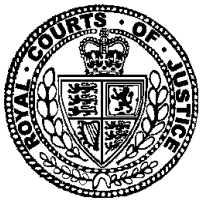

Neutral Citation Number: [2022] EWCA Civ 1370

Case No: CA-2022-000181

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE COUNTY COURT AT CENTRAL LONDON
HIS HONOUR JUDGE RICHARD ROBERTS
H40CL195

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 October 2022

Before:

LORD JUSTICE ARNOLD
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE NUGEE

- -

Between:

SHELLETT ROWE

Appellant

- and -

LONDON BOROUGH OF HARINGEY

Respondent

- -

Toby Vanhegan, **Justin Bates** and **Siân McGibbon** (instructed by **Lawstop**) for the **Appellant**
Nicholas Grundy QC and **Jennifer Moate** (instructed by **London Borough of Haringey Legal Services**) for the **Respondent**

Hearing date: 5 July 2022

- -

This judgment was handed down remotely at 10.30am on 21 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Approved Judgment

Lord Justice Stuart-Smith:

Introduction

1. This is a second appeal, brought with permission granted by Dingemans LJ, arising out of the Respondent Council's refusal of the Appellant's application for housing assistance. As will appear in more detail below, the Appellant appeals against the order of HHJ Roberts dated 20 January 2022 by which he dismissed her appeal against the Respondent's review decision dated 23 June 2021.

2. The three grounds of appeal, which I set out at [13] below, raise two main questions. First, on the assumption that Part X of the Housing Act 1985 ["HA 85"] applies when deciding whether it was reasonable for the Appellant to continue her occupation of her existing accommodation, should the question of overcrowding have been decided by reference to the whole of the property in which she was living and of which her accommodation formed part? Second, what (if anything) is the relationship between the concept of reasonableness for the purposes of deciding if a person is homeless and the concept of suitability for the purposes of a local authority discharging its duty to provide suitable accommodation to a homeless person?

The Factual Background

3. The Appellant lives with her two young children in a multi-occupancy house in Haringey ["the House"]. She and her children have exclusive use of one room ["the Appellant's Accommodation"] and shared use of communal facilities, namely a kitchen and a bathroom ["the Communal Facilities"]. The Communal Facilities are shared with four other adults. The House is a House in Multiple Occupation ["HMO"] within the meaning of section 254 of the Housing Act 2004 ["HA 04"] and is not licensed.

4. In March 2021 the Appellant applied to the Respondent for housing assistance on the basis that she was homeless because it was not reasonable for her to continue her occupation of the House. Her stated reason for contacting the Respondent was that she was overcrowded in her current home. In the course of its enquiries the Respondent recorded in its case notes the Appellant's evidence that she did not feel comfortable with one of the tenants living in the House because he reported to the landlord that her children "keep running around and going into the kitchen." The notes recorded that the Appellant felt "safe but not comfortable".

5. The Respondent rejected the Appellant's application on 31 March 2021 on the basis that she was not homeless because she had accommodation which it was reasonable for her to continue to occupy, this being the relevant criterion laid down by s. 175(3) of the Housing Act 1996 ["HA 96"]. The Respondent recorded the representation made by the Appellant and others that it was unreasonable for her to occupy the Accommodation because she occupied a room with her two sons. The Respondent's reasons for rejecting this representation included that:

    i) The Appellant was occupying a room in a shared house which was of suitable size for her and her two boys. She was not overcrowded under the space standard set out in the HA85. "The reason for this is because both your children

are under the age of 10 and therefore they can share a room with you, as you are a single adult household"; and

ii) The Appellant had advised that she did not feel comfortable because "one … tenant at the property reported to the landlord that [her] children keep running around. [She] confirmed that, although [she felt] uncomfortable, [she did] not feel at risk in [her] home".

6. At the Appellant's request, the Respondent reviewed its decision. The submissions made on the Appellant's behalf by her solicitors were that (a) her current accommodation was "unsuitable for her needs and unreasonable for her and her children to occupy" for the reasons they then set out and (b) the House was in a state of disrepair. The reasons did not refer to the fact of the House being an HMO (licensed or otherwise) and advanced no specific case on overcrowding save that the Appellant felt her children were uncomfortable spending any long period in the House and that they did not want to be in the bedroom because of the lack of space which made them unhappy.

7. On 23 June 2021, the Respondent upheld its decision. The information available to the reviewing officer included photographs of the property, one of which showed the size and layout of the Appellant's Accommodation. Under the sub-heading "Reasonableness for you to continue to occupy accommodation at [the House]," the Respondent dealt with the condition of the property, its size, and the presence of other residents. In relation to the size of the Appellant's Accommodation the reviewer said:

> "11. You currently occupy a room in a shared house which is of suitable size for you and your … boys. You are not overcrowded it is reasonable for you and household occupy under the space standards set out in the Housing Act 1985 [sic]. The reason for this is because both your children are under the age of 10 and therefore they can share a room with you, as you are a single adult household.
>
> 12. Given the above, I am satisfied that the accommodation is reasonable for you to continue to occupy in terms of its size. This is especially the case as there is no evidence that the size of the accommodation has had any significant impact on you and your children."

8. Turning to the other residents, the reviewer recorded in paragraph 13 of the decision the Appellant's evidence that she did not feel comfortable (because once a tenant had reported to the landlord that the children keep running around) but did not feel at risk. The Appellant was able to carry out all day-to-day activities and was able to take the children to play in the local park. Given the features identified in the review decision, the reviewer was satisfied that it was reasonable for the Appellant to continue to occupy her Accommodation.

9. The Appellant appealed to the County Court relying on 7 grounds of appeal. Grounds 2, 3 and 4 as originally advanced challenged the rationality and lawfulness of the Respondent's consideration of a number of issues including overcrowding. As presented in the Skeleton Argument for the hearing the grounds were elided to some extent. For present purposes it is sufficient to record the Appellant's submissions that:

i) The conclusion that the House is not overcrowded was erroneous as a matter of law. The Respondent had failed to make enquiries to determine how many other households or individuals occupied the House; and without making those enquiries it was not possible to consider whether the House as a whole was overcrowded by reference to either the space standard or the room standard set out in sections 325-326 of HA 85;

ii) The Respondent had failed to consider both the space standard and the room standard. It was the Appellant's case that the Respondent had given no consideration to the room standard when assessing whether the Appellant's Accommodation was overcrowded;

iii) The Respondent had failed to consider that the House is an unlicensed HMO as defined. This was alleged to be an enquiry that no reasonable authority could have failed to regard as necessary;

iv) The Respondent failed to consider whether it was reasonable that the Appellant and her two young children should share kitchen and bathroom facilities with other residents who were not part of their household, not known to them and who (it was asserted) make the children feel uncomfortable.

10. Ground 7 asserted a failure to make enquiries that adds little or nothing to the allegations advanced under Grounds 2, 3 and 4. It is not necessary to refer to the other grounds in any detail.

11. The Respondent submitted that the word "dwelling" in section 325(1) of HA 85 referred to the Appellant's Accommodation and not to the House as a whole. Whether other occupants of the house were overcrowded in their accommodation was submitted to be irrelevant to the Appellant. It was plain from the evidence that the reviewing officer had properly had regard to the photograph which showed that the Appellant's Accommodation was 110 sq. ft. or more and that occupation by the Appellant and her two young sons was permitted both in accordance with the room standard and the space standard. It also submitted that it was plain from the terms of the review decision that the reviewing officer had taken into account the lack of detrimental impact on the Appellant and her children.

12. On 20 January 2022, HHJ Roberts dismissed the Appellant's appeal. In summary on the issues that are relevant to the present appeal he held that:

i) By reason of section 3 of the Housing Act 1988 ["HA 88"], the Appellant's Accommodation was deemed to be a dwelling-house let on an assured tenancy. That answered the question of what constituted a dwelling for the purposes of s. 325 HA 85: the Judge held that it would be illogical for the Appellant's tenancy to be a dwelling house for the purposes of HA 88 but not for the purposes of HA 85. He therefore held that the word "dwelling" in section 325 referred to and meant the Appellant's Accommodation.

ii) The reviewing officer had considered separately from the room standard and the space standard whether the Appellant was overcrowded, citing paragraphs 12 and 13 of the review decision, to which I have referred above;

iii) He rejected the submission that the Respondent owed any duty to make enquiries about whether the House was an HMO as defined or, if it was, whether or not it was licensed.

Grounds of Appeal to this Court

13. There are three Grounds of Appeal before this Court, as follows:

Ground 1: The Learned Judge erred in concluding that the Appellant's bedroom, rather than the whole house in multiple occupation in which her bedroom is situated, was the relevant "dwelling" for the purposes of the "room standard" and "space standard" of overcrowding contained in ss. 325-326 HA 85.

