**CRISIS RELIEF? PUBLIC RESOURCES**

**AND JUDICIAL REVIEW REMEDIES**

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“In any normal case the remedy accompanies the right.”[[3]](#footnote-3)

“The general approach ought to be that a claimant who succeeds in establishing the unlawfulness of administrative action is entitled to be granted a remedial order.”[[4]](#footnote-4)

# INTRODUCTION

In this article, we take up the challenge laid down by Joanna Bell in a recent issue of this journal to ask more questions about, and engage more closely with, judicial review remedies.[[5]](#footnote-5) This is an area of public law which has become both practically relevant and exciting in recent times, not just because of legislative reform,[[6]](#footnote-6) but also because of the issues raised by relief in the context of austerity-induced problems in delivering public services.[[7]](#footnote-7) Our analysis is concerned with the discrete issues that arise in homelessness law, but are leeching into discussions across other discrete areas of public law litigation, including immigration.

When considering the discretion to refuse relief following a successful claim for breach of duty in public law,[[8]](#footnote-8) the orthodox view is as reflected in the extracts from authoritative texts above: that, in principle, a breach of duty should lead to a remedy. The reason for this presumption has been said to be that it is an “unusual and strong thing” to refuse relief because “[w]here a claimant establishes that an impugned decision is unlawful but is denied the fruits of that victory through the exercise of discretion to deny a remedy, the rule of law is undermined.”[[9]](#footnote-9)

As strong as the presumption is, it is also well-established that there are several exceptions to it. Some are found in statute, such as the controversial provision of the Criminal Justice and Courts Act 2015 that where “it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.”[[10]](#footnote-10) Others are found in the common law, such as where supervision of the remedy is impossible, where there is no practical purpose in granting relief, or where a claimant has not come to the case with “clean hands.”[[11]](#footnote-11) Yet, as Sir Tom Bingham observed, it is widely understood that any such discretion to refuse relief is “strictly limited and the rules for its exercise clearly understood.”[[12]](#footnote-12)

There is, however, a question that puts these orthodox understandings under pressure: how are the limited resources available to a public authority relevant to the availability of remedies in judicial review? The leading practitioner text in the field holds the line, asserting that “financial considerations ought not to feature in the calculation of a court deciding whether to grant a remedial order to a claimant who has demonstrated to the court’s satisfaction that a public authority has acted unlawfully.”[[13]](#footnote-13) In a series of recent cases, however, this line has come under the microscope in the context of the housing crisis. It has been argued that, to the extent that there has been a breach of a statutory duty, a court cannot compel a local authority to achieve the impossible by providing suitable accommodation to applicants for homeless assistance where there is simply none of that accommodation available; and that a mandatory order should only be made where conditions were intolerable or “enough is enough.”[[14]](#footnote-14) These submissions are increasingly being made before the Administrative Court,[[15]](#footnote-15) and potentially extend beyond homelessness law.[[16]](#footnote-16)

An authority faced with a considerable number of applications for urgent assistance, but no accommodation to satisfy those demands, is in difficulty in the face of a mandatory order requiring them to provide accommodation within a given timescale. The question of relief, then, is also a polycentric issue[[17]](#footnote-17) – an issue to which we return in our discussion. A number of judicial pronouncements recognise the scale of the housing crisis, with Lewison LJ’s expression perhaps the most striking: [y]ou would need to be a hermit not to know that there is an acute shortage of housing, especially affordable housing, in London; and that local government finance is severely stretched.[[18]](#footnote-18) This discursive crystallisation of the housing crisis into an underpinning legal proposition is the starting point of our analysis of the Court of Appeal important ruling in *Elkundi*, which also considers important issues relating to the nature of remedies in judicial review.

Our analysis of *Elkundi*, and its wider significance, is structured into three parts. First, we introduce the idea of the “housing crisis” and the relevant homelessness law. Second, we set out how the recent ruling in *Elkundi* arose and the position taken by the Court of Appeal as regards the relevance of resources to the availability of a remedy. Finally, we analyse the potential wider implications of this case for our understanding of the relevance of limited resources in the granting of remedies in judicial review. Here we draw attention to the potent problematic triptych of resources, reasonableness, and polycentricity.

# THE “HOUSING CRISIS” AND HOMELESSNESS

The idea of there being a housing “crisis” is longstanding.[[19]](#footnote-19) There have been new housing crises at different times, and it is hard to disagree with Malpass’ observation that the housing crisis is at least partly a result of all major political parties’ complacent attitude to housing policy.[[20]](#footnote-20) Recent scholarship has argued that the idea of the housing crisis is a discursive practice, which enable the primary definers (such as political parties, think tanks, and the media) to frame the problem and its solutions: “crises are truth claims: they are invoked, they define, and, in doing so, they privilege certain ideologies or policy ‘solutions’ over others.”[[21]](#footnote-21) Whether there is a “housing” crisis, or an intersectional range of issues—including gender, class, race, wealth inequality—which have housing as a focal point is also a point of discussion.[[22]](#footnote-22)

No matter whether it is characterised as a “crisis,” “problem,” or “question,” three fundamental features of the housing landscape have been in place for the last 40 or more years: issues relating to quality, supply, and cost. These issues should not be seen in isolation, but interact differently with each other in different local areas. In certain, mostly urban, areas, these three issues interact so that there is little accommodation in the private sector (whether owned or rented) available to those on low or no incomes, and that which might be available has quality problems. There is also considerable anecdotal evidence of private landlords refusing to provide accommodation to those in receipt of social security employment-related payments, in part because of the political risk of reductions in those payments.[[23]](#footnote-23) Where there are potential tenants who need adaptations to properties, they can find themselves overlooked in favour of other applicants for the same property or find themselves in a problematic property that does not cater to their needs.[[24]](#footnote-24)

