R v Lambeth LBC ex p A1 and A2

Court of Appeal
Hirst and Robert Walker LJJ and Harman J
11 December 1997

Flaws in community care assessments can be of little relevance in cases where the local authority concedes that it ought to provide the applicant with the service requested and needed by the applicant, but has been unable to make such provision because of a shortage of physical resources.

Facts

Mr and Mrs A looked after four children: G (male, 15 years), S (female, 12 years), R and R (female, twins, three years). Since September 1989, they had been living in a ground floor flat with three bedrooms (two of which were very small), a living room, kitchen and bathroom. Mr and Mrs A shared their bedroom with the twins. The flat was rented from the respondent local authority. G suffered from cerebral palsy and had severe learning difficulties. He had about 14 epileptic fits a day, both grand mal and petit mal, needed to be supervised at all times, was incontinent, was unable to dress, feed or toilet himself, as well as being unable to walk or lift himself. He weighed 10 stone. Four years previously, Mrs A had cracked the base of her spine lifting G. As a result she could no longer lift G. Mr A then gave up his job to help look after G. Both Mr and Mrs A had for years been driven close to the edge of physical and mental endurance by the stress of looking after G while at the same time trying to maintain a home life for their daughters. Their difficulties were greatly exacerbated by the unsuitable accommodation in which they lived. It did not have toilet or showering facilities appropriate for a heavy, growing child who was immobile and incontinent. Even after removing all of the doors, it was very difficult to move G's wheelchair around the flat and impossible to provide G with a larger wheelchair, with stabilisers, necessary to prevent the risk of injury to G arising as the result of epileptic fits. Because the flat was small and of flimsy construction it was not possible to install specialised equipment, eg, a standing frame, a special bed, a special commode chair. The respondent authority had been aware that the family had a serious housing problem since at least 1992. By 1994 at the latest, it accepted that the family required urgent rehousing. The respondent authority, however, had not been able to locate suitable four-bedroom accommodation for the family within its own housing stock as the result of lack of appropriate housing resources. Its education department had assessed G's educational needs and prepared a detailed statement of special educational needs. Its housing department had recognised the urgency of the need for a transfer and had in 1996 accepted that the family's accommodation was so unsuitable that they were 'homeless' for the purposes of Housing Act 1985 Part III. The family had had a social worker for 10 years who was clearly aware of the urgent need of the family for more suitable accommodation and had assessed them as having an essential need for larger suitable accommodation to which aids and adaptations could be added. The respondent authority's occupational therapist had written to the housing department stating that the family had top medical priority for rehousing. The respondent authority had been able to make four offers of accommodation but had conceded that none of these offers had been suitable. There was evidence that the respondent authority had limited, suitable housing stock, much of which was in poor repair.

Held:

1 The respondent local authority did not appear to have carried out a composite assessment addressing all of the needs of the A family, as exhorted in DoE Circular 10/92 and LAC(92)12 *Joint Circular on Housing and Community Care*. Neither did it appear to have carried out assessments which were clearly stated to be under Chronically Sick and Disabled Persons Act 1970 s2, the Carers (Recognition and Services) Act 1995 or the Children Act 1989. However, there had been some attempts, albeit belatedly, at inter-disciplinary planning, there had been a number of assessments of one kind or another and the authority had never refused to carry out an assessment. What was clear on the evidence was that the family needed a new home, that when a new home was provided suitable aids and adaptations would also be provided and that until a new home was provided there was almost nothing which the respondent authority could do in practice to ameliorate the family's plight. The judge had been correct to exercise his discretion in a common-sense way to refuse to grant relief on the basis of flaws in the assessments carried out since the heart of the matter was not the respondent authority's failure to assess the problem but its failure to solve it. What was required was a sincere and determined search for a new home for the family.

2 The respondent authority had power under Housing Act 1985 s9 to provide housing accommodation by acquiring houses. HA 1985 s9(5), however, provided that 'Nothing in this Act shall be taken to require . . . a local housing authority itself to acquire . . . any houses . . .' The respondent authority had not closed its mind to the possibility of acquiring a house for the family. It was not possible on the evidence, and in particular without knowing what all of the factors were, to say that the respondent authority had been *Wednesbury* unreasonable in all the circumstances in failing to acquire accommodation for the A family so far. The plain words of HA 1985 s9(5) made it exceptionally difficult to challenge a housing authority's decision not to exercise powers to add to its housing stock.

