SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 7
P733/21

Lord Justice Clerk
Lord Malcolm
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Reclaiming Motion

by

GLASGOW CITY COUNCIL

Respondent and Reclaimer

against

X

Petitioner and Respondent

and

SHELTER, THE NATIONAL CAMPAIGN FOR HOMELESS PEOPLE LIMITED

Intervener

Respondent and Reclaimer: Johnston KC, Middleton; Harper MacLeod LLP
Petitioner and Respondent: Dean of Faculty, Dailly (sol adv); Drummond Miller LLP
Intervener: Ross KC; Balfour + Manson LLP; by way of written submissions

31 January 2023

Introduction

[1] This reclaiming motion raises an issue of importance regarding the nature and scope

of the duty of a local authority to provide interim accommodation for a homeless household until permanent accommodation becomes available for them. The principal question is whether the statutory obligation to provide temporary accommodation that is "suitable for occupation by a homeless household, taking into account the needs of the household" imposes the same duty as that imposed in relation to permanent accommodation, which is to provide accommodation that meets all of the household's needs including any special needs of a member of the household. The Lord Ordinary decided that question in favour of the petitioner: see [2022] CSOH 35; 2022 SLT 554. The Council now reclaims (appeals) against that decision.

[2] By interlocutor of the court dated 31 August 2022, Shelter Scotland, a charity whose purposes include campaigning on behalf of homeless people, were granted leave to intervene in the reclaiming motion. The intervener was not represented at the oral hearing but provided a helpful written submission including a chronology of the legislative amendments to date, for which we are grateful.

Factual background

[3] The petitioner's household consists of the petitioner, her husband, three daughters currently aged 15, 13 and 11, and a son aged 13. The petitioner's son has been diagnosed as autistic and is disabled within the meaning of section 10 of the Equality Act 2010.

[4] On 4 February 2020 the petitioner and her husband were notified by the Home Office that they had been granted asylum in the United Kingdom. The effect of the grant was that they ceased to be entitled to reside in accommodation provided by the Home Office. They became homeless persons and the obligation to provide them with suitable accommodation passed to the Council as local authority. The Council provided the petitioner and her family

with a four-apartment (three bedrooms and a living room) second-floor flat, where they currently reside, as interim accommodation until permanent accommodation can be made available to them. The Council thereafter conducted an investigation of the household's permanent accommodation needs. A report dated 21 July 2021 by the Council's occupational therapist concluded that the petitioner's son should have his own bedroom:

> "This family need a 5 apartment property in order to accommodate their son's additional support needs and a garden would also be beneficial with regard to this."

[5] The difficulty facing the Council, as explained in an affidavit by Mr William Fulton, the caseworker for the Council's homelessness services assigned to the petitioner's case, is that five-apartment properties are in short supply. Since 2003, the Council has not had its own housing stock and sources accommodation for homeless persons from Glasgow Housing Association and other registered social landlords. Five-apartment houses are generally occupied by permanent tenants and only become available when someone dies or moves away. No five-apartment houses have become available since the petitioner made her application. Even if one did become available it might not be offered to the petitioner; there are other families, some larger, waiting for five or six-apartment houses.

[6] In these circumstances the Council took the decision to house the petitioner and her family in a four-apartment property. In the absence of any available five-apartment property this was the next best thing. In Mr Fulton's view the property meets the family's needs in terms of sleeping accommodation. If the living room is counted as sleeping accommodation there is sufficient for the family and it is possible for the petitioner's son to have his own bedroom. Although the property is not in the petitioner's preferred area (being some distance from where they resided in Home Office accommodation and where

some of the children attend school), there was no nearer alternative accommodation of sufficient size available.

[7] The petitioner does not consider that the interim accommodation provided by the Council is suitable for the needs of her son or of her household generally. Her son needs his own space and room. A four-apartment property is not sufficient for the needs of the household. It is not in the locality of the schools attended by three of her children. Certain other complaints are made about the condition of the premises.