A further issue that is specific to the private rented sector concerns the ease of exit from a particular property. Landlords have two particularly potent weapons: the mandatory ground for eviction, where two or more months’ rent is outstanding (at the point at which the tenant is served a notice and the date of the possession hearing);[[25]](#footnote-25) and what is commonly known simply as “section 21.”[[26]](#footnote-26) The latter enables the landlord to obtain possession on the mandatory ground at the end of a tenancy by service of a notice (under section 21) requiring the property back after two months, and subsequently bringing a possession claim. Providing the various conditions have been satisfied, the court must grant the possession order. Most private sector tenancies are determined using this procedure.[[27]](#footnote-27) Private landlord possession claims have been a leading cause of homelessness for some considerable time, and account for 37.1 *per cent* of households owed the prevention duty.[[28]](#footnote-28)

The decline in supply in the social rented sector has been marked since the 1970s, reducing particularly as a result of individual sales under the right to buy and collective sales to housing associations.[[29]](#footnote-29) It is only since 2019 that local housing authorities have been able to make the first tentative steps into acquiring or building housing.[[30]](#footnote-30) Much of social housing is now provided by housing associations, which are funded partly by government grants but mostly by private finance.[[31]](#footnote-31) Since 2011, Government policy and associated funding has tended to focus on the provision of “affordable” housing, which is roughly at 80 *per cent* of market rent levels.[[32]](#footnote-32) Around 89 *per* cent of new social housing is now “affordable” stock.[[33]](#footnote-33) The evidence in housing research suggests that housing associations’ risk management strategies and business planning have tended to move towards the effective exclusion of those who have been affected by the social security cuts.[[34]](#footnote-34) As the Government has accepted: “there is significant unmet need for social housing, leaving people paying high rents in the private rented sector unable to save for a home of their own.”[[35]](#footnote-35)

Homelessness is another element of this landscape. The law regarding homelessness is contained in Part 7 of the Housing Act 1996. There is a broad division between, on the one hand, the criteria to determine the level of assistance to a household, and the nature of the assistance to be provided. In respect of the former, households must be regarded by the local authority as eligible, homeless, in priority need, and not intentionally homeless.[[36]](#footnote-36) If so found, then they are entitled to rely upon the main housing duty, which is that the local authority must secure suitable accommodation.[[37]](#footnote-37) It is important to note at this stage that the “general circumstances prevailing in relation to housing in the district of the local housing authority” can be taken into account in determining whether a household is homeless or intentionally homeless.[[38]](#footnote-38) Accordingly, for example, where there is a level of overcrowding sufficient to engage criminal liability, or where accommodation is statutorily unsafe, a household may not be found to be homeless.[[39]](#footnote-39) The authority’s resources have been said not to be relevant when considering single people and priority need[[40]](#footnote-40) (households with children, or with whom children may reasonably be expected to reside, automatically have priority need[[41]](#footnote-41)), and eligibility involves considerations of immigration law.

The duty to provide suitable accommodation (which also applies to interim duties not in issue here) is similarly inflected by resources. Suitability is a relative concept, and depends, for example, on location,[[42]](#footnote-42) affordability,[[43]](#footnote-43) how long a household will have to live in the property.[[44]](#footnote-44) Social and medical factors may also influence the suitability of a property.[[45]](#footnote-45) There are plenty of examples of *Wednesbury* challenges to the suitability of property offered by a local authority, but, at a very broad level, such challenges are particularly hard to sustain, in part because of the recognition of the resource constraints under which authorities act.[[46]](#footnote-46) As Lewison LJ put it, “the shortage of housing in Westminster is the constant backcloth against which all housing decisions are currently made.”[[47]](#footnote-47)

There are two particular responses to the shortage of accommodation in the terms of the Act. It is recognised that some local authorities will have to make out-of-area placements – that is, place households in different areas. There are plenty of media reports of local authorities “exporting” their homeless population, but the legislation provides a restriction on that export in the opening words of the relevant section: “so far as reasonably practicable,” the authority must secure accommodation in their own district.[[48]](#footnote-48) In the leading case on this point, Baroness Hale held that:

'Reasonably practicability' imports a stronger duty than simply being reasonable. But if it is not reasonably practicable to accommodate 'in borough', they must generally, and where possible, try to place the household as close as possible to where they were previously living. There will be some cases where this does not apply, for example where there are clear benefits in placing the applicant outside the district, because of domestic violence or to break links with negative influences within the district, and others where the applicant does not mind where she goes or actively wants to move out of the area.[[49]](#footnote-49)

Nevertheless, out-of-area placements are regularly offered to many homeless applicants entitled to the main housing duty, involving uprooting families from their education, friends, medical and social support structures. This is a tangible effect of the housing “crisis.”

A second response to the “crisis” can be seen in how, since 2011, local authorities have been entitled to discharge their housing duties to applicants entitled to the main housing duty by making a private rented sector offer.[[50]](#footnote-50) Such an offer must also reach the suitability threshold as well as other conditions, related to quality and safety.[[51]](#footnote-51) The private rented market for this kind of temporary accommodation has been described as “niche” but, in London alone, worth well in excess of £660million and landlords, who had adopted “cartel-like behaviour” had developed nightly rates.[[52]](#footnote-52) Local authorities compete for property, both inside and out-of-area – in 2018, one leading review found that the situation had worsened considerably.[[53]](#footnote-53) One key dampening factor has been the issue of rental affordability in this sector at a time when social security for housing payments have been reduced or capped.[[54]](#footnote-54)

