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**The housing benefit deficit and intentional homelessness**

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**Legislation:**

Housing Act 1996 s.191

Homelessness (Suitability of Accommodation) Order 1996 (SI 1996/3204)

**Cases:**

*Samuels v Birmingham City Council* [2019] UKSC 28

*Burnip v Birmingham City Council* [2012] EWCA Civ 629

*R (on the application of Michael Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin).

**Introduction**

The decision of the Supreme Court in *Samuels v Birmingham City Council[[1]](#footnote-1)* reflects the reality for hundreds of thousands of tenants in the private rented sector in receipt of Local Housing Allowance (LHA). Faced with a woefully deficient *ex ante* housing benefit, subject to a series of cuts and freezes since 2010, they face acute shortfalls between their rental liability and the available housing benefit. For small families, LHA rates in 25% of the country leaves them with a deficit of over £100 per month to service.[[2]](#footnote-2) They face an impossible choice. Try to draw on subsistence benefits to make up the shortfall (foregoing essential needs), seek support from their Local Authority through the cash-limited and highly leveraged Discretionary Housing Payment (DHP) scheme, or face the consequences of falling into arrears.

Ms Samuels, renting as an assured shorthold tenant in Birmingham with her four children, was one of these households. She received housing benefit (LHA) of £548.51 per month to meet her rent of £700, leaving her with a shortfall of £151.49. Her only other income was through social security support: income support, child tax credit, and child benefit. She fell into rent arrears and in July 2011 was served notice by her landlord.

She applied to Birmingham City Council as homeless under Part VII Housing Act 1996. They determined that her accommodation was “affordable” and therefore was reasonable for her to continue to occupy. She had, so the reviewing officer determined, “flexibility in [her] overall household income” to meet the weekly deficit between her rent and housing benefit.[[3]](#footnote-3) Put another way, she should divert income from other non-housing benefits to the servicing of her rental liability. As a result, she was intentionally homeless under s.191 Housing Act 1996 and not owed the full housing duty under s.193. This decision was upheld on internal review.

After a drawn-out path through the High Court and Court of Appeal – resulting in many a dispute with the Legal Aid Agency[[4]](#footnote-4) ­­– in a mercifully concise and unanimous judgment, the UKSC upheld Ms Samuel’s challenge to this decision. The analysis that follows (i) deals briefly with an outline of the decision, before turning to (ii) broader issues on assessing the reasonableness (or lack thereof) of living expenses, and (iii) implications for the DHP scheme and Universal Credit.

**The decision**

The assessment of intentional homelessness – set out in s.191 Housing Act 1996 – is no stranger to the UK’s highest courts.[[5]](#footnote-5) The section is, however, as much as a creature of guidance as it is of statute. Local authorities are required under s.182(1) to have regard to guidance issued by the Secretary of State and s.177(3) allows the Secretary of State to specify by order circumstances to be accounted for when assessing the reasonableness of occupying accommodation.

The Homelessness (Suitability of Accommodation) Order 1996 (SI 1996/3204) requires local authorities take into account the financial resources available to any applicant, including any social security benefits, alongside their “reasonable living expenses” and payments of rent. The accompanying guidance – issued in 2006 (at the time of the decision under appeal) – states, *inter alia,* under paragraph 17.40:

In considering an applicant's residual income after meeting the costs of the accommodation, the Secretary of State recommends that housing authorities regard accommodation as not being affordable if the applicant would be left with a residual income which would be less than the level of income support or income-based jobseekers allowance that is applicable in respect of the applicant , or would be applicable if he or she was entitled to claim such benefit.[[6]](#footnote-6)

There were, therefore, two interrelated questions: (i) whether the recommended “income support” floor in the guidance passports inclusion of other social security payments (particularly those intended to meet the needs of children), and (ii) if money from these non-housing benefits could be expected to service a rental shortfall and thus render accommodation “affordable”?