The Council's statutory duties to accommodate homeless persons

Permanent accommodation

[8] Under section 28(1) of the Housing (Scotland) Act 1987 ("the Act"), if a person applies to a local authority for accommodation, the authority must make such inquiries as are necessary to satisfy themselves as to whether he is homeless or threatened with homelessness, and may also inquire into whether or not he became homeless intentionally. In terms of section 31(1) of the Act, if the local authority are satisfied that an applicant is homeless and that he did not become homeless intentionally, they must (unless they refer the applicant to another local authority on the ground of local connection) secure that permanent accommodation becomes available for his occupation. "Permanent accommodation" means, in essence, a secure tenancy (section 31(5)). "Accommodation" does not, however, include accommodation (a) that is overcrowded or which may endanger the health of its occupants; (b) that does not meet any special needs of the applicant or a member of his household; or (c) that it is not reasonable for the applicant to occupy (section 32(5)).

Interim accommodation

[9] A separate duty to provide an applicant who is or may be homeless with interim accommodation is contained in section 29(1) which (as amended) states *inter alia*:

> "If the local authority have reason to believe that an applicant may be homeless they shall secure that accommodation is made available for his occupation—
>
> > (a) pending any decision which they may make as a result of their inquiries under section 28;
> >
> > …
> >
> > (c) where, by virtue of a decision referred to in paragraph (a) or (b), the authority have a duty under section 31 to secure that accommodation of a particular description becomes available for the applicant's occupation, until such accommodation becomes available."

In terms of section 29(3), "accommodation" in the first place in which the expression occurs in subsection (1) does not include accommodation of such description as the Scottish Ministers may, by order made by statutory instrument, specify.

[10] The power in section 29(3) to specify accommodation that does not meet the statutory test was inserted by the Homelessness etc (Scotland) Act 2003, with effect from 30 January 2004. It has been exercised more than once. The first exercise of the power, in 2004, extended only to applicants who were pregnant or had dependent children, and allowed for the use of unsuitable accommodation for a maximum period of 14 days where a local authority had no suitable accommodation available. In 2014, the 2004 Order was repealed and replaced by the Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2014 (SSI 2014/243) ("the 2014 Order"), introducing a requirement that interim accommodation be wind and watertight. An amendment to the 2014 Order in 2017 reduced the period for which a household might be accommodated in unsuitable accommodation from 14 to 7 days. In 2020, the 2014 Order was extended from households including children to all homeless households.

[11] For present purposes, the critical provision is article 4 of the 2014 Order. In its original form, article 4 stated:

> "In all circumstances, accommodation is unsuitable if it is—
> (a) not wind and watertight; or
> (b) not suitable for occupation by children."

Following amendment by the Homeless Persons (Unsuitable Accommodation) (Scotland) Amendment Order 2020 (SSI 2020/139), article 4 stated, with effect from 6 May 2020:

> "In all circumstances, accommodation is unsuitable if it is—
> (a) not wind and watertight;
> (b) not suitable for occupation by a homeless household; or
> (c) not meeting minimum accommodation safety standards."

Article 4 reached its present form after further amendment by the Homeless Persons (Unsuitable Accommodation) (Scotland) Amendment (No 2) Order 2020 (SSI 2020/419) with effect from 31 January 2021. It currently states:

> "In all circumstances, accommodation is unsuitable if it is—
> (a) not wind and watertight;
> (b) not suitable for occupation by a homeless household, taking into account the needs of the household; or
> (c) not meeting minimum accommodation safety standards."

This case is primarily concerned with the proper interpretation of the words "taking into account the needs of the household" which were added to article 4(b) by the most recent amendment.

[12] The Order goes on to specify, in article 5 (as amended), a number of other circumstances in which accommodation is unsuitable. These include accommodation which

- is not in the locality of facilities and services for the purposes of health and education which are being used, or might reasonably be expected to be used, by members of the household, unless those facilities are reasonably accessible from the

accommodation, taking into account the distance of travel by public transport or transport provided by a local authority;

- lacks within the accommodation adequate toilet and personal washing facilities for the exclusive use of the household which meet the household's accessibility needs;
- lacks adequate and accessible bedrooms for the exclusive use of the household;
- does not afford the household the use of adequate and accessible cooking facilities and the use of a living room.

These disqualifications (though not those in article 4) are disapplied by article 6 in various circumstances, including where the local authority believes that the homelessness has resulted from an emergency such as flood, fire or other disaster. In addition, article 7 permits a local authority to provide accommodation that does not meet the requirements of article 5 for a maximum period of 7 days where the applicant seeks accommodation outwith normal business hours or where the local authority has no accommodation suitable for a homeless applicant. Finally, as regards a household which does not include children or a pregnant woman, article 7A permits a local authority to provide accommodation in certain specified forms which would otherwise be unsuitable in terms of article 5 because it lacks adequate exclusive toilet and personal washing facilities or is not usable by the household for 24 hours a day. In short, and as stated in terms, article 4 applies "in all circumstances" whereby an authority comes under an obligation to provide interim accommodation to a homeless household.