This situation has been compounded by the increased duties on authorities as a result of the Homelessness Reduction Act 2018.[[55]](#footnote-55) In particular, that Act created a duty on authorities to take reasonable steps to help secure accommodation for between six to 12 months for households which are homeless and eligible.[[56]](#footnote-56) The limit of 12 months was specifically employed because otherwise, ‘the problem would be lack of supply’ as few private landlords were thought to be willing to subscribe to longer terms.[[57]](#footnote-57) The assumption behind this provision was that authorities would engage more closely with the private rented sector, which was to be the main provider of housing for homeless households. The outcome of these obligations is that there are a considerable number of households who now find themselves in temporary accommodation under the homelessness provisions. On the basis of the 2021 census, the Office for National Statistics has observed that “England has seen a steady increase of 60% in the number of households in temporary accommodation, from 50,430 (2012) to 80,720 (2018).”[[58]](#footnote-58) In the first quarter of 2022, 95,060 households had been placed in temporary accommodation, 28 *per cent* of which had been placed out-of-area (and mostly placed out-of-area by London authorities); 119,820 dependent children are living in temporary accommodation.[[59]](#footnote-59) Most households are placed in private sector accommodation – just 25.4 *per cent* were placed in social housing.[[60]](#footnote-60)

Homelessness legislation is not a self-contained code in and of itself. There are cross-cutting obligations under section 11 of the Children Act 2004 and the public sector equality duty under section 149 of the Equality Act 2010.[[61]](#footnote-61) Neither obligation is overriding, but decision-makers must give those provisions due regard in individual cases[[62]](#footnote-62) (although the jurisprudence on both has become uneven).[[63]](#footnote-63) At the least, they require decision-makers to consider the effects of their decisions on children and those with protected characteristics (most commonly, disability).

# *ELKUNDI*

In *Elkundi*, the starting point was the finding—which had been controversial—that the main housing duty is engaged immediately after the relevant criteria are met,[[64]](#footnote-64) and is non-delegable and non-qualified.[[65]](#footnote-65) The duty, it was ruled, can be performed in stages, but is immediate, as opposed to within a “reasonable time.”[[66]](#footnote-66) The importance of the staged performance is that overcrowded or hostel accommodation could, for example, be regarded as suitable if for a short period.[[67]](#footnote-67) It also provides the first gauge as to the performance of the statutory obligation—the date on which the obligation is to be performed.

The position on relief before *Elkundi* lacked clarity. Scarman LJ in *R v Bristol Corporation ex p Hendy*,[[68]](#footnote-68) a case which concerned a parallel rehousing obligation where a property was found to be unfit for human habitation,[[69]](#footnote-69) said in *obiter:*

[I]f in a situation such as this there is evidence that a local authority is doing all that it honestly and honourably can to meet the statutory obligation and that its failure, if there be failure, to meet that obligation arises really out of circumstances over which it has no control, then I would think that it would be improper for the court to make an order of mandamus compelling the local authority to do that which it either cannot do or can only do at the expense of other persons not before the court who may have equal rights with the applicant and some of whom would certainly have equal moral claims.[[70]](#footnote-70)

The jurisprudence, as it developed, suggested that the test was whether the authority was doing “all that it could” to satisfy the duty.[[71]](#footnote-71) A slightly more nuanced approach was taken, however, by Scott Baker J in *R (Khan) v Newham LBC*, in which he suggested a multi-factoral approach taking into account the nature of the accommodation being occupied; the length of time that the housing authority had been in breach; the efforts made by the housing authority to find suitable accommodation; the likelihood of accommodation becoming available in the near future; and, any other relevant factors, including whether the authority had conceded breach of duty.[[72]](#footnote-72) In *Codona* and *Aweys*, it had also been suggested that the Court “would not make an order to force [the authority] to do the impossible.”[[73]](#footnote-73)

In *Imam v Croydon LBC*,[[74]](#footnote-74) at first instance, the Deputy Judge, Matthew Gullick QC, held that the resources available to the authority to meet the obligation were a relevant consideration along with other factors, including the number of other applicants waiting for housing.[[75]](#footnote-75) In particular, an “unchallenged budgetary decision”—in that case that Croydon’s budgetary overspend was £67million in that financial year—was relevant.[[76]](#footnote-76) Placing the burden of proof on the claimant, he found that she had not provided evidence that the property was “intolerable” or that “enough is enough”.[[77]](#footnote-77) In the first instance Administrative Court ruling in *Elkundi*,[[78]](#footnote-78) Steyn J held, in relation to the question as to the threshold for granting a mandatory order:

In my judgment, while the court will not order an authority “to do the impossible”, it does not follow that nothing less than impossibility will suffice to persuade a court not to grant a mandatory order. Collins J in *Begum* and Auld LJ in *Codona* also focused on the reasonableness of the authority’s position, by reference to the steps and time taken. But the context in which the steps taken by the Council fall to be considered is one in which Parliament has imposed an unqualified duty with which the Council has failed to comply.

The Court granted relief in two of the three matters, but in one case, it declined to grant relief because the council was taking all reasonable steps to secure suitable accommodation, including making adaptations in any property.[[79]](#footnote-79) If the court were to make a mandatory order in such a case “it would be enforcing the duty unreasonably”.[[80]](#footnote-80)

The Court of Appeal, in the joined appeals in *Elkundi* and *Imam,* sought to rationalize this area. In the judgment of Lewis LJ, with whom Underhill LJ and Peter Jackson LJ agreed, resources were found not relevant to the question of relief because they would already have been taken into consideration in other decisions made by the authority, including as to suitability:

Resources and financial constraints on the housing authority are relevant to whether it is reasonable for a person to continue to occupy accommodation or in assessing whether the current accommodation is suitable. Once a duty is owed, however, and once the current accommodation is found to be unsuitable, financial constraints cannot justify non-compliance with the duty imposed by Parliament and would not of itself justify refusing to grant an appropriate order intended to bring about compliance with the duty.[[81]](#footnote-81)