Cases referred to in judgment:

Ainsbury v Millington [1987] 1 WLR 379; (1987) 131 SJ 361; [1987] 1 All ER 929; (1987) 84 LS Gaz 1241, HL.

Associated Provincial Picture Houses v Wednesbury Corp [1948] 1 KB 223; [1947] 2 All ER 680; 45 LGR 635, CA.

O'Rourke v Camden LBC [1997] 3 WLR 86, HL.

R v Brent LBC ex p Awua; sub nom *Awua v Brent LBC* [1996] 1 AC 55; [1995] 3 WLR 215; [1995] 3 All ER 493; (1995) 27 HLR 453; [1995] 2 FLR 819; [1995] 3 FCR 278; [1996] Fam Law 20; (1996) 160 LG Rev 21; [1995] NPC 119; (1995) 145 NLJ Rep 1031; (1995) 139 SJLB 189; (1995) *Times*, 7 July; (1995) *Independent*, 25 July, HL.

R v Devon CC ex p Baker and Johns; R v Durham CC ex p Curtis and Broxon [1995] 1 All ER 73; (1994) 6 Admin LR 113; 91 LGR 479; [1993] COD 253; (1993) *Times*, 21 January; (1993) *Independent*, 22 February (CS), CA.

R v Gloucestershire CC and Secretary of State for Health ex p Barry; R v Lancashire CC ex p Royal Association for Disability and Rehabilitation and Gilpin (1997) 1 CCLR 19; [1996] 4 All ER 421; [1996] COD 387; (1996) 93(33) LS Gaz 25; (1996) 140 SJLB 177; (1996) *Times*, 12 July; *Independent*, 10 July, CA.

R v Gloucestershire CC and Secretary of State for Health ex p Barry (1997) 1 CCLR 40; [1997] 2 All ER 1; [1997] 2 WLR 459, HL.

A *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484; [1986] 2 WLR 259; (1986) 130 SJ 143; [1986] 1 All ER 467; (1986) 18 HLR 158; [1986] 1 FLR 22; (1986) 16 Fam Law 218; (1986) 136 NLJ 140; (1986) 83 LS Gaz 785, HL.

Legislation/guidance referred to in judgment:

B Carers (Recognition and Services) Act 1995 s1 – Children Act 1989 Part III and ss17 and 20 and Sch 2 – Chronically Sick and Disabled Persons Act 1970 ss2 and 3 – Housing Act 1985 Part III and ss9, 17, 22, 58, 59, 62, 65, 69 and 71 – Housing Act 1996 Part VII – Housing and Planning Act 1986 – Local Authority Social Services Act 1970 s7 – Local Government Act 1972 s111 – Local Government and Housing Act C 1989 – DoE Circular 10/92 and LAC(92)12 *Joint Circular on Housing and Community Care*.

This case also reported at:

Not elsewhere reported.

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Representation

J Maxwell (instructed by Howard, Thomas & Petrou) appeared on behalf of the appellants/applicants.

N Giffin (instructed by the Legal Department of the London Borough of Lambeth) E appeared on behalf of the respondent.

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Judgment

LORD JUSTICE ROBERT WALKER: The respondent, the London Borough of Lambeth ('Lambeth'), is a local authority with numerous statutory responsi- F bilities for children under Part III of the Children Act 1989 ('the Children Act'). It is also a local housing authority with statutory responsibility for homeless persons under, as it was at the material time, Part III of the Housing Act 1985. Part III of the Housing Act 1985 ('the Housing Act') is now replaced by Part VII of the Housing Act or is about to be replaced by Part VII of the Housing Act 1996, but the new G provisions are not relevant to this appeal, which is brought with the leave of a single Lord Justice from an order of Owen J refusing two applications for judicial review made on behalf of two residents of Lambeth, Mrs A and her son G, who is now aged about 15 years and 10 months.