Scottish Government Guidance

[13] Section 37 of the Act requires a relevant authority (including a local authority) to have regard, in the exercise of their functions in relation to homeless persons, to such guidance as may from time be given by the Scottish Ministers.

[14] On 7 November 2019 the Scottish Government published a code of guidance for local authorities. Annex A contains advisory standards for temporary accommodation. One of the specified physical standards is that the accommodation should "be accessible and able to meet the needs of any disabled person within the household". In January 2021, the Scottish Government published further guidance relating specifically to the 2014 Order. The guidance in respect of article 4 includes the following paragraph (3.4):

> "In assessing whether accommodation is unsuitable for a homeless household, a local authority must take account of the needs of each member of the household, including any protected characteristics, equality considerations or vulnerabilities around psychological informed service delivery and childhood trauma."

The purpose of the amendment made by SSI 2020/419 is said (at para 2.7) to have been "to ensure that the needs of vulnerable people are met".

The Council's statutory equality duties

[15] As a service provider and a person exercising public functions, the Council is under a duty to make reasonable adjustments for disabled people. In terms of section 20(3) of the Equality Act 2010, that duty includes a requirement, where a practice of the Council puts a disabled person at a substantial disadvantage in relation to the provision of a service in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Separately, section 149(1)(b) of the 2010 Act requires a public authority to have due regard to the need to advance equality of opportunity between persons who share a "relevant protected characteristic" (including disability) and persons who do not share it. In terms of section 149(3)(b) and (4), this involves having due regard to

the need to take steps to meet the needs of disabled persons that are different from the needs of persons who are not disabled, including steps to take account of disabled persons' disabilities.

The Lord Ordinary's decision

[16] The Lord Ordinary began by noting, under reference to the observations of Lord Nicholls of Birkenhead in *R* v *Barnet London Borough Council* [2004] 2 AC 208 at para 12, that the discretion of a local authority as to how to spend its resources is displaced when it is discharging a statutory duty as opposed to exercising a power. The more specific and precise the duty, the more readily the statute may be interpreted as imposing an obligation of an absolute character. At paragraph 19, the Lord Ordinary identified the issue in the present case as being whether there was an absolute duty on the Council to provide accommodation that was suitable for the needs of the petitioner's autistic child, or whether the Council had freedom not to do so.

[17] The Lord Ordinary concluded that the duty was an absolute one. He rejected a contention by the Council that article 4(b) could be distinguished from the absolute duties in article 4(a) and (c). The duty imposed by article 4(b) was not of the wide ranging general nature of the duty under consideration in *R* v *Barnet London Borough Council*. It was restricted to the housing needs of a homeless family and was capable of being assessed and met. The Council had made an assessment and had concluded that the petitioner needed a five-apartment property in order to address her son's additional support needs. The Lord Ordinary rejected a submission by the Council that the phrase "taking into account" conferred a discretion to balance the needs of the household against other demands on a local authority's finite resources. The words in article 4(b) indicated that the needs of the

household were a factor to be considered in deciding whether accommodation was suitable for their occupation. If the household had a need for a five-apartment property then that was what the local authority was obliged to provide. It could not avoid compliance with its duty because it was reliant on third party providers or because there were significant pressures on resources. The Lord Ordinary concluded (at paragraph 31):

> "I find that the respondent is under an absolute duty to provide temporary accommodation to the petitioner which is suitable for occupation by the petitioner's household, taking into account the additional support needs of the petitioner's son. To put it in another way, the respondent is under an absolute duty to provide a five apartment property."