However, a range of factors were relevant including: the nature of the accommodation occupied and its impact on the household; the length of time the applicant had been there; and the likelihood of suitable accommodation being provided in the near future.[[82]](#footnote-82) Where an authority was arguing impossibility, “a court will have regard to whether the local housing authority has taken all reasonable steps to secure that suitable accommodation is available.”[[83]](#footnote-83) In so doing, he expressly found that intolerability or “enough is enough” was not the test for relief.[[84]](#footnote-84) It was also found that general references to resources “may not persuade a court that a local housing authority has taken all reasonable steps particularly, when there has, for example, been a lengthy period of non-compliance with the duty, or where the accommodation falls so far below any level of suitability that more immediate action might be expected.”[[85]](#footnote-85) Authorities would therefore have to explain why they could not use properties earmarked for waiting list applicants for an allocation of accommodation.[[86]](#footnote-86) He did, however, accept:

that the fact that there are a limited number of satisfactory properties available of the type needed (for example houses capable of accommodating large families or persons with particular disabilities) may be relevant to whether the housing authority has done all it reasonably can to secure suitable accommodation.[[87]](#footnote-87)

This proviso is a curiosity. If resources are not relevant to the question of relief, then it is difficult to see how the “limited number of satisfactory properties” available could be. It is probably best explained by reference to the impossibility issue, which he did not overrule explicitly.[[88]](#footnote-88) He also seemed to accept Scarman LJ’s proposition about relief in *Hendy*.

These same issues were raised again shortly after *Elkundi* in another case in the Administrative Court—*Bell v Lambeth LBC*.[[89]](#footnote-89) In one sense, this case raised incredibly difficult circumstances for the authority, which had provided accommodation for Princess Bell and her three children out-of-area in Croydon. On 10th December 2020, Lambeth had found that accommodation not to be suitable for the needs of the family, in particular as two of the children had needs for large bedrooms for themselves on the ground floor as a result of their medical needs. Their necessary surgery was being delayed because of issues with the property. Ms Bell’s eldest son was on the first floor of the property but could not be brought downstairs.[[90]](#footnote-90) Ms Bell was effectively a prisoner in her own home without respite care. At a relatively late stage in the proceedings, she had clarified that she would accept a property anywhere in England (other than Lambeth and certain surrounding boroughs, and Croydon).[[91]](#footnote-91) Lambeth had made a large number of informal and formal offers of alternative accommodation to Ms Bell, and Ms Bell had self-sourced accommodation herself. However, the properties were either regarded as not suitable, or became unavailable. Ms Bell was next in line on Lambeth’s allocation scheme for a four-bedroom property:

However “competition is fierce”: there are currently 37,311 applicants on Lambeth's housing register and in 2020/21 Lambeth allocated 850 tenancies, a success rate of around one in every 44 applicants. Further, properties of the type the Claimant needs seldom come up: the average waiting time for 4 bedroom properties with no disability requirements for those housed in 2020 was 5.2 years, and in the last five years, Lambeth has only been able to let six 4-bedroom, wheelchair accessible properties.[[92]](#footnote-92)

Accordingly, Lambeth’s argument was that it had done all that it reasonably could. Ms Bell had the highest priority for an allocation, 20 properties had been considered, and it had gone to “extraordinary lengths” to seek to accommodate Ms Bell’s preferences.[[93]](#footnote-93) It provided case studies of other applicants who had an urgent need for rehousing.[[94]](#footnote-94)

Hill J applied the factoral approach adopted by Lewis LJ. She was particularly assisted by one central fact – the landlord of Ms Bell’s Croydon property was said to be bringing a possession claim shortly after the hearing. Lambeth conceded at the hearing that it would have to provide suitable accommodation to the household in that situation and would not leave the household homeless. As a result, Hill J found that:

[T]he fact that Lambeth feels confident it can secure suitable accommodation for the Claimant if a possession order is made (and indeed, on Mr Ogwu's evidence, if a mandatory order is made) is relevant in a further way. This is because it shows that Lambeth has not taken all reasonable steps to secure suitable accommodation for the Claimant to date and that it would be capable of complying with a mandatory order within a reasonable time if one was made.[[95]](#footnote-95)

Other factors included that Ms Bell had been living in this property for 20 months, the property was below the minimum level of suitability and impacting on the children’s health, as well as Ms Bell’s, and the children’s education. Further, given that Ms Bell was willing to be housed anywhere in England, Lambeth had sufficient flexibility and had not done all they reasonably could have done.[[96]](#footnote-96) She also held that there was force in Ms Bell’s submissions “that the combined effect of the PSED and section 11 of the Children Act 1989 is that local authorities need to be proactive in ensuring that they have available to them housing that will meet the needs of families with disabled children under Part VII.”[[97]](#footnote-97) That added force to the need for a mandatory order.[[98]](#footnote-98)

# RESOURCES, RESONABLENESS AND RELIEF

The outcome of these cases has been that the question of relief for breach of statutory duty in this discrete area is dependent on that “flexible judicial friend,” reasonableness, “which is innately well suited for the authoritative expression of value judgments.”[[99]](#footnote-99) However, the assertion by the Court of Appeal that financial constraints cannot justify withholding the remedy must be interrogated.