Ground 2: The Learned Judge erred in concluding that the Respondent had properly considered the question of overcrowding (by reference to the "room standard", the "space standard", and otherwise than in according to those standards).

Ground 3: The Learned Judge erred in concluding that the respects in which the Property was not "suitable" were not relevant considerations in assessing whether it was "reasonable to continue to occupy."

Withdrawal of the Review Decision

14. By a letter dated 12 May 2022 the Respondent informed the Appellant's solicitors that it had withdrawn its original decision because it had failed to enquire whether the HMO was licensed and it accepted that failure was one which no reasonable authority should have failed to make. The Respondent expressly accepted that if the HMO was unlicensed (which subsequent enquiries have shown to be the case) then a different outcome could have resulted.

15. The Respondent contended that the effect of its withdrawal of the decision rendered the appeal academic. At the start of the hearing the Court indicated its provisional view that the appeal was not academic and should continue to be heard. Having now heard the appeal, I remain of the view that the appeal is not academic because it raises issues that will be relevant to and could affect the outcome of the reassessment that the Respondent will inevitably have to carry out in the light of its withdrawal of its original decision. The question whether the Respondent should assess overcrowding by reference only to the Appellant's Accommodation or by reference to the whole House remains live and is of itself sufficient justification for the appeal to be heard and determined.

The Legal Framework

Homelessness and HA 96

16. The route by which this case comes before the Court is charted by Part VII of HA 96, which makes provision for applications to be made to a local housing authority for accommodation and for the authority to respond to such applications.

17. Section 184(1) of HA 96 provides that:

> If the local housing authority have reason to believe that an applicant may be homeless or threatened with homelessness, they shall make such inquiries as are necessary to satisfy themselves—
>
> (a) whether he is eligible for assistance, and
>
> (b) if so, whether any duty, and if so what duty, is owed to him under the following [provisions of Part VII].

18. On completing their inquiries, the authority is required to notify the applicant of its decision and, so far as any issue is decided against the applicant's interests, to inform the applicant of the reasons for their decision: s. 184(3). Section 202 gives the applicant a right of review of an adverse decision. If the applicant is not satisfied with the outcome of that review, they may apply to the County Court on any point of law arising from either the original decision or the decision of the authority on the review: section 204(1). That is what happened in the present case. The Judge below dismissed the Appellant's appeal. The present (and second) appeal is principally against the review decision and not against the decision of the County Court on the statutory appeal: see *Danesh v Kensington & Chelsea RLBC* [2006] EWCA Civ 1404, [2007] 1 WLR 69 at [30].

19. Section 175 of HA 96 sets out the criteria for determining when a person is homeless. In the main, homelessness is defined by reference to the absence of accommodation; but s. 175(3) provides that "a person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy." Thus a person who has accommodation is homeless within the meaning of Part VII of HA 96 if it would not be reasonable for them to continue to occupy that accommodation. That is the asserted basis for the Appellant's application for assistance in the present case.

20. Section 177(1) of HA 96 provides that it is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to violence or domestic abuse against them or a person who normally resides with them as a member of their family or any other persons who might be expected to reside with them. Section 177(2) provides that, in determining whether it would be reasonable for a person to continue to occupy accommodation, regard may be had to the general circumstances prevailing in relation to housing in the district of the local housing authority to whom the person has applied for accommodation. Neither of these provisions are intended to be exhaustive.

21. Section 177(3) of HA 96 provides that:

> The Secretary of State may by order specify—
>
> (a) other circumstances in which it is to be regarded as reasonable or not reasonable for a person to continue to occupy accommodation, and

> (b) other matters to be taken into account or disregarded in determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation.

The point remains that, as things stand, the statutory provisions that touch on the question of reasonableness for the purposes of s. 175(3) are not intended to be and are not exhaustive and do not provide a comprehensive definition of when it will or will not be reasonable for a person to continue to occupy accommodation. It is also to be noted that sections 175(3) and s. 177 apply to accommodation generally, whether or not it is or forms part of an HMO.

22. Part VII of HA 96 also defines the duty owed by a local authority to someone who is found to be homeless, with separate and additional provisions in respect of those with a priority need, as defined. Where a local housing authority has a duty or power under Part VII to house an applicant who is homeless within the meaning of HA 96, it must ensure that any accommodation provided by them in discharge of their functions is "suitable": see s. 206(1)(a). Section 210 provides:

> **Suitability of accommodation.**
>
> (1) In determining for the purposes of this Part whether accommodation is suitable for a person, the local housing authority shall have regard to Parts 9 and 10 of the Housing Act 1985 (slum clearance and overcrowding) and Parts 1 to 4 of the Housing Act 2004.
>
> (2) The Secretary of State may by order specify—
>
> (a) circumstances in which accommodation is or is not to be regarded as suitable for a person, and
>
> (b) matters to be taken into account or disregarded in determining whether accommodation is suitable for a person.

It will immediately be seen that section 210(2) is akin to section 177(3) but addresses the question of "suitability" rather than of "reasonableness".

23. Orders have been made by the Secretary of State, which provide that:

i) In determining whether it would be, or would have been, *reasonable* for a person to continue to occupy accommodation and in determining whether accommodation is *suitable* for a person there shall be taken into account whether or not the accommodation is affordable: The Homelessness (Suitability of Accommodation) Order 1996, Article 2;

ii) B&B accommodation, which is defined as accommodation in which a toilet, personal washing facilities or cooking facilities are shared by more than one household, is not to be regarded as *suitable* for an applicant with whom dependent children reside or might reasonably be expected to reside. There are exceptions where no accommodation other than B&B accommodation is available and where the Applicant occupies the B&B accommodation for a

period, or total period, which does not exceed 6 weeks: The Homelessness (Suitability of Accommodation) (England) Order 2003, Articles 1, 3 and 4;

iii) Location is to be taken into account when determining the *suitability* of accommodation: The Homelessness (Suitability of Accommodation) (England) Order 2012, Article 2;

iv) Article 3 of the 2012 Order lists circumstances in which accommodation is not to be regarded as *suitable* for a person when determining whether an authority may approve a private rented sector offer. One of the characteristics that will render accommodation *unsuitable* is where the accommodation is an HMO and is not appropriately licensed: see Article 3(f) & (g).

24. Article 2 of the 1996 Order refers both to the question whether it is *reasonable* for a person to continue to occupy accommodation and, separately, to the question whether accommodation is *suitable* for a person. By contrast, the 2003 and 2012 Orders refer to *suitability* and not to the question whether it would be *reasonable* for a person to continue to occupy accommodation. This distinction mirrors the different language used by section 175(3) of HA 96, which raises the question whether it is *reasonable* for a person to remain in accommodation as a criterion for treating the person as homeless, and section 206(1), which addresses the separate question whether accommodation that the authority provides in the discharge of its functions is *suitable*. It is therefore no accident that the 1996 Order was made under s. 177(3)(b) and s. 210(2)(b) while the 2003 and 2012 Orders were made under s. 210(2)(a) and (b) but not under s. 177(3)(b).

25. This statutory distinction between the questions to be asked when assessing homelessness under s. 175(3) and the questions to be asked when considering the discharge of the authority's housing functions is clear, deliberate and coherent. It may also be noted that Part VII of HA 96 contains no provision equivalent to section 210(1) (which relates expressly and only to the assessment of suitability) relating to the assessment of the reasonableness of continued occupation of existing accommodation. Generally, the statutory provisions regulating the question of suitability are more extensive and prescriptive than those regulating the question of reasonableness, and not all of the features that are prescribed in relation to suitability have obvious relevance to the question of reasonable continued occupation. One example suffices: Article 3(j) of the 2012 Order provides that accommodation shall not be regarded as suitable "if 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." It is easy to see why this is a relevant consideration when considering the discharge of the authority's housing functions; it is less obvious why it should be relevant when considering whether it is reasonable for a person to continue to occupy accommodation so that they are not to be regarded as homeless.

26. Just as it would be impermissible to read section 210(1) across and to apply it directly or by necessary analogy to the question of reasonableness, it would be equally inappropriate to read across provisions such as are in Article 3 of the 2012 order, which expressly relates to the question of suitability, or to interpret Article 3 as applying directly or by necessary analogy to the question of reasonableness under s. 175(3) of HA 1966.