[18] As regards the Council's duty under section 20 of the Equality Act 2010, the Lord Ordinary identified the issue as being what the Council should do if registered social landlords were unable to provide accommodation that was suitable for a disabled person. In that situation the local authority was obliged by section 20(3) to make a reasonable adjustment to its practice in relation to the sourcing of accommodation, in order to provide suitable accommodation. The Council was not restricted as a matter of law to sourcing through registered social landlords: where suitable accommodation for a disabled person could not be obtained from registered social landlords, obtaining it from another source would be a reasonable adjustment. Accordingly, had the Lord Ordinary not found in favour of the petitioner on section 29 of the Housing (Scotland) Act 1987, he would in any event have found in her favour on section 20 of the Equality Act 2010. He made no finding as to whether the Council had complied with its duty under section 149 of the 2010 Act.

[19] Among the remedies sought by the petitioner was an order for specific performance of the Council's duty to provide suitable interim accommodation to her and her family. The Lord Ordinary noted that the Council opposed the granting of such an order, on the extraordinary ground that it proposed not to comply with it but to continue to act

unlawfully because, according to the Council, it would be impossible to comply for the reasons set out in Mr Fulton's affidavit. The Lord Ordinary observed that it was fundamental to the rule of law that public authorities obey the law and the courts. The Council had to find a way to comply with its statutory duty; it was not up to the court to specify how precisely it would do so. If the usual third party providers could not provide the means of compliance, the Council had to find others who could, or find another way to comply with the decision of the court. At a subsequent by order hearing the Lord Ordinary (i) pronounced declarators that the Council had acted unlawfully by providing the petitioner with unsuitable temporary accommodation and that its failure to make any reasonable adjustments was *ultra vires* of section 29 of the Housing (Scotland) Act 1987 when read with sections 20 and 29 of the Equality Act 2010, and (ii) granted an order for specific performance of the Council's duty under section 29 of the 1987 Act to provide suitable temporary accommodation by 30 September 2022.

Argument for the Council

[20] On behalf of the Council it was submitted that the Lord Ordinary had erred by misconstruing the scope of the duty under section 29 of the 1987 Act or, if he had construed it correctly, by misapplying it to the facts of the case. The scope of the section 29 duty could not be determined by reference to the household's permanent accommodation needs. It applied where the homeless person was waiting for accommodation "of a particular description" to become available as permanent accommodation, which implied that the temporary accommodation might not meet a need for permanent accommodation of that description. There was a clear qualitative difference between the duties imposed in relation to temporary and permanent accommodation respectively: the latter had to meet the special

needs of the petitioner or a member of the household; there was no such requirement in relation to the former.

[21] Although article 4(b) imposed a mandatory duty to take into account the needs of a homeless household, it did not impose an absolute duty to meet those needs. Provided the local authority had taken account of the household's needs, the accommodation would not be "unsuitable" within the meaning of the order. The Lord Ordinary had erred in equating the identification by the Council's occupational therapist of the petitioner's need for permanent accommodation comprising five apartments with the reference to needs in article 4(b). A "need" was a relative concept which the Council's experienced officers were better equipped to assess than the courts. In this case the decision maker properly took into account the household's needs for the purpose of provision of temporary accommodation. The accommodation across four rooms allowed the petitioner's son to have his own bedroom. The decision maker had taken into account the petitioner's need to be close to the area where she had previously lived and her need for access to schools and health facilities. It had been acknowledged that the solution was not ideal and that a five-apartment house would be necessary for permanent accommodation, but the decision to allocate this property as temporary accommodation had been within the range of reasonable decisions open to the decision maker.

[22] If the Lord Ordinary's decision was correct, the Council would have a statutory duty to provide accommodation that met the needs of the petitioner's disabled son as soon as it began investigating whether the household was homeless, or immediately in the event of an emergency occurring. It made more sense if the duty applied only to the provision of permanent accommodation after the household's needs had been assessed. That accorded with the decision of the court in *Dafaalla* v *City of Edinburgh Council* 2022 SLT 807 in which it

was accepted that a full assessment of housing needs required to be carried out only after initial eligibility had been determined.

[23] The statutory scheme envisaged that a person could be homeless and waiting for permanent accommodation but still have unmet housing needs because the local authority considered that those needs were not capable of being met by housing options that were available. In that situation, section 20 of the 1987 Act simply imposed a duty to give the homeless person a reasonable preference in the allocation of housing that became available, which was inconsistent with a duty to meet the needs on day 1.

[24] In analogous English case law it had been held that it was not a breach of duty to house people in accommodation which did not meet their needs for a short period of time, but that the lapse of time could make that situation intolerable, in which case the court would step in. The same would apply here. The English case law also supported the proposition that the duties of a Council with finite resources were not identical as regards permanent and temporary accommodation respectively.