G is and has been from birth very severely disabled. Apart from short occa- H sional periods of respite care, he has throughout his life been cared for at home by one or both of his parents. Owen J expressed his admiration for their devoted care, and I wish to add mine to that. The affidavit evidence sworn by Mrs A in no way overstates or dramatises the dire and distressing responsibilities which she and her husband have undertaken. Unfortunately, their position has in many I ways got worse rather than better over the years, as G has got bigger and heavier and his parents have suffered physically, emotionally and financially from the strain and effort of caring for their son, while at the same time trying to maintain a home life for their three daughters, S who is now aged 12, and R and R who are now aged 3.

J I need read only a short passage from the judgment of Owen J.

It is clear that for years Mrs A and her family have lived in unsuitable accommodation, the nature of which has made their task very much harder.

As to the son's condition I shall do no more than read the passages from the K *grounds set out in the first application. He suffers from cerebral palsy. He is now 14 years of age. [That was a year ago.] He has severe epilepsy, suffering up to 14*

fits a day. He has to be supervised at all times. He cannot dress, feed or toilet himself. He is incontinent. He weighs 10 stone. He has severe learning difficulties. He is unable to walk or lift himself. Mrs A cracked the base of her spine some four years ago from lifting G. She is unable to lift G and is not permitted to drive a car. She is in receipt of disability living and mobility allowances. Her husband gave up his job in 1991 in order to care for G.

Since G's birth the family has at all times lived in Lambeth, except that in August 1988 Mrs A found caring for G so stressful and difficult that she left him in respite care and also left her husband. They then had a council flat in Lambeth, east of Clapham Common. Mr A took S, who was then aged 3, to live with his mother. However, the family were reunited when, in September 1989, they were rehoused by Lambeth at 20, Berry Lane, London, SE21, which is in West Norwood fairly near Crystal Palace. That is still their home. It is a ground floor flat with a large living room, three bedrooms, a kitchen and bathroom. Two of the bedrooms are very small and the parents share their bedroom with the twins. The flat is described in detail in a report dated 27th September 1996 by Mr Laurie Goodwin. It is common ground that it is not accommodation that has been adapted or could properly be adapted for home care of a growing child with disabilities of the severity of G's disabilities. It does not have the sort of toilet and showering facilities needed for a heavy growing child who is both immobile and incontinent.

When the family first occupied this flat, G was nearly 8 and could still be moved by pushing him in a large-size buggy. But soon he needed a wheelchair which could not easily be moved around the flat, even with all the doors taken off. In particular, it could not be turned in the hallway. There was very little room in G's bedroom for any specialised equipment.

Mr and Mrs A's problems became worse when she injured her spine in 1990 and Mr A gave up his job as a specialised sheet metal worker in order to care for G. The birth of the twins in 1994 was no doubt a joy to their parents in many ways, but it certainly added to the problems of life in the flat. It became overcrowded as well as lacking facilities for a severely disabled teenager. Because G is now over 10 stone and is subject to epileptic fits, grand mal as well as petit mal, he has to have not merely an adult sized wheelchair, but a larger than normal size with stabilizers to reduce the risk of injury if he has an attack.

If the flat had been larger and if its fabric had been stronger, it would have been possible to install overhead hoists to assist his parents in moving him, in particular to the lavatory, and also to install a specially adapted shower. That has not been possible and the shortage of space has meant that other facilities offered to G, in particular, a standing frame, a special bed and a special commode chair, have not been able to be used because there is not enough room.

During the time when Mrs A was living apart from her husband and he and S were living with his mother, substantial rent arrears built up at the original flat. Mr and Mrs A have been paying off those arrears regularly and at a considerably faster rate than Lambeth had required.

Nevertheless, the existence of rent arrears has made it more difficult for Lambeth to arrange accommodation from some other source, that is, some other local housing authority with which the family has some connection or a local housing association .

In 1992 Lambeth Education Department assessed G's educational needs, and a detailed statement of special educational needs was prepared. It had appended reports by G's head teacher, a senior clinical medical officer, a speech therapist and a physiotherapist. It recommended that G should attend the Windmill

Special School at Mandall Road, Brixton, and he did so from 1993 until last September. There were initially serious problems because of G's weight, epileptic condition and incontinence, but these problems were to a large extent overcome.