27. Logically, the questions of reasonableness of occupation and the suitability of accommodation provided in the discharge of an authority's housing functions, though conceptually similar, are different and arise in different contexts. The first arises where the applicant is in accommodation which may fall to be disregarded in assessing whether the person is homeless; the second arises where the authority is proposing to provide accommodation for a person who has been adjudged to be homeless, for whatever reason. It is easy to accept that they are "related concepts": see *Harouki v Kensington & Chelsea LBC (CA)* [2007] EWCA Civ 1000, [2008] 1 WLR 797 at [20]. But there is no logical reason why the two concepts should be regarded as congruent, and the separate statutory treatment to which I have referred strongly suggests that they are not. That said, although neither "suitable" nor "reasonable" are comprehensively defined, it is obvious that factors that may go to whether continued occupation is "reasonable" may, depending on the factor and all other relevant circumstances, also be capable of going to the question of "suitability", and vice versa. Article 2 of the 1996 Order demonstrates this to be so by requiring affordability to be taken into account both when assessing reasonableness and when assessing suitability.

28. We were referred to decisions of high authority that consider the questions of "reasonableness" and "suitability" and how they relate to each other.

29. In *Harouki* the applicant submitted that it could not be reasonable for her to continue to occupy overcrowded occupation. At [20] Ward LJ (with whom Thomas and Richards LJJ agreed) held that section 210 of HA 96 expressly recognised that overcrowding did not necessarily render accommodation unsuitable for a person and that coherence could and should be achieved by adopting the same approach when considering whether it was reasonable for a person to continue to occupy their existing accommodation.

30. The subtle and fact sensitive nature of the considerations that would surround an assessment of whether and for how long it was reasonable for a person to continue to occupy their existing accommodation was the subject of consideration by the House of Lords in *Birmingham City Council v Ali* [2009] UKHL 36, [2009] 1 WLR 1506. The leading speech was given by Baroness Hale, with whom the other members of the House agreed. Rejecting a more extreme approach, the House held that, when applying section 175(3), a council can accept that a family is homeless even though they can actually get by where they are for a little while longer; otherwise an authority would have to reject an application for housing assistance until the family could not stay in their existing accommodation any longer: see [38]. Accommodation which may be unreasonable for a person to occupy for a long period may be reasonable for him to occupy for a short period: see [42].

31. The conceptual link between the test of reasonableness under section 175(3) and the test of suitability under section 206 (or, in relation to an interim duty to provide assistance, under section 188(1)) was made clear at [40], where Lady Hale said:

> "However, the combination of section 188(1) and section 206(1) means that the council's interim duty under section 188 is to provide "suitable" accommodation. If an applicant is occupying accommodation which it is unreasonable for him to continue occupying for even one night, it is hard to see how such accommodation could ever satisfy section 188(1).

> Section 175(3) obviously includes such cases but does not have to be limited to them."

32. In the same vein, at [46]-[47] Lady Hale said:

> "46. … in our view it is proper for a local authority to decide that it would not be reasonable for a person to continue to occupy the accommodation which is available to him or her, even if it is reasonable for that person to occupy it for a little while longer, if it would not be reasonable for the person to continue to occupy the accommodation for as long as he or she will have to do so unless the authority take action.
>
> 47. This does not mean that Birmingham were entitled to leave these families where they were indefinitely. Obviously, there would come a point where they could not continue to occupy for another night and the council would have to act immediately. But there is more to it than that. It does not follow that, because that point has not yet been reached, the accommodation is "suitable" for the family within the meaning of section 206(1). There are degrees of suitability. What is suitable for occupation in the short term may not be suitable for occupation in the medium term, and what is suitable for occupation in the medium term may not be suitable for occupation in the longer term. … As we have already pointed out, the suitability of a place can be linked to the time that a person is expected to live there. Suitability for the purpose of section 193(2) does not imply permanence or security of tenure. … ."

33. In *R (Elkundi) v Birmingham City Council* [2022] EWCA Civ 601 Lewis LJ (with whom the other members of the Court agreed) carried out a detailed review of the decision in *Ali* and identified the ratio of the decision as follows:

> "101. Analysing the speech, the basis for Baroness Hale's decision for allowing the appeal is that a person may be homeless for the purpose of section 175 of the 1996 Act if he is in accommodation which it is reasonable for him to occupy at present, albeit that at some stage in the future it will cease to be reasonable for him to occupy. Given that, a local housing authority would not necessarily be in breach of section 193(2) of the 1996 Act by leaving a person who is homeless in his present accommodation. The reason is that it may become unreasonable for him to continue to occupy that accommodation in the medium or longer term but it is not necessarily unreasonable for him to occupy the accommodation at present. A local housing authority would not therefore necessarily be in breach of section 193(2) by leaving a person in his present accommodation as the accommodation may be suitable in the short term."

34. These passages emphasise the fact sensitive nature of the enquiry that is involved when considering either (a) whether it is reasonable for a person to continue in their present accommodation, or (b) whether accommodation being provided (or to be provided) by the authority in the exercise of their housing function is suitable. At one extreme, if it would not be reasonable to expect a person to continue in accommodation for another day, it is hard to see how that accommodation could ever be suitable: see [40] of *Ali*,

set out above; but none of these statements of principle equate the test for suitability with the test of reasonableness.

35. The conceptual difference between the two criteria was authoritatively established by the decision of the Court of Appeal in *Temur v Hackney LBC* [2014] EWCA Civ 877, [2015] PTSR 1. The decision is accurately summarised in the headnote:

> "Part VII of the 1996 Act required a local housing authority to consider whether accommodation was satisfactory at two different stages, first, when considering whether an applicant's existing accommodation was "reasonable" for him to continue to occupy, within sections 175 and 177, and secondly, when considering whether accommodation which it proposed to provide for the applicant was suitable, within sections 206 and 210; that the statutory scheme and statutory guidance proceeded on the basis that the two different stages involved different processes and different criteria; that, therefore, when determining whether accommodation was "reasonable" for a person to continue to occupy, for the purposes of section 175(3) of the 1996 Act, a local authority was not required to consider whether the accommodation was "suitable" within sections 206 and 210; …"

36. Jackson LJ (with whom the other members of the Court agreed) expressed himself with typical clarity:

> "45 … Part VII of the 1996 Act requires a local authority to consider whether housing accommodation is satisfactory at two different stages. First it has to consider the adequacy of any accommodation in which the applicant is currently residing, in order to determine whether or not he/she is "homeless". Subsequently it has to consider the adequacy of any accommodation which it proposes to provide for the applicant under section 193 of the 1996 Act. I will refer to consideration at the first stage as "the stage 1 exercise" and consideration at the second stage as "the stage 2 exercise".
>
> 46. Parliament could have laid down identical tests for different stages, but for policy reasons it decided not to do so.
>
> 47. Sections 175(3), 176 and 177(2) of the 1996 Act set out the test to be applied in the stage 1 exercise. Essentially the local authority must consider whether the existing accommodation is such that it would be "reasonable" for the applicant and anyone living with him/her to continue to reside there. In carrying out this exercise it can have regard to the general circumstances prevailing in its district.
>
> 48. Sections 206(1) and 210 (as amended) of the 1996 Act set out the test to be applied in the stage 2 exercise. This is a more elaborate test, because it may involve carrying out a hazard assessment under the 2004 Act.
>
> 49. …
>
> 50. Mr Colville submits that we should construe the statutory provisions so that the stage 1 exercise and the stage 2 exercise involve applying the

same standards. In other words, when considering whether it is "reasonable" under section 175(3) of the 1996 Act for someone to continue to occupy accommodation, the local authority must consider whether that accommodation is "suitable" within section 206(1) of the 1996 Act. That in turn will or may involve carrying out a hazard assessment under the 2004 Act.

51. In support of this submission Mr Colville relies on the decision of the House of Lords in [*Ali*]. … Mr Ali and the other applicants were living in accommodation which it was reasonable for them to occupy in the short-term, but not in the long-term. The House of Lords held that the city council was entitled to regard the applicants as homeless under section 175(3) of the 1996 Act, but nevertheless to leave them there for a limited period. Thereafter the city council had to move the applicants to accommodation which was "suitable" under sections 206 and 210 of the 1996 Act. Baroness Hale of Richmond … makes clear, at paras 47 and 48, that the tests to be applied under section 175(3) and 206 of the 1996 Act are different. There is a period of time during which the applicants are characterised as homeless under section 175(3) of the 1996 Act, but their accommodation is characterised as "suitable" under section 206 of the 1996 Act.

52. I therefore conclude that [*Ali's*] case does not support the applicant's case. On the contrary it supports the local authority's submission that the stage 1 exercise and the stage 2 exercise involve applying different standards.