[25] As regards the Council's equality duties, there had been no evidence that the petitioner's disabled son had been disadvantaged by any practice of the Council. The temporary accommodation provided in fact allowed him to have his own room. No case had been advanced in the petition that the Council had breached its duty by failing to make a reasonable adjustment to its practice of sourcing accommodation from registered social landlords. As a result there had been no evidence that any substantial disadvantage suffered by the petitioner's son could have been avoided by recourse to "other sources", or whether it would have been reasonable for the Council to make such an adjustment.

Argument for the petitioner

[26] On behalf of the petitioner it was submitted that the Lord Ordinary's construction of the words in section 29 and article 4(b) gave them their natural and ordinary meaning in the proper statutory context. Section 29 used mandatory language. The Lord Ordinary was correct to hold that the specific and precise wording of those provisions was a strong indication that they should be interpreted as imposing an obligation of an absolute character. He had correctly distinguished the English cases in which a welfare duty was expressed in general and wide-ranging terms. Moreover Scots law now gave greater protection to homeless persons than English law, having ceased to apply a "priority need" test, and English homelessness cases were not in point.

[27] The Lord Ordinary had not taken upon himself the assessment of whether the accommodation met the needs of the petitioner's household. The Council had made the assessment and concluded that they needed a five-apartment house. On the basis of the Council's own assessment the temporary accommodation provided did not meet the needs of the petitioner's son as a disabled person or those of the petitioner's household generally. The Council provided no explanation of why it had chosen to rely solely on registered social landlords for sourcing temporary homeless accommodation and not, for example, the private sector or utilising its general statutory powers to contract or purchase property. The lack of supply of larger temporary homeless properties in Glasgow was an issue of which the Council was well aware. The Council's discretionary entitlement to have regard to the general circumstances prevailing in relation to housing in its area arose only in the context of assessing whether a person was homeless or threatened with homelessness under section 24 of the Act; it did not apply after the Council had accepted that a person was homeless and placed them in temporary accommodation. There was no entitlement to have regard to the needs of other households.

[28] The only distinction of substance between permanent and temporary accommodation was that the former had to provide secure tenure. Despite the differing statutory wording, there was no material difference between the assessment of needs for the purposes of temporary and permanent accommodation respectively. The words "special needs" in section 32(5) were not used in a technical sense: they simply referred to the needs of the household in question. In the case of this family, that meant five-apartment accommodation. To conclude that the household needed five apartments and then to decide that four apartments were suitable was to disregard the terms of article 4(b). The wording of the Guidance was supportive of the petitioner's argument.

[29] The obligations imposed on social landlords generally by section 20 of the Act were not in point. They were in a different part of the Act, dealing with a different issue and applicable to different entities.

[30] It was accepted that in practice it was likely that there would be a period of time between the Council's decision on the eligibility of an applicant for homeless accommodation and an assessment of that applicant's needs. During this period the Council would not be in breach of its statutory duty by failing to meet all of the household's needs, but the position changed once the assessment had been made. From that time the Council came under a clear and prestable duty to provide accommodation which met those needs.

[31] As regards equality duties, there was a sufficient evidential basis for the Lord Ordinary's finding that the Council ought to have made reasonable adjustments to its practice in order to provide the petitioner's disabled son with suitable accommodation. The issue of a lack of available larger properties had been addressed in both parties' pleadings; the Council's position, supported by Mr Fulton's affidavit, was that it was dependent upon the accommodation which registered social landlords had available at any particular time.

A reasonable adjustment to the Council's practice ought to have been made in order to meet the petitioner's son's needs in order to avoid him being placed at a substantial disadvantage in comparison to someone who was not disabled.

Written submission for the intervener

[32] Shelter Scotland submitted that the Lord Ordinary had been correct to characterise the duty under section 29, read with article 4(b), as an absolute duty which could not be qualified by reference to resource. Once a local authority had identified the needs of a homeless household, it required to meet those needs.