Reference to the availability of suitable accommodation seems relevant to the determination of reasonableness, as does the ability of the cash-strapped local authority to source that accommodation. Underhill LJ, for example, in *Elkundi*, expressed the court’s awareness of:

the burden placed on very many local housing authorities by the need to comply with their duties under Part VII of the 1996 Act, in circumstances where housing may be in extremely short supply, particularly for applicants with large families or particular needs, and where the authority’s financial resources are seriously constrained.[[100]](#footnote-100)

Wrestling with these questions places the court in the difficult position, under the guise of reasonableness, of determining the proper distribution of the more general resources available to the local authority. At the same time, there is the concern, expressed by the House of Lords in *R v East Sussex ex p Tandy,* that to “permit a local authority to avoid performing a statutory duty on the grounds that it prefers to spend the money in other ways is to downgrade a statutory duty to a discretionary power.”[[101]](#footnote-101)

Moreover, such decisions on remedies clearly have an allocative impact across the entire range of a local authority’s housing resources. The suggestions of using accommodation earmarked for the performance of target duties or buying new properties—or even considering accommodation options across the country—inevitably involve decisions impacting on other households and local authorities. Although King suggests that these cases may be treated differently due to the problems individual claimants have historically faced in enforcing their rights and interests, we still must face up to the consequences of so doing.[[102]](#footnote-102) The main such consequence is that written into the legislation: that homeless persons take priority over other households. This is, in turn, a consequence of the judicial construction of the statutory powers relating to the allocation of social housing as target duties,[[103]](#footnote-103) and one which housing scholars have suggested contributes to the marginalisation of social housing.[[104]](#footnote-104)

Accordingly, the public policy question about people potentially “queue jumping”[[105]](#footnote-105) though legal actions has been settled by the legislature, and are not up for grabs in the courts.[[106]](#footnote-106) In a prescient passage, Roach has argued that “queue jumping” can be justified “where the state fails to justify the reasonableness of its allocation of scarce resources and a successful litigant requests an individual remedy.”[[107]](#footnote-107) However, this remains a bitter pill in cases like *Princess Bell*, where the specific accommodation needs of the children required the provision of particular accommodation which many households in the area would have wanted. The resolution of this issue is to deny that the Claimants were “queue jumping” because their entitlement under homelessness law is to non-permanent, non-secure suitable accommodation; whereas a Part VI allocation requires the grant of long-term security of tenure.[[108]](#footnote-108) This is what explains the odd disjunction between, on the one hand, the judicial tightening of homelessness law, and, on the other, the approach taken to the question of relief. The individual relief of the mandatory injunction, which was necessary for the successful vindication of Princess Bell’s judicial review claims, has oncosts as well. These oncosts were well-considered, however, as a result of the evidence provided in all the cases. In *Princess Bell*, Lambeth provided specific case studies of applicants on the waiting list for accommodation. But it was clear the queue jumping occurred as a result of the specific means adopted—an application for homelessness assistance in particularly dire circumstances. The case studies were all of applicants for an allocation, and not for homelessness assistance.[[109]](#footnote-109) If those interests cannot be represented in these cases, which raise a systemic issue for the housing system, it is a rather wan response to say that it “… will make real for governments and society what is at stake”.[[110]](#footnote-110) The political settlement of the legislation effectively rendered those other affected parties voiceless.

It must also be observed that Lambeth’s approach was inconsistent. On the one hand, as Princess Bell’s leading counsel noted, they claimed that they were unable to find suitable accommodation but, on the other hand, they claimed that they would be able to find and provide suitable accommodation should an eviction occur relatively imminently. The situation is less clear-cut in cases like *Imam*, which was referred back to the High Court for consideration as to relief, as the Deputy Judge had mistakenly considered the authority’s resources. Both Ms Imam and Croydon wanted to adduce fresh evidence, which gave rise to the decision to remit the matter to the High Court. However, it is unclear quite how Croydon can properly argue its case given the narrow envelope left by the Court of Appeal.

The most important question resulting from these cases is how the rulings are going to impact on public decision-making. As regards homelessness matters, if resources are not relevant to the question of relief, a rational local authority will seek to harden its criteria for determining whether an applicant satisfies the criteria for assistance. Here, they are considerably assisted by the jurisprudence in homelessness cases which gives considerable latitude to decision-making and decision-makers, particularly around resources. To the extent that it might be said that these cases may impact on decision-making, it is likely to be at this juncture, leading to further hard cases.

There is also the question of the extent to which these rulings will be regarded as discrete to the particular issues around homelessness law in the context of the lack of available accommodation.[[111]](#footnote-111) Homelessness law already provides a series of specific and discrete footnotes in public law, and its juridification has been remarkable.[[112]](#footnote-112) Perhaps, *Elkundi* and *Bell* similarly will be a further footnote correction to those leading texts cited at the head of this article. Already, however, there appear to be signs that they are not regarded as discrete in that way. First, *Elkundi* is not written in those terms, but seems to be laying down a general proposition where there has been a breach of duty (admitted or otherwise). Secondly, in *Parul v Secretary of State for the Home Department*,[[113]](#footnote-113) DHCJ Benjamin Douglas-Jones QC applied this jurisprudence to a breach of duty in the immigration context, where the Secretary of State was found to have breached duty in respect of a destitute asylum seeker where it was necessary to avoid an Article 3 breach.[[114]](#footnote-114) The Secretary of State failed to provide evidence to support her assertion of housing stock shortage. The Deputy Judge applied *Elkundi* and *Bell* and made a mandatory order.[[115]](#footnote-115) Although a case about housing, it suggests there will be a stretch of the principles in *Elkundi* beyond homelessness law, as was intended.