On the former, the court determined that it would be “surprising, even nonsensical”[[7]](#footnote-7) for the reference to “income support” in the guidance to exclude provision made for children through child tax credit and child benefit. Not least because provision for child tax credit had historically been subsumed into the delivery of “income support” (effectively existing as an applied for top-up).[[8]](#footnote-8)

However, more fundamentally, notwithstanding the true meaning of “income support” within the guidance, benefits received by the household are “not generally designed to provide a surplus above subsistence” and the guidance itself underscores that amounts will vary in line with the composition of the household.[[9]](#footnote-9) On the second question, therefore, these payments should not be treated by local authorities as a means to offset deficiencies in housing benefit to meet rental liabilities. Put another way, as Mr Stark argued in his submissions on behalf of Ms Samuels, it is wrong to treat “non-housing benefit as containing a surplus”.[[10]](#footnote-10)

Instead of assessing whether her (non-housing) living expenses were reasonable, the local authority officer had instead considered whether there was “flexibility”[[11]](#footnote-11) to meet the £151.49 shortfall between housing benefit and rent by directing income from other benefits to service the rental liability. Ms Samuels’ monthly expenses were already lower than the gross total of the benefits she received (£1,234.99 to £1,349.33 respectively), indicating – given the benefit payments’ benchmarking against subsistence – that they were reasonable.[[12]](#footnote-12) As a result, the decision by the local authority was unlawful and quashed.

**Assessment of income and expenditure: Topping up one benefit with another**

The treatment of social security payments as income to be mined in the face of deficiencies or penalties elsewhere is not particular to the ambit of Part VII Housing Act 1996. The courts have already criticised the assessment of payments designed to meet the costs of disability – particularly Disability Living Allowance – as a form of income that could be expected to service deficiencies in housing benefit under both the calculation of applicable LHA rates[[13]](#footnote-13) and in the assessment of DHP awards.[[14]](#footnote-14)

The practice has been given short shrift by the courts. In *Burnip*, the court mirrored efforts in *Samuel* to draw a “clear distinction” between benefits claimed for “subsistence” and those for meeting “housing needs”[[15]](#footnote-15) – the former should not be expected meet deficiencies in the latter. To do so risks jeopardising the very need that social security payment is intended to address. Likewise, in *Hardy,* in the context of a DHP income and expenditure assessment, the court determined that disability benefits are “not the same as any other income, but [are] awarded specially to enable disabled persons in need of personal care to cope better with their disabilities in the way they see fit”.[[16]](#footnote-16) To consider them as income to be offset against a shortfall in housing benefit is to place disabled applicants at a disadvantage and to unlawfully discriminate against them.[[17]](#footnote-17)

The courts’ continued derision of these practices points to broader problems with income and expenditure based models of assessing affordability. As detailed in *Samuels*, the income and expenditure evidence “presented a somewhat confusing picture”[[18]](#footnote-18) and the amounts detailed to the local authority varied. This is hardly surprising for a household with four children. Affordability assessments capture a snap-shot of household finances at a given fixed point in time (generally a one month period); the assumption that income and expenditure is managed in a liner and consistent way does not accord with what is known about living on low incomes. The Joseph Rowntree Foundation’s report examining destitution in the UK[[19]](#footnote-19) underscores that households with low levels of income exercise a ‘limited degree of choice’ over expenditure patterns, particularly where irregular costs – such as travel to attend GP or hospital appointments – have to be prioritised over day-to-day expenditure,[[20]](#footnote-20) or where stocking up on goods in some weeks to take advantage of cost-efficiencies leads to lower spend in subsequent weeks.[[21]](#footnote-21) Expenditure is lumpy and difficult to track and evidence.

In *Samuels,* the court disposes of these problems by underscoring that the assessment of “reasonable living expenses” within the guidance “requires an objective assessment; it cannot depend simply on the subjective view of the case officer.”[[22]](#footnote-22) In this case, the objective benchmark is pegged to at least benefit levels, with the specific circumstances of the household capable of justifying a higher standard. The decision highlights the deficiencies in the eco-system of inherently *subjective* affordability assessments that exist elsewhere – particularly in the administration of the DHP scheme, where the detailed assessment of income and expenditure is commonplace.[[23]](#footnote-23)

**Implications of the judgment**

The immediate implications of the judgment stretch outside of the confines of Part VII Housing Act 1996. Other assessments of affordability should take note of the UKSC’s criticisms of assessing a claimant’s ability to offset shortfalls in housing benefit with other social security payments, especially for households with children. Within the administration of the DHP scheme in particular, closely textured analyses of income and expenditure resulting in recommendations to meet deficiencies in housing benefit by drawing on other social security payments are widespread. Indeed, Ms Samuels herself, facing a £151.49 shortfall between her rent and LHA, and with reasonable levels of household expenditure, would have been a prime candidate for a DHP award. The demand on these payments presents Local Authorities with a serious problem: the insufficiency of LHA rates by themselves, let alone other pressures such as the benefit cap, bedroom tax, and so on, dwarf the centrally allocated DHP budgets.