[33] A distinction fell to be drawn between part I (sections 1 to 23) and part II (sections 24 to 43) of the 1987 Act. Part I set out the powers of local authorities in relation to the provision and allocation of housing generally. Section 20, which was founded on by the Council, concerned the allocation of permanent accommodation by social landlords and not the provision of interim accommodation to homeless people. Part II was concerned with duties towards homeless people. The series of changes made to the 1987 Act and relevant orders over the years had resulted in increased protection for homeless people. Guidance issued in relation to the 2014 Order and the amendments to it made clear that children's best interests had to be met both at the stage of providing interim accommodation under section 29 and of providing permanent accommodation under section 31.

[34] It was important to note that households often unfortunately spent a lengthy period of time in "interim" accommodation; for example 1,075 households in Scotland with children (including 240 in Glasgow) whose cases were closed in the year to 31 March 2022 spent more than one year in temporary accommodation. All homeless households requiring temporary accommodation were entitled to suitable accommodation, determined according

to what met the household's needs. The Council's position that it was not bound to meet needs of which they were aware was inconsistent with the legislative purpose.

[35] It did not follow from the inclusion of the phrase "accommodation of a particular description" in section 29(1)(c) that it was permissible for the local authority to provide temporary accommodation which did not meet the household's needs. Permanent accommodation was provided by secure tenure which brought the homeless application to an end. Interim accommodation was by its nature insecure and could be provided in a variety of ways, but it had to meet the needs of the household. It was not the case that permanent accommodation did not have to meet all the needs of the household; section 32(5) stated that "accommodation" in section 31 did not include accommodation that did not meet any special needs of the applicant or member of the household. There was a parallel between this provision and the terms of article 4(b) in relation to temporary accommodation.

[36] Use of the phrase "taking into account" in article 4(b), in contrast to, for example, "having regard to", connoted a factual assessment admitting of a clear answer. That was consistent with subparagraphs (a) and (c) which both concerned matters of fact. The phrase "taking into account the needs of the household" was introduced in 2021 because the provision had lacked a yardstick with which to test unsuitability. It made clear that suitability had to be assessed against the needs of the household in question and not households generally. No reference was made to other considerations such as local availability.

[37] Even if the assessment of the petitioner's needs was made for the purposes of permanent accommodation, the Council had awareness of the needs and was required to take account of them when providing interim accommodation. It would be artificial to

distinguish between needs in respect of permanent accommodation and those in respect of interim accommodation. Here the Council's officer had identified a need (a five-apartment property) and also something which would be beneficial but was not a need (a garden). In a situation where their needs had been assessed for the purpose of allocating permanent accommodation, it would be extraordinary if the Council were able to disregard those needs while the household was waiting.

Decision

The duty to provide suitable interim accommodation

[38] The key issue is whether the duties imposed on a local authority in relation to the provision of interim accommodation are the same as those imposed in relation to the provision of permanent accommodation. In our opinion they are not. There are striking differences in the wording of the respective statutory provisions which cannot be disregarded, and the 2014 Order must be taken to have been drafted with a knowledge and understanding of the terms of the Act. In order to discharge its obligation to provide a homeless applicant with permanent accommodation, the local authority must provide accommodation which satisfies the requirements of section 32(5) of the Act. One of those requirements is that it meets any special needs of the applicant or any other member of the household. There is thus a specific obligation to *meet* such needs, and the reference is clearly to the special needs of a particular individual within the household.

[39] In contrast, the duty imposed by section 29(1) is to secure that interim accommodation is made available until accommodation "of a particular description", which must *inter alia* satisfy the requirements of section 32(5), becomes available for the applicant's (permanent) occupation. Article 4(b) of the 2014 Order requires the local authority to

provide interim accommodation that is suitable, *taking into account* the needs of the household. It does not require particular needs to be met. Nor does it refer to the special needs of an individual member of the household but rather to the needs of the household as a whole. Those differences indicate that the content of the section 29 duty to provide temporary accommodation is not the same as that of the section 31 duty to provide permanent accommodation. It follows that an assessment of a homeless household's needs in respect of permanent accommodation, including any special needs of a member of the household, is not determinative of whether a property is suitable for the household's temporary occupation until accommodation meeting the assessed needs becomes available.

