2010 and/or children under s.11, Children Act 2004 are concerned: see *Pieretti v Enfield LBC* [2010] EWCA Civ 1104; [2011] H.L.R. 3. Section 11, Children Act 2004 is particularly relevant in the context of out-of-area placements: see *Nzolameso v Westminster CC* [2015] UKSC 22; [2015] H.L.R. 22 and, most recently,

R (E) v Islington LBC [2017] EWHC 1440 (Admin), which will be addressed in detail in the plenary session on out-of-area placements.



35. In terms of the public sector equality duty under s.149, Equality Act 2010, it is now clear that where a real possibility exists on the face of the evidence that a person is disabled, an authority is obliged to conduct enquiries into the relevance of that disability to the function in issue: *Birmingham CC v Wilson* [2017] H.L.R. 4; *Pieretti*; and *Haque*.

VIEWING PROPERTY

36. There is no requirement that authorities provide applicants with an opportunity to view and comment on the suitability of any accommodation before moving into it or before a decision is made on its suitability: *Khatun v Newham LBC* [2004] EWCA Civ 55, [2004] HLR 29. It is not oppressive, perverse or disproportionate to the fair and efficient administration of Part 7 for an authority to require an applicant who has not viewed a property to decide whether or not to accept it on pain of immediate cancellation of his or her current accommodation if he or she does not do so, as applicants can challenge suitability by internal review after moving in.
37. Be aware, however, of the role of the authority as a service provider, which includes the provision of a service in the exercise of a public function for the purposes of Part 3, Equality Act 2010. If it is correct that the provision of homelessness assistance is a “service” in the exercise of a public function, that would give rise to a need, in these types of cases, to make reasonable adjustments under s.20, EA 2010. If a person with a disability would be placed at a substantial disadvantage by the authority failing to permit a viewing or failing to provide sufficient time for an offer to be accepted then a claim for discrimination may be available (subject to a request for the adjustment etc.): Sch.2, para 2, EA 2010.

CHALLENGES TO SUITABILITY

38. *Review and appeal* - Challenge to the suitability of an offer is by review under s.202, HA 1996 (s.85, H(W)A 2014) and appeal under s.204 (s.88, H(W)A 2014). The right to seek a review may be exercised whether or not the applicant has accepted the offer of accommodation: s.202(1A).
39. An issue arises where a property which may have been suitable originally becomes unsuitable owing to a change of circumstance. There are degrees of suitability so that accommodation which may not be suitable in the medium or long term may be suitable

as short-term accommodation: *Ali v Birmingham City Council* [2009] UKHL 36; [2009] 1 W.L.R. 1506; [2009] H.L.R. 41. In *Kannan v Newham LBC* [2019] EWCA Civ 57; [2019] H.L.R. 22 it was held that although the flat might have been suitable for the appellant in the short term for the purposes of Pt 7 of the 1996 Act, by the time of the review decision, the appellant had been in it for over a year and the reviewing officer had taken no account of the passage of time. The right to seek a review is time constrained (i.e. a review must ordinarily be sought within 21 days of the authority notifying the applicant of their “decision”: s.202(3). However, suitability is not a decision fixed in time – it is an ongoing “decision” in that authorities must consider any changes in circumstances which occur while they are discharging their duty: *R (Zaher) v Westminster CC* [2003] EWHC 101 (Admin), [2003] JHL D41.



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