53. When I stand back and look at the provisions of the statute, I can see that Parliament has established different sets of rules for the stage 1 exercise and the stage 2 exercise. There would be no point in doing this if the intention was that both exercises would assess accommodation in the same way.

54. This point is reinforced when one looks at the Code of Guidance. Chapter 8 tells councils how to carry out the assessments under sections 175(3) and 177(2) of the 1996 Act. Chapter 17 tells councils how to carry out assessments under sections 206 and 210 of the 1996 Act, as well as under the 2004 Act. The whole statutory scheme and the statutory guidance proceed on the basis that the stage 1 exercise and the stage 2 exercise involve different processes as well as different criteria.

55. Mr Colville places reliance on the Court of Appeal's decision in [*Harouki*]. I accept that, for the reasons stated by Ward LJ in *Harouki's* case, the tests applied in the stage 1 exercise and the stage 2 exercise are related concepts. They will often lead to the same results. Nevertheless the fact remains that they are different tests. Also it is now necessary to read *Harouki's* case subject to the later decision of the House of Lords in [*Ali's*] case.

56. Let me now draw the threads together. The reviewing officer in this case was considering whether the applicant was homeless. This was a

> stage 1 exercise. The reviewing officer applied the tests set out in sections 175 to 177 of the 1996 Act, as he was required to do. He was not required to and did not carry out a hazard assessment under the 2004 Act."

37. I consider that the position is now clearly established. The procedure and criteria to be applied when considering (a) whether it is reasonable for a person to continue to occupy their present accommodation and (b) whether accommodation that may be provided in the discharge of an authority's housing function are different. An authority that is considering the question whether it is reasonable for a person to continue to occupy their present accommodation is not required to replicate the procedure and enquiries that are required by statute when considering the separate and later question of suitability of accommodation. However, depending on the facts of the case, factors that may be relevant to the prior assessment of reasonableness may also be relevant to the later question of suitability and vice versa. It is more accurate to express the overlap in this way rather than to say that the concepts of reasonableness and suitability themselves overlap.

38. Two further points may be made. First, in the absence of a comprehensive statutory definition of "reasonable" there is no obvious a priori limitation on what may be relevant to the assessment of reasonable continued occupation. Second, and following from the first point, where an authority is considering whether it is reasonable for a person to continue to occupy their present accommodation it may well be that a particular consideration is relevant and necessarily to be taken into account by the decision maker even though it is not expressly required by statute (or Ministerial Guidance). Because the concepts are related, it may well be that in such a case, a factor which is specified as being relevant to the question of suitability of accommodation is also relevant to be taken into account when considering whether it is reasonable for a person to continue to occupy their present accommodation. Though not expressly accepted by the Respondent, it seems that this proposition should be uncontroversial given that the Respondent has withdrawn its section 184 decision because it failed to consider whether the House, which was known to be an HMO, was appropriately licensed. The licensing of HMOs is a matter that is expressly made relevant to the question of suitability by Article 3(f) and (g) of the 2012 Order but is nowhere expressly specified to be a matter that must be taken into consideration in relation to the question of continued occupation of existing accommodation. Yet it is common ground that, on the facts of this case, it is a factor that is relevant to *reasonableness* as well as to *suitability*.

Current statutory provisions on Overcrowding: HA 85

39. There are two main strands of statutory provision relating to overcrowding of residential accommodation. As noted above, in determining whether accommodation is suitable, the authority is required by section 210 of HA 96 to have regard to various other statutory provisions, including Part X of HA 85 and Part 2 of HA 04. Although there is no equivalent provision in relation to the question of reasonableness of continued occupation, it was not suggested that overcrowding (and the various statutory provisions addressing overcrowding) are irrelevant to the question of reasonableness under s. 175(3) of HA 96. Nor, in my judgment, could it be, since overcrowding is self-evidently a feature that may mean that it is not reasonable for a person to continue to occupy their present, overcrowded accommodation.

40. The first main strand of statutory provision relating to overcrowding is currently represented by Part X of HA 85, which makes provision in relation to overcrowding of "dwellings". Section 324 of HA 85 addresses and defines overcrowding as follows:

> A dwelling is overcrowded for the purposes of this Part when the number of persons sleeping in the dwelling is such as to contravene—
>
> (a) the standard specified in section 325 (the room standard), or
>
> (b) the standard specified in section 326 (the space standard).

41. Section 325 of HA 85 provides:

> **The room standard**
>
> (a) The room standard is contravened when the number of persons sleeping in a dwelling and the number of rooms available as sleeping accommodation is such that two persons of opposite sexes who are not living together as a married couple or civil partners must sleep in the same room.
>
> (b) For this purpose—
>
> a. children under the age of ten shall be left out of account, and
>
> b. a room is available as sleeping accommodation if it is of a type normally used in the locality either as a bedroom or as a living room.

42. On the facts of the present case, if the room standard fell to be assessed by reference to the Appellant's Accommodation only, the room standard permitted the Appellant and her two children to sleep in their single bedroom because the children are under the age of 10 and so are left out of account.

43. Section 326 of HA 85 provides:

> **The space standard.**
>
> (a) The space standard is contravened when the number of persons sleeping in a dwelling is in excess of the permitted number, having regard to the number and floor area of the rooms of the dwelling available as sleeping accommodation.
>
> (b) For this purpose—
>
> a. no account shall be taken of a child under the age of one and a child aged one or over but under ten shall be reckoned as one-half of a unit, and

> b. a room is available as sleeping accommodation if it is of a type normally used in the locality either as a living room or as a bedroom.
>
> (c) The permitted number of persons in relation to a dwelling is whichever is the less of—
>
> a. the number specified in Table I in relation to the number of rooms in the dwelling available as sleeping accommodation, and
>
> b. the aggregate for all such rooms in the dwelling of the numbers specified in column 2 of Table II in relation to each room of the floor area specified in column 1
>
> c. No account shall be taken for the purposes of either Table of a room having a floor area of less than 50 square feet.

44. Tables 1 and 2 set out the numbers of persons permitted either per room (Table 1) or by reference to floor area (Table 2). On the facts of this case, if the space standard fell to be assessed by reference to the Appellant's Accommodation only, Table 1 permitted the Appellant and her two children to sleep in the Appellant's Accommodation since each of her children was to be reckoned as one-half of a unit, so that she and her two children added up to 2 units, which is the permitted maximum in a single room. Assuming that the floor area of the Appellant's Accommodation was 110 sq. ft. or more and was to be treated in isolation, the maximum number of persons permitted to sleep in it was again 2.

45. A constant feature of these three sections of HA 1985 is the reference to a "dwelling" being overcrowded. The term "dwelling" is defined for the purposes of Part X of HA 85 as "premises used or suitable for use as a separate dwelling": see s. 343. The term is ubiquitous in this part of HA 85, as it is in other contexts concerning housing law. Specifically, s. 327(1) of HA 85 makes it a summary offence for the occupier of a dwelling to cause or permit it to be overcrowded; and s. 331(1) of HA 85 makes it a summary offence for the landlord of a dwelling to cause or permit it to be overcrowded. By virtue of the definition in s. 343, these summary offences apply to the overcrowding of "premises used or suitable for use as a separate dwelling".

46. The derivation of these sections can be traced back to Part 1 of the Housing Act 1935 ["HA 35"], which introduced the concept of what are now known as the Room Standard and the Space Standard. The provisions were re-enacted by the Housing Act 1936 ["HA 36"] and Part IV of the Housing Act 1957 ["HA 57"]. The immediate precursor to section 324-326 of HA 85 was section 77 of HA 57 which read:

> **77.— Definition of overcrowding.**
>
> (1) A dwelling-house shall be deemed for the purposes of this Act to be overcrowded at any time when the number of persons sleeping in the house either—

> (a) is such that any two of those persons, being persons ten years old or more of opposite sexes and not being persons living together as husband and wife, must sleep in the same room; or
>
> (b) is, in relation to the number and floor area of the rooms of which the house consists, in excess of the permitted number of persons as defined in the Sixth Schedule to this Act.
>
> (2) In determining for the purposes of this section the number of persons sleeping in a house, no account shall be taken of a child under one year old, and a child who has attained one year and is under ten years old shall be reckoned as one-half of a unit.

The Sixth Schedule set out two tables in the same general format and with the same content as those that are now part of section 326(3) of HA 85.

47. Section 87 HA 57 defined "dwelling-house" for the purposes of Part IV as "any premises used as a separate dwelling by members of the working classes or of a type suitable for such use." Though not identical, it is evidently the precursor to s. 343 of HA 85.