[40] A number of factors support this analysis. First, article 4(b) must be read in the context of the 2014 Order as a whole. Article 5 lists a number of features rendering accommodation unsuitable as temporary accommodation, but these disqualifications are disapplied by article 6 where, for example, the homelessness results from an emergency such as flood or fire, and by article 7 where, for example, the application is made outwith normal business hours. But the requirements of article 4 are not disapplied in either case. If the petitioner's interpretation of article 4(b) was correct, the local authority could, in a case of homelessness caused by an emergency, or in response to an out of hours application, provide accommodation which lacked adequate bedrooms for the exclusive use of the household and/or accommodation within which the household did not have the use of a living room, yet would still be required by article 4 to provide the household with accommodation which met all its permanent needs including, in the present case, a bedroom for the exclusive use of the petitioner's son. That would make no practical sense, indicating that the article 4(b) duty ought rather to be construed as a more general duty to provide accommodation that takes account of the basic needs of a household of the size and

composition in question, as opposed to the permanent needs of the particular household and each of its members. This is reflected in para 4.1 of the Guidance which states that "the basic standard must always be met".

[41] Secondly, the petitioner's interpretation fails to have regard to the fact that the duty to provide interim accommodation will usually have to be performed before any assessment has been made of the permanent accommodation needs of the household and its individual members. As the court observed in *Dafaalla* v *City of Edinburgh Council* (above) at paragraph 28, the assessment of housing needs has to be made only after initial eligibility has been determined. There may, for example, where a local authority decides it is necessary, be an inquiry under section 28(2) as to whether an applicant has become homeless intentionally, but while this inquiry is being carried out the local authority is already under its section 29 duty to provide interim accommodation. In the present case no section 28 inquiry was needed because the petitioner's homelessness resulted from being granted asylum. Even in that situation, however, there required to be an assessment of the needs of her and her household in relation to permanent accommodation, and as a matter of fact she was provided with the accommodation where she currently resides before that assessment was made. This affords a further indication that the assessment of the household's needs in relation to permanent accommodation is not determinative of the suitability of interim accommodation which will ordinarily have been provided in advance of that assessment being made. We are not persuaded by the petitioner's argument that the making of the permanent needs assessment creates a duty in relation to the provision of interim accommodation which had not previously existed.

[42] It was submitted on behalf of the petitioner that the only material distinction between temporary and permanent accommodation lay in the definition in section 31(5)

which restricted the latter expression to accommodation of which, one way or another, the applicant had a secure tenancy. We do not accept that this is the only significance attaching to permanent accommodation. The local authority's duty to secure permanent accommodation for an applicant is discharged when it has secured accommodation which satisfies the description in section 32(5), including meeting the special needs of any member of the household. Pending the local authority's discharge of that duty the household has to have somewhere to live, but the accommodation provided during this period is required to satisfy the requirements of the 2014 Order and not section 32(5). Providing accommodation which satisfies the 2014 Order will not discharge the local authority's section 31 duty.

[43] For these reasons we conclude that the article 4 test of "suitability" may be met even where the temporary accommodation does not meet any special needs of individual members in all respects, so long as account is taken of the general needs of the household and the decision of the local authority in that regard is a reasonable one. In so far as the Guidance issued in relation to the 2014 Order might be read as suggesting a more onerous duty in relation to "the needs of vulnerable people", it is for the court and not the executive to determine the proper construction of legislation: see eg *Yemshaw* v *Hounslow London Borough Council* [2011] 1 WLR 433, Baroness Hale of Richmond at para 25; Lord Brown of Eaton-under-Heywood at para 56.

[44] Our conclusion accords with the approach taken in English cases dealing with equivalent statutory provisions. In *R (Aweys)* v *Birmingham City Council* [2009] 1 WLR 1506, the House of Lords drew a distinction between what might be suitable for fulfilling a local authority's duty to provide interim accommodation and what would be necessary to discharge its duty in relation to provision of permanent accommodation: see Lord Hope of Craighead at para 4 and Baroness Hale of Richmond at para 18. As Lord Hope observed, the

court must have regard to the practicalities of the situation. To similar effect are the observations of Lewis LJ in *R (Elkundi)* v *Birmingham City Council* [2022] QB 604 at paras 81 and 82:

> "81 …Suitability is, as the Judge said, a flexible concept. It will include factors such as the nature of the accommodation, the length of time that the homeless person has been in the accommodation and his and his family's needs. The lack of alternative accommodation may also be a factor affecting what is suitable in the short or medium term as may the fact that the housing authority has limited resources available to secure accommodation. There may be other factors which are relevant either generally or in a particular case. This judgment is not intended to suggest any exhaustive list of factors capable of being relevant to the question of suitability.
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> 82 In other words, the duty to secure that suitable accommodation is available does not mean that permanent accommodation suitable for long term occupation must be provided immediately once the duty is owed. Different accommodation may be provided at different times to ensure that the duty is being performed…"

The English legislation does not contain a direct counterpart of the 2014 Order, but in our view the same approach should be taken to interpretation of the duty in article 4(b) to take into account the needs of a household when determining whether interim accommodation is suitable for its occupation.