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2. + Professor of Public Law, University of York. [↑](#footnote-ref-2)
3. W. Wade & C. Forsyth, *Administrative Law*, 11th ed (OUP, 2014), [↑](#footnote-ref-3)
4. *De Smith’s Judicial Review*, 8th ed, (Sweet & Maxwell, 2021), 18-047. [↑](#footnote-ref-4)
5. J. Bell, “Remedies in judicial review: Confronting an intellectual blindspot” [2022] PL 200, 201. [↑](#footnote-ref-5)
6. Judicial Review and Courts Act 2022. [↑](#footnote-ref-6)
7. Bell, above n 2, 22. [↑](#footnote-ref-7)
8. By “relief”, we are here referring specifically to the remedy of the mandatory injunction requiring (in this case) an authority to provide accommodation within a certain period. Such a remedy is discretionary by the terms of the statutory provision: s. 31(2), Senior Courts Act 1981. [↑](#footnote-ref-8)
9. Wade & Forsyth, op cit n 1. [↑](#footnote-ref-9)
10. S. 84, Criminal Justice and Courts Act 2015, inserting s. 31(2A), Senior Courts Act 1981. The courts had reached this point in any event, albeit in limited circumstances: see *R v Chief Constable of Thames Valley Police ex p Cotton* [1990] IRLR 344; this limited jurisdiction has been particularly important in challenges to eviction decisions made by public authorities: *Forward v Aldwyck Housing Group* [2019] EWCA Civ 1334; *Luton Community Housing Ltd v Durdana* [2020] EWCA Civ 445. For a critical analysis, see: C. Crummey, ‘Why Fair Procedures Always Make a Difference’ (2020) M.L.R. 1221. [↑](#footnote-ref-10)
11. See generally, de Smith, op cit n 2, 18047-60. [↑](#footnote-ref-11)
12. Bingham LJ, “Should public law remedies be discretionary?” [1991] PL 64, 64. [↑](#footnote-ref-12)
13. De Smith, op cit n 2, 18-58. [↑](#footnote-ref-13)
14. *R(Elkundi) v Birmingham City Council*; *R(Imam) v Croydon LBC* [2022] EWCA Civ 601, [2022] 3 WLR 71; *R(Bell) v Lambeth LBC* [2022] EWHC 2008 (Admin). [↑](#footnote-ref-14)
15. The authors have been made aware of at least two further matters which have settled following issue of judicial review claims. [↑](#footnote-ref-15)
16. See *R(Parul) v SoS for the Home Department* [2022] EWHC 2143 (Admin) [61]-[64], concerning the provision of suitable accommodation under s 4, Immigration and Asylum Act 1999. [↑](#footnote-ref-16)
17. For discussion of the issues, see L. Fuller, “The forms and limits of adjudication” (1978) 92 Harv LR 353; for a summary of the various ways in which Fuller has been discussed in the literature, see K. Roach, “Polycentricity and queue jumping in public law remedies: A two-track response” (2016) 66(1) *UTLJ* 3, Pt 2. [↑](#footnote-ref-17)
18. *Alibkhiet v Brent LBC* [2018] EWCA Civ 2742, [2019] HLR 15, [1]. [↑](#footnote-ref-18)
19. J. Barlow, “The housing crisis and its local dimensions”, (1987) 2(1) *Housing Studies* 28. [↑](#footnote-ref-19)
20. P. Malpass, “from complacency to crisis”, in P. Malpass (ed), *The Housing Crisis*, (Routledge, 1986), 11. [↑](#footnote-ref-20)
21. I. White & G. Nandedkar, “The housing crisis as an ideological artefact: Analysing how political discourse defines, diagnoses, and responds”, (2021) 36(2) *Housing Studies* 213, 214; J. Heslop & E, Ormerod, “The politics of crisis: Deconstructing the dominant narratives of the housing crisis”, (2020) 52(1) *Antipode* 145. [↑](#footnote-ref-21)
22. See White & Nandekar, op cit. [↑](#footnote-ref-22)
23. W. Wilson, *Can Private Landlords Refuse to Let to Housing Benefit Claimants?*, 18th July 2022, Research Briefing No CBP07008, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://researchbriefings.files.parliament.uk/documents/SN07008/SN07008.pdf. [↑](#footnote-ref-23)
24. The same is the case in social housing: see EHRC, *Housing and Disabled People: Britain’s Hidden Crisis*, (EHRC, 2018). [↑](#footnote-ref-24)
25. Housing Act 1988, Sch 2. [↑](#footnote-ref-25)
26. Housing Act 1988, s 21. [↑](#footnote-ref-26)
27. Ministry of Justice, Mortgage and landlord possession statistics: April to June 2022, 11th August 2022, part 5, available at [Mortgage and landlord possession statistics: April to June 2022 - GOV.UK (www.gov.uk)](https://www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-april-to-june-2022/mortgage-and-landlord-possession-statistics-april-to-june-2022#overview-of-landlord-possession) [↑](#footnote-ref-27)
28. DLUHC, *Statutory Homelessness January to March (Q1) 2022: England*, available at [Statutory homelessness in England: January to March 2022 (publishing.service.gov.uk)](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1094516/Statutory_Homelessness_Stats_Release_Jan-Mar_2022.pdf) [↑](#footnote-ref-28)
29. For discussion, see H. Pawson & D. Mullins, *After Council Housing: Britain’s New Social Landlords* (Palgrave Macmillan, 2010). [↑](#footnote-ref-29)
30. The history of this can be found in various sources, but see D. Cowan, *Housing Law and Policy* (Cambridge, 2011), ch 4; M. Loughlin, *Local Government in the Modern State*, (Sweet & Maxwell, 1986). [↑](#footnote-ref-30)