The judgment finishes by outlining two key regulatory changes since Ms Samuels’ homelessness application in 2011. The first is the (ongoing) introduction of Universal Credit in the wake of the Welfare Reform Act 2012. Notionally, this dispenses with the concerns over the meaning of “income support” outlined above by virtue of introducing a combined rate to replace the benefits at issue in this appeal (child tax credits, income support, and housing benefit), among others. The problem of a deficient “housing element” under the new Universal Credit regime relative to rental liability, does however, still remain as before.

The second is the Homelessness Reduction Act 2017, which has brought into train new preventative duties for Local Authorities. Its introduction has, in turn, led to revised guidance to local authorities. There is no longer a direct “recommendation” to consider benefit levels as determinative of affordability, but instead that authorities “may be guided” by Universal Credit standard allowances when assessing whether the applicant can “afford the housing costs without being deprived of basic essentials”.[[24]](#footnote-24) The UKSC’s conclusion that further guidance is warranted by Government is surely correct, but, in my view, given the clear arguments accepted by the court on social security being pegged to subsistence levels,[[25]](#footnote-25) it is difficult to see how supplementing a shortfall in the Universal Credit housing element with another award component would do anything other than deprive a household of basic essentials.

The headline of *Samuels* is its criticism of assessing the ability to service a deficiency in one social security payment – designed (and failing) to meet one set of subsistence needs – with income from another – designed to meet another set of subsistence needs. This key principle will outlast variations in the guidance and specific context of the social security regime in which the judgment sits. It joins a body of case law – with *Burnip* and *Hardy* – that all highlight the perverse consequences of an approach to assessing affordability or need that treats all social security income as a fund that to be mined for costs well outside of their payment’s initial purpose. A clear statement of this principle by the Supreme Court sends a clear and welcome message to both central Government and local authorities tasked with the assessment of income and expenditure.

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 [2019] UKSC 28 [↑](#footnote-ref-1)
2. Shelter, ‘Analysis: Local Housing Allowance Freeze’ (2017) <<https://england.shelter.org.uk/__data/assets/pdf_file/0020/1349012/Final_LHA_analysis.pdf>> accessed 27.06.2019. [↑](#footnote-ref-2)
3. *Samuels* (n 1) [14]. [↑](#footnote-ref-3)
4. See the write-up of the case on Nearly Legal’s inimitable blog for links to more information on the saga that preceded the UKSC appeal: <https://nearlylegal.co.uk/2019/06/reasonable-expenses-and-intentional-homelessness/>. [↑](#footnote-ref-4)
5. See *Haile v Waltham Forest LBC* [2015] UKSC 34; *R. (on the application of Aweys) v Birmingham City Council* [2009] UKHL 36; *Birmingham City Council v Balog* [2013] EWCA Civ 1582. [↑](#footnote-ref-5)
6. *Samuels* (n 1) [6] (emphasis added in judgment). [↑](#footnote-ref-6)
7. Ibid [33]. [↑](#footnote-ref-7)
8. See Ibid [7] with reference to Lady Hale’s explanation in *Humphreys v Revenue and Customs Comrs* [2012] UKSC 18; [2012] 1 WLR 1545. [↑](#footnote-ref-8)
9. *Samuels* (n 1) [35]. [↑](#footnote-ref-9)
10. Ibid [21]. [↑](#footnote-ref-10)
11. Ibid [36]. [↑](#footnote-ref-11)
12. Ibid [36]. [↑](#footnote-ref-12)
13. *Burnip v Birmingham City Council* [2012] EWCA Civ 629. [↑](#footnote-ref-13)
14. *R (on the application of Michael Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin). [↑](#footnote-ref-14)
15. *Burnip* (n 12)[45]. [↑](#footnote-ref-15)
16. *Hardy* (n 13) [58]. [↑](#footnote-ref-16)
17. Ibid [60]. [↑](#footnote-ref-17)
18. Ibid [8]. [↑](#footnote-ref-18)
19. Suzanne Fitzpatrick et al, ‘Destitution in the UK’ (Joseph Rowntree Foundation 2016). [↑](#footnote-ref-19)
20. Ibid 36. [↑](#footnote-ref-20)
21. ibid 51. [↑](#footnote-ref-21)
22. *Samuels* (n 1) [34]. [↑](#footnote-ref-22)
23. Jed Meers, ‘Awarding Discretionary Housing Payments: Constraints of time, conditionality and the assessment of income/expenditure’ (2018) 25(2) Journal of Social Security Law, 102, 109. [↑](#footnote-ref-23)
24. *Samuels* (n 1) [40]. [↑](#footnote-ref-24)
25. Ibid [26]. [↑](#footnote-ref-25)