[45] We recognise that there is an underlying practical problem in that homeless persons, especially larger families, may find themselves accommodated in interim accommodation for a considerable period of time before permanent accommodation meeting their needs becomes available. The statistics provided to us by the intervener illustrate the extent of this problem, but it does not determine the proper interpretation of the statutory provisions. However, as the House of Lords made clear in *R (Aweys)* v *Birmingham City Council*, what is suitable for occupation in the short or medium term may not be suitable for occupation in the long term. If the time that is allowed to elapse becomes intolerable, the court may feel that it is proper for it to step in (Lord Hope at para 4). As Lady Hale stated at para 51:

> "…(T)here will be cases where the court ought to step in and require an authority to offer alternative accommodation, or at least to declare that they are in breach of their duty so long as they fail to do so. While one must take into account the practical realities of the situation in which authorities find themselves, one cannot overlook the fact that Parliament has imposed on them clear duties to the homeless, including those occupying unsuitable accommodation. In some cases, the situation of a particular applicant in her present accommodation may be so bad, or her occupation may have continued for so long, that the court will conclude that enough is enough."

These observations confirm, as a matter of generality, that a homeless person who is housed for an unreasonable period of time in accommodation which does not meet his needs is not without a remedy.

[46] It will be apparent that our identification of the issues in the case differs from that of the Lord Ordinary. We do not find it helpful to formulate the question as being whether or not the Council is under an absolute duty to provide the petitioner with a five-apartment property as interim accommodation. Nor do we understand the Council's position to be that it had a discretion to balance the needs of the household, including in particular the special needs of the petitioner's son, against other demands on its resources and to decide not to meet those needs. In our view, the issue for determination is the nature and scope of the article 4(b) duty to provide interim accommodation that is suitable for occupation by the household, taking account of its needs. We accept the Council's submission that whether the interim accommodation is suitable in terms of section 29 and the 2014 Order, including article 4(b), is primarily a matter for assessment by a local authority's experienced officers. No case was made by the petitioner that the Council's homelessness services officers acted unreasonably or that they left a material consideration out of account. The petitioner's contention was rather that the Council was under a statutory duty to provide her with five-apartment temporary accommodation. For the above reasons we reject that contention.

The equality duty

[47] The petitioner's alternative case, accepted *obiter* by the Lord Ordinary, was that the Council had been under a duty in terms of section 20 of the Equality Act 2010 to make a reasonable adjustment to its practice of sourcing homeless accommodation from registered social landlords in order to avoid putting her disabled son at a substantial disadvantage, due to not having his own bedroom, in comparison to persons who are not disabled. We reject this submission for two reasons. First, it was not established by the evidence before the Lord Ordinary that the petitioner's son was precluded from having his own room in the property provided to them. Although it is averred that he shares a bedroom with one of his sisters, there are, as Mr Fulton has pointed out in his affidavit, other possible sleeping configurations that would enable him to have his own room.

[48] Secondly, we are not persuaded that the Council's practice for sourcing homeless accommodation puts disabled persons such as the petitioner's son at a disadvantage in comparison with persons who are not disabled. There is clearly no intrinsic reason why accommodation obtained from a registered social landlord as opposed to some other source is less suitable for disabled persons than for persons who are not disabled. The issue in this case is not whether property sourced from a registered social landlord puts a disabled person at a substantial disadvantage but rather whether the temporary accommodation provided to the petitioner is unsuitable because it puts her disabled son at a substantial disadvantage. That is a matter which falls to be addressed by application of the housing and homelessness legislation and not by equality legislation. We therefore also reject the petitioner's alternative case.

Disposal

[49] We shall allow the reclaiming motion, recall the Lord Ordinary's interlocutor dated 17 May 2022, sustain the respondent's third and fourth pleas in law and repel the petitioner's pleas in law, and refuse the petition.