48. The provisions of sections 76 to 89 of HA 57 were drafted by reference to dwelling-houses, as defined. Thus, for example, section 78 made it an offence for the occupier or the landlord of a dwelling-house to cause or permit it to be overcrowded. Section 81 provided that "every rent book or similar document used in relation to a dwelling-house" by or on behalf of the landlord should contain a summary of section 77 and a statement of the permitted persons "in relation to the house". Section 84 provided that where "a dwelling-house is overcrowded in such circumstances as to render the occupier thereof guilty of an offence, nothing in the Rent Acts shall prevent the landlord from obtaining possession of the house."

49. Tracing the derivation of sections 324-326 HA 85 indicates that this line of statutory provisions have consistently been drafted on the basis that the unit of interest has successively been a "dwelling-house" and, latterly, a "dwelling", and that, in each case, the unit of interest has been defined as premises that are used as a separate dwelling by their occupants or are suitable for occupation as separate dwellings. This approach is carried through to the ancillary provisions relating to such premises: see, for example, sections 76 to 89 of HA 57 and sections 327 ff of HA 85, to which I have referred at [44] and [47] above. This language is in marked contrast to the statutory language adopted when dealing with houses in multiple occupation, to which I now turn.

Current statutory provisions on overcrowding: HA 04

50. The present manifestation of the second relevant strand of statutory provision about overcrowding is now contained in Parts 2 and 4 of HA 04. For many years, specific statutory attention has been given to houses that, in general terms, are in multiple occupation. Historically, there were two aspects of this statutory attention. First, there was a system of regulation which included a power for local authorities to make bye-laws in relation to such houses; and, second, there was a power to serve "overcrowding notices" on those having control or management of such houses: see section 12 of the

Housing Repairs and Rents Act, 1954, section 90 of HA 57, section 146 of HA 80 and section 358 of HA 85.

51. The language used to describe or define those houses in multiple occupation to which the statutory provisions applied changed with time and need not be fully traced here. Section 90 of HA 57 as originally enacted made provision that was specifically in relation to overcrowding in "houses ... or a part of such a house, which is let in lodgings or occupied by more than one family". It provided:

> 90.— **Overcrowding in houses let in lodgings.**
>
> (1) If it appears to a local authority, in the case of a house within their district, or of part of such a house, which is let in lodgings or occupied by members of more than one family, that excessive numbers of persons are being accommodated on the premises having regard to the rooms available, the local authority may serve on the occupier of the premises or on any person having the control and management thereof, or on both, a notice—
>
> > (a) stating, in relation to any room on the premises, what is in the authority's opinion the maximum number of persons by whom it is suitable to be occupied as sleeping accommodation at any one time, or, as the case may be, that it is in their opinion unsuitable to be occupied as aforesaid, and
> >
> > (b) informing him of the effect of subsection (4) of this section.
>
> (2) …
>
> (3) …
>
> (4) Any person who has been served with a notice under this section shall be guilty of an offence if, after the notice has become operative, -
>
> > (a) he causes or knowingly permits any room to which the notice relates to be occupied as sleeping accommodation otherwise than in accordance with the notice, or
> >
> > (b) …
>
> …

52. This language may be contrasted with the language of sections 76 to 89 of HA 57, which it immediately followed. Section 90 makes no reference to premises being used or suitable for use as a separate dwelling. Rather, it concentrates on the maximum occupancy of a room within a house which is let in lodgings or occupied by members of more than one family. This distinction was carried through by successive re-enactments to HA 85. Immediately after the provisions of Part X of HA 85 dealing with the overcrowding of "dwellings" as defined by section 343, Part XI (which was entitled "Houses in Multiple Occupation") provided for the regulation of houses in

multiple occupation, which were defined by section 345(1) as houses "which [are] occupied by persons who do not form a single household".

53. Sections 358(1) and 359 of HA 85 retained the essential characteristics of section 90 of HA 57. Section 358(1) provided:

> (1) Where it appears to the local housing authority in the case of a house in multiple occupation—
>
> (a) that an excessive number of persons is being accommodated on the premises, having regard to the rooms available, or
>
> (b) that it is likely that an excessive number of persons will be accommodated on the premises, having regard to the rooms available,
>
> they may serve an overcrowding notice on the occupier of the premises or on the person managing the premises, or on both.

54. Section 359 provided:

> (1) An overcrowding notice shall state in relation to every room on the premises—
>
> (a) what in the opinion of the local housing authority is the maximum number of persons by whom the room is suitable to be occupied as sleeping accommodation at any one time, or
>
> (b) that the room is in their opinion unsuitable to be occupied as sleeping accommodation;
>
> and the notice may specify special maxima applicable where some or all of the persons occupying the room are under such age as may be specified in the notice.

55. Part XI of HA 85 was repealed by HA 04. The current statutory language refers to HMOs rather than houses let in lodgings. Section 254 of HA 04 defines HMOs by a series of tests including the "standard test", which is set out in section 254(2) and provides that:

> A building or a part of a building meets the standard test if—
>
> (a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
>
> (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
>
> (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

> (d) their occupation of the living accommodation constitutes the only use of that accommodation;
>
> (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
>
> (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

56. By section 254(8) "basic amenities" are defined for the purposes of section 254 as a toilet, personal washing facilities or cooking facilities. It is common ground that the House in the present case satisfies the standard test and is an HMO for the purposes of the statute.

57. Part 2 of HA 04 did away with the old system of regulation with its reliance on Local Authority bye-laws and created in its place a new system for the regulation of most but not all HMOs by licensing. A licence under Part 2 is defined as "a licence authorising occupation of the house concerned by not more than a maximum number of households or persons specified in the licence": section 61(2). Schedule 4 lists mandatory conditions to be included in any licence under Part 2. Paragraph 1A of Schedule 4 lists conditions requiring the licence holder to ensure that minimum floor areas and maximum numbers of persons sleeping in individual rooms are observed. Those standards are virtually the same and clearly share the same provenance as the Room Standard and the Space Standard under sections 325 and 326 of HA 85.

58. Licences may be revoked in the case of serious breach of licence conditions: section 70(2)(a). Section 72 provides that a person having control of or managing an HMO which is required to be licensed commits an offence if it is not so licensed; or if, being a licence holder or a person on whom restrictions or obligations under a licence are imposed, he fails to comply with any condition of the licence. There are other sanctions which it is not necessary to list here.

59. Part 4 of HA 04 contains additional control provisions in relation to residential accommodation including HMOs i.e. it is not exclusively applicable to HMOs. Those provisions include a power to make interim and final management orders, which it is not necessary to review in any detail. Chapter 3 of Part 4 of HA makes updated provision for the service of overcrowding notices in relation to most but not all HMOs at sections 139-144. The provenance of these provisions may be traced back to section 90 of HA 57. This is apparent from section 139(2) of HA 04, which provides:

> "The local housing authority may serve an overcrowding notice on one or more relevant persons if, having regard to the rooms available, it considers that an excessive number of persons is being, or is likely to be, accommodated in the HMO concerned."

60. Section 140(1) provides, in terms very similar to those of section 359 of HA 85 and, before that, section 90 of HA 57, that:

> (1) An overcrowding notice must state in relation to each room in the HMO concerned–
>
> > (a) what the local housing authority consider to be the maximum number of persons by whom the room is suitable to be occupied as sleeping accommodation at any one time; or
> >
> > (b) that the local housing authority consider that the room is unsuitable to be occupied as sleeping accommodation.

61. What this brief review shows is that, despite successive re-enactments culminating in the more radical change implemented by HA 04, there has been a consistency in the way that houses in multiple occupation have been addressed. Most obvious is the reference to the living accommodation being occupied by persons who do not form a single family or household: see section 90 of HA 57 and section 254(2)(b) of HA 04. Although the earlier provisions did not expressly mention them, the probability that basic amenities would be shared in such houses, which forms part of the standard test under section 254(2)(f) of HA 04, was acknowledged by provisions relating to a management code by section 13(1)(c) of the Housing Act 1961, to the power to require execution of works by section 352(1A)(a) of HA 85, and relating to the management code by section 369 of HA 85, which it is not necessary to set out in detail here. In addition, as set out above, there has been consistency in the thrust of the overcrowding notices pursuant to this line of statutory provision, namely that the notice will concentrate upon the maximum occupancy of individual rooms within the house.

Shared accommodation and HA 88

62. Section 3(1) of HA 88 provides as follows:

> Where a tenant has the exclusive occupation of any accommodation (in this section referred to as "the separate accommodation") and—
>
> > (a) the terms as between the tenant and his landlord on which he holds the separate accommodation include the use of other accommodation (in this section referred to as "the shared accommodation") in common with another person or other persons, not being or including the landlord, and
> >
> > (b) by reason only of the circumstances mentioned in paragraph (a) above, the separate accommodation would not, apart from this section, be a dwelling-house let on an assured tenancy,
>
> the separate accommodation shall be deemed to be a dwelling-house let on an assured tenancy and the following provisions of this section shall have effect.