31. See Pawson & Mullins, op cit n 27. [↑](#footnote-ref-31)
32. See Communities and Local Government (CLG), *Local Decisions: A Fairer Future for Housing*, (CLG, 2010); Localism Act 2011, ss 154-5. [↑](#footnote-ref-32)
33. DLUHC, Live tables on affordable housing supply, Live table 1000, https://www.gov.uk/government/statistical-data-sets/live-tables-on-affordable-housing-supply. [↑](#footnote-ref-33)
34. See, for example, T. Manzi & N. Morrison, “Risk, commercialism and social purpose: Repositioning the English housing association sector”, (2018) 55(9) *Urban Studies* 1924. [↑](#footnote-ref-34)
35. DLUHC, *Levelling up the United Kingdom*, CP604, p 224, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/1052706/Levelling\_Up\_WP\_HRES.pdf. [↑](#footnote-ref-35)
36. Respectively, ss 185, 175, 189, 190. [↑](#footnote-ref-36)
37. Ss. 193(2) & 206, Housing Act 1996. [↑](#footnote-ref-37)
38. S. 177(2). [↑](#footnote-ref-38)
39. See *Temur v Hackney LBC* [2014] EWCA Civ 877; *Harouki v Kensington and Chelsea RLBC* [2007] EWCA Civ 1000; [2008] HLR 16. [↑](#footnote-ref-39)
40. *Hotak v Southwark LBC* [2015] UKSC 30, [2016] AC 811. [↑](#footnote-ref-40)
41. Although resources are relevant where families have split – “It is impossible to consider only what would be desirable in the interests of the family if resources were unlimited”: *Holmes-Moorhouse v Richmond-Upon-Thames LBC* [2009] 1 WLR 413, [12], Lord Hoffman. [↑](#footnote-ref-41)
42. See Homelessness (Suitability of Accommodation) (England) Order 2012, SI 2012/2601, art 2 (“the 2012 order”). [↑](#footnote-ref-42)
43. *Paley v Waltham Forest LBC* [2022] EWCA Civ 112. [↑](#footnote-ref-43)
44. *Awua v Brent LBC* [1996] AC 55, 68, Lord Hoffmann; *Birmingham CC v Ali, Manchester CC v Moran* [2009] UKHL 36; see also, DLUHC, *Homelessness Code of Guidance for Local Authorities*, ch 17, to which local authorities are required to “have regard”: s. 182. [↑](#footnote-ref-44)
45. Code of Guidance, 17.5-6. [↑](#footnote-ref-45)
46. In general, see *Poshteh v Kensington and Chelsea RLBC* [201] UKSC 37, [2017] AC 624. [↑](#footnote-ref-46)
47. *Alibkhiet*, [75]. [↑](#footnote-ref-47)
48. S. 208. [↑](#footnote-ref-48)
49. *Nzolameso v Westminster CC* [2015] UKSC 22, [19]; *Alibkhiet*; see also, Waltham Forest LBC v Saleh [2019] EWCA Civ 1944; *Abdikadir v Ealing LBC* (2022) EWCA Civ 979. [↑](#footnote-ref-49)
50. Housing Act 1996, s. 193(7AA)-(7AD), as amended by Localism Act 2011, s. 148(5). Previously, authorities had been entitled to make a private rented sector offer only in limited cases, or in cases where there was no obligation to accept the offer. The option of using the private rented sector to satisfy the main housing duty has, however, been available to authorities in principle even prior to these changes (and prior to the changes introduced in the Homelessness Act 2002: University of Birmingham, *How Local Authorities Used the Private Rented Sector Prior to the Housing Act 1996*, DETR Research Summary 86, (DETR, 1998). [↑](#footnote-ref-50)
51. Art 3, 2012 Order; see also *Hajjaj v Westminster CC* [2021] EWCA Civ 1688 for a relatively strict interpretation of the requirement in that the authority must rely on actual evidence of the property and not on assumptions about the provider. [↑](#footnote-ref-51)
52. J. Rugg, *Temporary Accommodation in London: Local Authorities under Pressure*, (York: Centre for Housing Policy, 2016). [↑](#footnote-ref-52)
53. J. Rugg & D. Rhodes, *The Evolving Private Rented Sector: Its Contribution and Potential*, (York, 2018), p 135. [↑](#footnote-ref-53)
54. *Ibid.* [↑](#footnote-ref-54)
55. For commentary, see D. Cowan, “Reducing homelessness or re-ordering the deckchairs?”, (2019) 82(1) *MLR* 105. [↑](#footnote-ref-55)
56. S. 189B, Housing Act 1989. [↑](#footnote-ref-56)
57. Public Bill Committee, 4th Sitting, col 86, 18 December 2016. [↑](#footnote-ref-57)
58. ONS, *UK Homelessness: 2005 to 2018*, available at [UK homelessness - Office for National Statistics (ons.gov.uk)](https://www.ons.gov.uk/peoplepopulationandcommunity/housing/articles/ukhomelessness/2005to2018). [↑](#footnote-ref-58)
59. DLUHC, *Statutory Homelessness January to March (Q1) 2022: England*, available at [Statutory homelessness in England: January to March 2022 (publishing.service.gov.uk)](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1094516/Statutory_Homelessness_Stats_Release_Jan-Mar_2022.pdf) [↑](#footnote-ref-59)
60. DLUHC, *Live Tables on Homelessness*, Table TA1, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/1094516/Statutory\_Homelessness\_Stats\_Release\_Jan-Mar\_2022.pdf. [↑](#footnote-ref-60)
61. See respectively, *Nzolameso v Westminster CC* [2015] UKSC 22; *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] PTSR 565 [↑](#footnote-ref-61)