63. This approach of treating separate accommodation as having protected status which it would not otherwise have because of the existence of shared accommodation was not new:

i) Section 7 of the Landlord and Tenant (Rent Control) Act 1949 ["LTRCA 49"] provided that, where under any contract a tenant had the exclusive occupation of any accommodation but the terms on which he held that accommodation included the use of other accommodation in common with his landlord or with his landlord and other persons and, by reason only of the use of part of the accommodation in common with others, his exclusive accommodation was not a dwelling-house to which the principal Rent Acts applied, the Rent Act of 1946 applied to the contract notwithstanding that the rent did not include payment for the use of furniture or for services;

ii) Section 8 of LTRCA 49 provided that where a tenant had the exclusive occupation of any accommodation (referred to as *"the separate accommodation"*), but the terms as between the tenant and his landlord on which he held the separate accommodation included the use of other accommodation (referred to as *"the shared accommodation"*) in common with another person or other persons, not being or including the landlord, and, by reason only of use of the shared accommodation, the separate accommodation would not otherwise be a dwelling-house to which the principal Rent Acts would apply, the separate accommodation shall be deemed to be a dwelling-house to which the principal Acts applied;

iii) Section 23 of the Rent (Agriculture) 1976, which remains in force, adopts an approach that is materially identical to that of section 3(1) of HA 88 so as to give the tenant the security of a protected or statutory tenancy over the separate accommodation as the case may be by deeming it to be a dwelling house let on a protected or statutory tenancy:

> (1) Where a tenant has the exclusive occupation of any accommodation ("the separate accommodation"), and
>
> > (a) the terms as between the tenant and his landlord on which he holds the separate accommodation include the use of other accommodation (in this section referred to as *"the shared accommodation"*) in common with another person or other persons, not being or including the landlord, and
> >
> > (b) by reason only of the circumstances mentioned in paragraph (a) above, the separate accommodation would not, apart from this section, be a dwelling-house subject to a protected occupancy or statutory tenancy,
>
> then, subject to subsection (2) below, the separate accommodation shall be deemed to be a dwelling-house subject to a protected occupancy or statutory tenancy as the case may be, …

iv) Section 22 of the Rent Act 1977, which remains in force, adopts the same approach and wording so as to give the tenant the security of a protected tenancy over the separate accommodation by an equivalent deeming provision.

Guidance on the meaning of "dwelling" in other circumstances

64. It has been recognised on the highest authority that "dwelling" is a normal English word which, in normal parlance, signifies the place where a person makes their home; and that a single room may in some circumstances qualify as a "dwelling". Where a person has exclusive possession of part and possession in common of other parts, it will be a question of fact and degree whether what was enjoyed in common was of such a character or of such significance as to preclude description of what was let as a separate dwelling. In making that assessment, distinctions have understandably and rightly been drawn between living rooms, such as bedrooms and kitchens, and ancillary offices, such as bathrooms and lavatories. Common enjoyment of the former but not the latter tend to weigh against recognition of the premises let as a separate dwelling: see *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301 ("*Uratemp*") at [3] per Lord Irvine LC, [8] per Lord Bingham, [15] per Lord Steyn and [30] per Lord Millett, with whom the other members of the House agreed; see also *R(N) v Lewisham LBC* [2014] UKSC 62, [2015] AC 1259 at [45] per Lord Hodge JSC.

Discussion

65. As I have set out at [13] above, Ground 1 concentrates upon the proper interpretation of sections 325-326 of HA 85. The parties' submissions for the hearing were predicated on the basis that those sections were the relevant sections to be interpreted and applied. With one exception, the parties' submissions as originally presented on this appeal did not address the possible significance of the provisions of HA 04 relating to the overcrowding of HMOs. Still less was there any examination of the derivation of the two main strands of statutory provisions to which I have referred above. That appeared to the Court to be an omission, which the parties were requested to rectify shortly before the hearing. In the event, only partial submissions were made at the hearing. The Court therefore invited the parties to provide further materials on the statutory derivation of the current legislation in the hope that this would assist in determining the relevance of the historical and current provisions about overcrowding.

66. This invitation led to the presentation of very extensive further materials and written submissions of considerable complexity. By way of illustration, the Appellant's response to the Respondent's initial (and detailed) submission consisted of a "note" that was almost as long as the Appellant's original skeleton argument for the appeal, accompanied by a bundle of further statutory materials, authorities and citations from text books of 599 pages. The end result of the process of legal archaeology undertaken by the parties was that (a) the Appellant submits that the regimes instituted by Part X of HA 85 and Parts 2 and 4 of HA 04 are separate but complimentary, with both being potentially applicable to HMOs; whereas (b) the Respondent now submits that the two regimes are mutually exclusive and only the HA 04 regime is applicable to HMOs. This change of position by the Respondent is not the subject of a Respondent's Notice; nor has it been the subject of full argument, being contained in the post-hearing supplementary submissions. It raises additional questions and issues since the Respondent's case until then had been that Part X of HA 85 applied to the facts of this case and (subject to the HMO licensing point) had been properly applied by the Respondent.

67. Earlier in this judgment I have drawn attention to the differences in language used by the two different strands of authority. My present and provisional view is that those differences of language support a submission that the two regimes are concerned with different categories of residential accommodation, with the regime established by HA 04 applying to HMOs and the regime under Part X of HA 85 applying to premises that are separate dwellings. This seems to me to follow from the consistency of the different characterisation and definition of the premises to which the two strands of authority respectively apply: see [39] to [61]. It also makes sense of the formulation of the various criminal offences that now appear in Part X of HA 85: primary responsibility is placed on the occupier of premises, which makes perfect sense in the case of a single separate dwelling but may lead to bizarre and seemingly unfair results if one occupier of an HMO may be rendered criminally liable in circumstances where it is the actions of another occupier that render the property as a whole statutorily overcrowded.

68. This state of affairs is problematic for two reasons. First, although we have received detailed written submissions of considerable diligence and complexity since the hearing on the applicability of the two strands of authority, we have not heard oral argument. Speaking for myself, I would be intensely reluctant to decide a point of such potential significance without full and focused oral argument to clarify the issues that seem to me to arise from the written submissions. Second, the logical consequence of the Respondent's present submission that the regimes are mutually exclusive is that the appeal and the Respondent's original and review decisions have proceeded on a false basis because they proceeded on the basis that sections 325 and 326 of HA 85 were relevant and applicable, the dispute being about whether they should be applied by reference to the Appellant's Accommodation alone or to the House as a whole. If it was to be the Respondent's case that sections 325 and 326 were not applicable, it should have been taken clearly from the outset so that it could be addressed thoroughly and fully at the hearing. Instead, the Respondent initially relied upon the provisions of HA 85, the subsequent challenge simply being about the interpretation of those provisions. It is small comfort for the Court to receive the Respondent's submission (correct though it appears to be) that the Appellant's Accommodation would not have been overcrowded if assessed by reference to the HA 04 regime rather than by reference to the HA 85 regime.

69. The unsatisfactory nature of the present position is exacerbated by the fact that we are dealing with a second appeal in a case where the Respondent has, albeit late in time, withdrawn the underlying decision. Although, as I have already said, I do not consider the appeal to be academic, it cannot affect the immediate outcome of the appeal, since the decision has been withdrawn - whatever we may decide.

70. However, the question raised by Ground 1 is whether, assuming that Part X of HA 85 applies, it requires the question of overcrowding to be assessed by reference to the House as a whole. If it does not, the appeal on Ground 1 fails without the need for us to decide the separate question whether Part X applies to an HMO such as the House at all. Equally, it is not necessary to decide the separate question whether Part X also required the question of statutory overcrowding to be assessed by reference to the Appellant's Accommodation alone: if it did, the local authority complied with that requirement and its decision cannot be criticised since the Appellant's Accommodation satisfied both the room standard and the space standard: see [42] and [44] above.