62. Even if the duty is not expressly considered, “… a conscientious reviewing officer who was investigating and reporting on a potentially vulnerable applicant, and who was unaware of the fact that the equality duty was engaged, could, despite his ignorance, very often comply with that duty”: *Hotak*, [79], Lord Neuberger. [↑](#footnote-ref-62)
63. Compare *Nzolameso* with *Alibkhiet* (on s 11), and *Hotak* with *Hackney LBC v Haque* [2017] EWCA Civ 4. [↑](#footnote-ref-63)
64. That is, the applicant is found to be eligible, homeless, in priority need and not intentionally homeless. [↑](#footnote-ref-64)
65. *Elkundi*, [77]. [↑](#footnote-ref-65)
66. As had been submitted by Counsel for Birmingham: *Elkundi*, [72]. [↑](#footnote-ref-66)
67. As Baroness Hale put it in *Brimingham CC v Ali* [2009] 1 WLR 1506, [42]: “… 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.” [↑](#footnote-ref-67)
68. [1974] 27 P&CR 180. [↑](#footnote-ref-68)
69. S. 39, Land Compensation Act 1973. [↑](#footnote-ref-69)
70. At p 185. [↑](#footnote-ref-70)
71. *R. (Mashuda Begum) v Newham LBC* (2000) 32 HLR 808; *R(Bantantu) v Islington LBC* (2001) 33 HLR 76; *Codona v Mid-Bedfordshire DC* [2004] EWCA Civ 925. [↑](#footnote-ref-71)
72. [2001] EWHC Admin 589. [↑](#footnote-ref-72)
73. Codona, op cit, [38], Auld LJ; *R(Aweys) v Birmingham CC* [2008] EWCA Civ 48; [2008] 1 WLR 2305, Ward LJ; *Ali*, Lord Hope. [↑](#footnote-ref-73)
74. [2021] EWHC 739 (Admin). [↑](#footnote-ref-74)
75. [81]. [↑](#footnote-ref-75)
76. [81](v). [↑](#footnote-ref-76)
77. [82]. [↑](#footnote-ref-77)
78. [2021] EWHC 1024 [↑](#footnote-ref-78)
79. [324]-[329]. [↑](#footnote-ref-79)
80. [329]. [↑](#footnote-ref-80)
81. [131]. [↑](#footnote-ref-81)
82. [131]. [↑](#footnote-ref-82)
83. [132]. [↑](#footnote-ref-83)
84. [136], arguing that those words had been used by Baroness Hale in *Ali* in the context of suitability and not relief. [↑](#footnote-ref-84)
85. [132]. [↑](#footnote-ref-85)
86. Under Part 6, Housing Act 1996. [↑](#footnote-ref-86)
87. [137]. [↑](#footnote-ref-87)
88. See [133]. [↑](#footnote-ref-88)
89. [2022] EWHC 2008 (Admin). [↑](#footnote-ref-89)
90. “There is no lift. He now weighs over 30 kg and there are significant safety risks to the Claimant in her carrying her son up and down the stairs safely. With his reduced mobility and bone-mineral density along with his previous fracture, he is also at increased risk of sustaining another fracture”: [15](ii). [↑](#footnote-ref-90)
91. Respectively due to issues of violence from her former partner and Croydon’s withdrawal of care that she regarded as essential to meet the children’s needs. [↑](#footnote-ref-91)
92. [25]. [↑](#footnote-ref-92)
93. [76]. [↑](#footnote-ref-93)
94. [77]. [↑](#footnote-ref-94)
95. [109]. [↑](#footnote-ref-95)
96. Such as requesting assistance from a wider range of other housing authorities: [113]. [↑](#footnote-ref-96)
97. [116]. [↑](#footnote-ref-97)
98. Ibid. [↑](#footnote-ref-98)
99. C. Harlow & R. Rawling, *Law and Administration*, 4th ed (Cambridge: CUP, 2022), 727. [↑](#footnote-ref-99)
100. [157]. [↑](#footnote-ref-100)
101. [1998] AC 714, 749, Lord Browne-Wilkinson. [↑](#footnote-ref-101)
102. J. King, “The justiciability of resource allocation” (2007) 70(2) MLR 197, 210. [↑](#footnote-ref-102)
103. *Ahmad v Newham LBC* [2009] UKHL 14, [12], Baroness Hale, drawing attention to the issue of how relief can be constructed when there is no requirement on a local authority to have a stock of accommodation to fulfil its obligation. [↑](#footnote-ref-103)
104. See, for example, D. Mullins & A. Murie, *Housing Policy in the UK* (Palgrave Macmillan, 2006), ch 10. [↑](#footnote-ref-104)
105. K. Young, *Constituting Economic and Social Rights* (Oxford: OUP, 2012), 161. [↑](#footnote-ref-105)
106. This is a somewhat odd proposition in some ways given the Conservative government’s antipathy towards homeless households “queue jumping,” see: D. Cowan, “Reforming the Homelessness Legislation” (1998) 18(4) *Critical Social Policy* 433; I. Loveland, “Reforming the homelessness legislation? Exploring the constitutional and administrative legitimacy of judicial law-making” [2018] PL 299. [↑](#footnote-ref-106)
107. K. Roach, “Polycentricity and queue jumping in public law remedies: A two-track approach” (2016) 66(1) UTLJ 3, 16, and Pt. 5. [↑](#footnote-ref-107)
108. *Elkundi*, [147]. [↑](#footnote-ref-108)
109. [68](iii). [↑](#footnote-ref-109)
110. Roach, op cit n 15, 47. [↑](#footnote-ref-110)
111. Bell, op cit n 3, 222. [↑](#footnote-ref-111)
112. See, for example, D. Cowan, “The judicialisation of homelessness law: A study of Regulation 8(2), Allocation of Housing and Homelessness (Review Procedures) Regulations 1999” [2016] PL 235. [↑](#footnote-ref-112)
113. [2022] EWHC 2143 (Admin). [↑](#footnote-ref-113)
114. S. 4(2), Immigration and Asylum Act 1999. [↑](#footnote-ref-114)
115. [64]. [↑](#footnote-ref-115)