Ground 1: the interpretation of sections 325 and 326

71. Relying upon *Uratemp* and *Parkins v Westminster City Council* (1997) 39 HLR 894 (CA), the Appellant submits that her accommodation in the House is not a separate dwelling as normally understood because it includes both the Appellant's Accommodation and the Communal Facilities. She submits that the word "dwelling" in sections 325 and 326 can only refer to the House as a whole. She submits that reliance on section 3 of HA 88 (set out at [62] above) does not assist the Respondent because the Appellant's Accommodation is merely to be deemed to be a separate dwelling for the purposes of giving the Appellant security of occupation. The fact that this deeming provision is necessary demonstrates that, in fact, the Appellant's Accommodation is not a separate dwelling since, if it were a separate dwelling, no deeming provision would be necessary. She also relies upon the fact that HA 88 postdates HA 85, submitting that it is impermissible to have regard to the later statute when interpreting the earlier. In addition, the Appellant submits that to interpret sections 325 and 326 as referring to the Appellant's Accommodation and not to the House as a whole would undermine the regime for the regulation of HMOs as now set out in HA 04 by introducing a discrepancy between the definition of the relevant premises for the purposes of statutory overcrowding and the licensing of HMOs respectively. This leads to the Appellant's fundamental submission that it is the House as a whole that she and her children occupy as a "dwelling" and not just their bedroom, since they could not reasonably manage without the use of the shared basic amenities.

72. In response, the Respondent relies upon the finding made by the reviewing officer and the Judge below, which is not challenged on this appeal, that the Appellant had an assured shorthold tenancy of the Appellant's Accommodation by virtue of section 3 of HA 88. It submits that there is self-evident practical sense in equating the *separate dwelling* to which the overcrowding rules established by sections 325-326 of HA 85 apply and the *separate accommodation* that is protected by section 3. It points to the fact that, if the Appellant's interpretation is correct, the question whether she is living in overcrowded accommodation would depend upon the density of occupation of parts of the House to which she has no right of access and over which she has control. She could therefore be exposed to criminal liability as an occupier because of the actions of other tenants. Similarly it is submitted that if the landlord were to let one room in a large house together with the right of access to the kitchen and bathroom to a family who were overcrowded in that room, the landlord would avoid criminal liability on the basis that the accommodation to be taken into account was the house as a whole and not the accommodation let to the overcrowded family as their dwelling.

73. The researches of counsel have not identified any authority on the point.

74. The definition provided by s. 343 is of little assistance, merely identifying that the relevant premises must be "used or suitable for use" as a separate dwelling.

75. I see no basis upon which it could be said either that the Appellant occupies or uses the House as a whole as a separate dwelling or that the effect of all the households occupying their separate accommodation and the Communal Facilities satisfies the requirement that the House as a whole is being used as a separate dwelling. To my mind, multiple occupation of this kind is the antithesis of use of the House as a separate dwelling (by anyone or by everyone).

76. Nor, as presently constituted, can it reasonably be said that the House as a whole is suitable for use as a separate dwelling. It is not a satisfactory answer to say that, if the tenants were not there and the House were to be rearranged, it would then be suitable for use as a separate dwelling: the question whether it is suitable for use as a separate dwelling should be answered by reference to its present condition and not by reference to some hypothetically possible future rearrangement. If it were otherwise, almost any and every property would be "suitable for use as a separate dwelling" since almost any and every property could be rearranged and converted to be suitable for use as a separate dwelling. If that were right, there would be no point in the original restriction to premises "used as a separate dwelling." Nor is there any basis for inferring that the House in its present condition would, if empty, be suitable for use as a separate dwelling. If anything, the fact that it is presently set up and used in multiple occupation supports an inference to the contrary.

77. I would not place weight upon the terms of section 3(1) of HA 88. There is nothing in the Appellant's timing point. Although it is correct that section 3(1) of HA 88 post-dates HA 85, the HA 88 approach to treating separate accommodation as having protected status reflects the well-established approach that can be traced back to LTRCA 49: see [63] above. That said, the approach has been adopted for a specific and limited purpose, namely to give a person security of tenure over the separate part of their accommodation which they would not otherwise have. There is nothing in the terms of those provisions that either requires or implies that the provisions themselves should have a wider application; and, given the limited purpose underlying the provisions, I see no good reason to apply them by analogy. Convenience and consistency are not, in my judgment, a good or sufficient reason for applying the provisions more broadly than their obvious and limited purpose.

78. I have read in draft the judgment of Nugee LJ, with which I fully agree. For the reasons I have set out above and those he gives, I would hold that ss. 325 and 326 of HA 85 do not require the question of overcrowding to be assessed by reference to the occupation of the House as a whole.

Ground 2: general consideration of overcrowding

79. The Appellant's submissions on this ground in her skeleton argument are largely predicated on her interpretation of sections 325 and 326, which I have rejected. She also relies upon the failure of the Respondent to confirm that the House was an unlicensed HMO, which is now conceded and has led directly to the withdrawal of the Respondent's decision; and upon the Respondent's failure to take into account the number of people sharing bathroom and kitchen facilities within the House; and upon the Respondent's alleged failure to consider overcrowding in the context of the needs of the Appellant's children for space and privacy.

80. The Respondent accepts that, in an appropriate case, the factors identified by the Appellant might be relevant to whether it was reasonable for her to continue to occupy the House; but it submits that (now with the exception of investigating whether the House was an HMO) the Appellant did not raise these issues and that, in the absence of her doing so, they were not matters that no reasonable authority properly directing itself

would have failed to consider, citing *R v Kensington and Chelsea RBC Ex p Bayani* (1990) 22 HLR 406, CA.

81. Two general points arise. First, the task facing the Respondent authority was to assess whether it was reasonable for the Appellant to continue her occupation of the House: see section 175(3) of HA 96. While reference to the statutory definition of overcrowding was an obviously relevant consideration in the present case and will probably be relevant in any case where the issue of overcrowding is raised, the question of reasonableness was not limited to statutory overcrowding. This is, in my judgment, self-evident; but if confirmation were needed it is supplied by Article 2 of the 1996 Order: see [23] above. There is no a priori limitation on what may be relevant to the assessment of reasonable occupation for the purposes of section 175(3).

82. Second, while the Respondent is right to accept that the matters identified by the Appellant in her skeleton argument may in an appropriate case be relevant to the question of reasonable occupation, it is also right to maintain that the parameters of the exercise it has to undertake, both when making an original section 184 decision and also on a review, will be set by the representations made by the applicant, questions that flow naturally and reasonably from those representations, and other factors that no reasonable authority would fail to investigate.

83. In the present case, leaving on one side the status of the House as an unlicensed HMO, the Appellant raised the broader question of overcrowding tenuously and the impact upon her children by reference to the one neighbour who had complained about the children running around the House: see [4]-[6] above. The Respondent dealt with the Appellant's submissions expressly and adequately: see [7]-[8] above. It drew the reasonable distinction between not feeling comfortable and feeling at risk: the important feature was that the Appellant did not feel at risk and was able to carry out all her day-to-day activities. In addition, the reviewing officer specifically addressed the space that was available to the Appellant and concluded that there was no evidence that the size of the accommodation had any significant effect on the Appellant or her children. There was and remains no evidence, and no point was raised by the Appellant to suggest, that the size of the Communal Facilities was in any way inadequate: the only point raised by the Appellant related to the one neighbour who had complained; and that complaint was not about space but about the children's behaviour.

84. Leaving on one side the question of the House being an unlicensed HMO, I would dismiss Ground 2.

Ground 3: reasonableness and suitability

85. I have reviewed the authorities touching on reasonableness and suitability at [19]-[37] above. For the reasons there set out, I consider that the Judge went too far in stating categorically that "the requirements and standards set out in Article 3 of the 2012 Order do not apply to reasonableness considerations under s. 175 of Part VII of the 1996 Act." Whether a factor that may or will go to an assessment of suitability is relevant to be taken into account when undertaking the prior assessment of whether it is reasonable for an applicant to continue to occupy their present accommodation depends (with the possible exception of affordability, if applicable) upon the facts of the case being considered.

86. In her skeleton argument for the hearing, the Appellant identified specific aspects of unsuitability which the review and the Judge should have considered when considering the reasonableness of requiring the Appellant to remain in her existing accommodation. They are:

    i) The House was an unlicensed HMO and therefore unsuitable pursuant to Article 3(f) of the 2012 Order;

    ii) The Appellant was not provided with a written agreement as required by Article 3(j) of the 2012 Order; and

    iii) The House was B&B accommodation and therefore unsuitable for the Appellant and her children pursuant to Article 3 of the 2003 Order.

    In oral submissions, the Appellant concentrated upon the status of the House as an unlicensed HMO but did not abandon the other features that had been included in her skeleton argument.

87. The Respondent relies upon *Temur* as direct and binding authority for the proposition that a reviewing officer is not obliged to pursue the same process when conducting a Stage 1 exercise as would be required if they were conducting a Stage 2 exercise: see [34]-[35] above. That said, by its concession, the Respondent accepts that the status of the House as an unlicensed HMO was something that no reasonable authority would have failed to consider. To that extent, it accepts the Appellant's case that the status of the House was something that was potentially relevant to the question of reasonableness and should have been considered.

88. In my judgment, the Appellant's case on the other two identified features has not been made out. Although the Respondent was aware that the Appellant had no written agreement, that was not at any stage an element upon which the Appellant relied in relation to reasonableness; nor, in my judgment, was it a matter that was so important that no reasonable authority would have failed to consider it in relation to the question of reasonableness. To my mind, what mattered most on the question of reasonableness was the physical conditions in which the Appellant and her children were living, not whether she had a written agreement. The Respondent considered the important question and reached the conclusion that there was no significant overcrowding and no significant detriment to the Appellant or her children arising from the physical conditions in which they were living. While I can readily accept that living in shared accommodation can have a detrimental impact, particularly on children, the Respondent's conclusion that this was not such a case was a conclusion that the Respondent was entitled to reach.

89. Leaving the status of the House as an unlicensed HMO to one side, I would hold that the Judge's overstatement of the position does not vitiate the Respondent's decision. The Respondent's concession about the status of the House means that the Respondent will have to retake its decision.

Conclusion

90. But for the Respondent's concession about the status of the House, I would dismiss this appeal. Viewed overall or in detail, the Respondent otherwise gave adequate consideration to the question whether it was reasonable for the Appellant to continue to occupy her existing accommodation. Because of the Respondent's concession I would remit the withdrawn decision to the Respondent for reconsideration in the light of all currently prevailing circumstances and any guidance that can usefully be gained from our decision on this appeal.

Lord Justice Nugee:

91. I am very grateful to Stuart-Smith LJ for his erudite and comprehensive judgment, with which I agree.

92. I add just a few words on Ground 1 which is the ground which justified a second appeal. As appears from Stuart-Smith LJ's judgment, at the oral hearing of the appeal it appeared to be common ground that Part X HA 85 applied to the premises where the Appellant lived, the dispute between the parties being whether it applied to the house as a whole (as the Appellant contended) or the Appellant's room (as the Respondent contended and as the reviewing officer had assumed). But in post-hearing submissions a more fundamental point was raised by the Respondent which is whether Part X applied at all.

93. Like Stuart-Smith LJ, and without seeking to ascribe blame to anyone, I think this leaves us in a less than ideal position and I too am reluctant to decide anything other than we need to. In those circumstances I propose to focus on the question raised by Ground 1 which is whether the Appellant is right that Part X HA 85 applied to the house as a whole. I agree with Stuart-Smith LJ that the answer to this is No.

94. The question turns on whether the house is a "dwelling" as defined in section 343 HA 85. That section defines "dwelling" as "premises used or suitable for use as a separate dwelling". It was accepted by Mr Toby Vanhegan for the Appellant that the house was not "used … as a separate dwelling". He was clearly right about that: premises are only used as a separate dwelling if they are used for a single household. There is a very long history to the concept of a "separate dwelling", familiar to all those who had to deal with the Rent Acts: see the account given by Lord Millett in *Uratemp* at [32ff] which traces the phrase "let as a separate dwelling" back to the first of the Rent Acts, the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, and the concept of a "separate dwelling" much further back to the reforms of the parliamentary franchise in 1832 and 1867.

95. It is not necessary to go over the history. The upshot of the long series of cases is that if premises are let to an occupier on terms that living accommodation is shared with others not in the same household, the occupier does not have a separate dwelling. For these purposes a kitchen is (generally) part of the living accommodation in a house so if, like the Appellant, the occupier of a bedroom has shared use of the kitchen, she does not have a separate dwelling. More significantly for present purposes, no one household occupies the house in which the Appellant lives as a whole. It is a house occupied by several different households. This is the very antithesis to a house let as a separate dwelling.

96. Mr Vanhegan's argument was that the house as a whole was nevertheless a dwelling because it was "suitable for use as a separate dwelling". One can see a purely linguistic argument to that effect: if the house were vacant, it no doubt could be let to a single household. But even on a linguistic level, this seems very odd. The definition has two limbs. The first limb refers to premises in fact used as a separate dwelling; the second to premises suitable for use as a separate dwelling. The effect of the first limb is clear enough: it is confined to premises let to a single household. But what is the point of including this limb of the definition if the second limb is then going to bring in any other premises that *could* be let to a single household? Why not just define the premises as those capable of being so let? This by itself makes one doubt if the definition was really intended to catch houses that were not let to a single household but could be if they were empty.

97. Then when one examines Part X HA 85 in more detail, it becomes clear that the Appellant's interpretation would have some odd consequences. Part X is concerned solely with limiting the number of people who can lawfully sleep in a dwelling: it says nothing for example about the number of people using a kitchen or a bathroom or the like. Under section 325 the room standard is concerned with how many people (based on their age, sex and relationship) can sleep in a dwelling given the number of rooms available as sleeping accommodation; and under section 326 the space standard is concerned with how many people can sleep in the dwelling given the number of rooms, and amount of space in each room, available as sleeping accommodation.

98. As Stuart-Smith LJ has pointed out (paragraph 67 above), the primary responsibility for avoiding overcrowding is placed by Part X on the occupier. Under section 327(1) the occupier of a dwelling who causes or permits it to be overcrowded commits an offence. It is true that under section 331(1) the landlord may also be guilty of an offence if he causes or permits it to be overcrowded, but by section 331(2) this is only so in certain very specific circumstances, namely if (a) he had reasonable cause to believe that the dwelling would become overcrowded "in circumstances rendering the occupier guilty of an offence", (b) he failed to make inquiries of the occupier as to the number age and sex of those who would be allowed to sleep there, or (c) if he receives a notice from the local housing authority and fails to act on it.

99. All of this makes sense if the landlord is letting premises to an occupier as a separate dwelling. If a house is let to a single household, it is the tenant who controls who lives there. Responsibility for ensuring that the house is not overcrowded naturally falls on him. And the landlord is liable if he had cause to believe that the tenant would cause it to be overcrowded, or failed to ask the tenant who would be allowed (that is, by the tenant) to sleep there.

100. But these provisions make far less sense in the case of a house in multiple occupation like the Appellant's. Here there is no occupier who controls how many people sleep on the premises. It is the landlord who does that, and one would expect the landlord to be responsible for ensuring that the house did not become overcrowded. But Part X is ill adapted to achieving this. As we have seen the landlord is not guilty of an offence for letting the separate rooms to too many people – his liability is dependent on the occupier being guilty, or in other limited circumstances.

101. To take a specific example, suppose there is a house with 4 bedrooms. The landlord lets each of them to a couple. If Part X HA 85 applies to the house as a whole, this means there is a breach of the space standard as by Table 1 in section 325 the permitted

number of persons for a house with 4 bedrooms is 7½ (even assuming the rooms are large enough under Table 2). One would expect the landlord who is responsible for this to be guilty of an offence. But this is only so if the occupier would be. Who is the occupier for these purposes? If it refers to an occupier of the whole house, there is no-one who answers that description. If it refers to an occupier of any room in the house, it no doubt refers to each of the tenants. But which of them is guilty of an offence? It can scarcely be any of the first three couples as when their rooms were let to them the house was not overcrowded. But can it be said that the couple who occupy the fourth room are guilty of an offence? They have no control over the number of other people sleeping in the house: indeed, they may not even know, when the room is let to them, how many there are. It seems hard to hold them criminally liable for causing the house to be overcrowded when all they did was take a letting of a single room. But unless they can be made liable, the landlord cannot be.

102. Further examples of anomalies could be multiplied. But it is not necessary to do so. I am wholly unpersuaded that Parliament's intention was that Part X HA 85 should apply to the whole house in a case such as the present. I agree with Stuart-Smith LJ that this cannot have been what was intended. The house here is not in my judgment "suitable for use as a separate dwelling" as it is in fact occupied by multiple households already. These words would be apt to include a house that was empty but could be let to a single household; they do not in my judgment include a house in fact let to multiple households.

103. In those circumstances, I agree that Ground 1 should be dismissed. Having reached this conclusion it is not necessary to consider whether Part X HA 85 applies to the Appellant's room taken by itself. I am rather doubtful about it, but even if it does, there was no breach of Part X. Her room, taken by itself, was not statutorily overcrowded as neither the room standard nor the space standard was contravened. Indeed she never complained that her bedroom was too small.

104. Nor is it necessary to add anything on Grounds 2 and 3. I agree with Stuart-Smith LJ on those grounds for the reasons that he gives.

Lord Justice Arnold:

105. I agree with both judgments.