Lambeth, which is concerned in this matter both as an education authority and a provider of social services and as a local housing authority, was well aware of a serious housing problem from about 1992. It appears that, at any rate initially, the Social Services were more vividly aware of the problem than the housing department. On 29th July 1994 an officer in Lambeth Housing Services wrote to Mr Hector MacEachern (who is G's social worker and with whom the family had had regular contact for nearly 10 years) that the housing department was aware of the urgency of Mr and Mrs A's transfer request, especially with the arrival of the twins. The position was that 20, Berry Lane was overcrowded as well as being, as it was already, unsuitable for the exceptional needs of G and those who were caring for him and is incapable of being adapted for those needs.

It is clear that by 1994 Lambeth accepted this and accepted that the family urgently needed rehousing. That is reflected in a letter dated 8th September 1994 from John Fitzgerald, a senior neighbourhood housing manager. The letter included this passage:

> *I am aware how desperate you are to move, but we have discussed the very limited supply of this type of property. We would not be able to guarantee a move to another borough or housing association outside Lambeth. As I previously said the rent arrears mean that route is closed. I also explained that the arrears is only part of the problem, and that even if you managed to pay off the arrears, a transfer to suitable property in a borough of your choice would not be automatic. I accept the points you made previously that the arrears did not arise through a simple refusal to pay the rent, and that you have been paying off the arrears for over 2 years, but these points would not mean another authority would be any more likely to accept a nomination.*
>
> *After speaking to our Special Needs section, who make nominations to wheelchair properties, I advised you that to stand a reasonable chance of being rehoused within Lambeth you would need to be prepared to accept almost any area within the borough. I also suggested that we ask for a reassessment to be done by Lambeth's doctor, on the basis that G's housing need may be more acute than when the last one was done, and that an ordinary property might be adaptable, if our doctor gave a sufficiently high priority.*
>
> *Congratulations on the birth of the twins – I hope you are all recovering from recent illnesses. As soon as we see the birth certificates we can add them to your application.*
>
> *I am concerned to increase your chances to getting a move to suitable property, but feel that you will need to be more flexible over what areas within Lambeth you will consider.*

Letters were written to Lambeth Special Needs Housing Section by Paul Kavanagh of Mencap. Mr Fitzgerald also sent a memorandum to the Special Needs section on 16th March 1995. Mr MacEachern sent a memo to Mr Fitzgerald on 5th April 1995. One internal memorandum dated 6th April 1995 indicates that the family had been classified as Priority II for rehousing, although other material, which I shall mention later, seems to have treated them as Priority I.

At about that time Mrs A made a complaint to Lambeth about the lack of progress in rehousing the family. The Social Services Department replied on 11th May that they believed they were doing all they could to support the rehousing application. The Housing Department wrote on the same day 'to confirm that

Lambeth Housing (Special Needs section) understands the essential need for you to be transferred to a suitable 4 bedroom wheelchair adapted property in order for you to be able to care for G'. At that stage Lambeth was, through its housing department as well as its social services, acknowledging that there was a serious and urgent problem, but there had been no obvious progress towards solving it.

In September 1995 Mrs A instructed the solicitors who have since acted for her and G. Mr MacEachern reported in a file note dated 16th October 1995:

> *The situation has not altered with this family. Mrs A has engaged the services of a solicitor to try and get a move and this has led to some correspondence with Hugh Alexander. [He was the manager responsible for the children and disabilities team in Lambeth.]*
>
> *Mrs A continues to be angry that no-one at the Special Needs section in the Housing Department appears to be doing anything and she continues to threaten to put G in care to alleviate the situation at home and in the hope that this will achieve a move.*

The first solicitor's letter dated 12th September 1995 to Lambeth's Special Needs Housing refers to Part III of the Housing Act 1985, and contended that the A family were homeless because there was no accommodation available to the family that it was 'reasonable for them to continue to occupy'. There was then a frustrating sequence of events in which Lambeth said that appointments would be arranged to interview the family, but officers at the special needs section knew nothing about the case and sent them away on the basis that if they were already tenants in Lambeth, they could not be homeless. This apparent maladministration must have added considerably to Mrs A's anxieties.

On 16th January 1996 Lambeth's own occupational therapist sent a memorandum to special needs housing recommending that the family should have accommodation consisting of a four bedroomed property with wheelchair access. This memorandum was, it seems, accompanied by copies of two earlier recommendations ante-dating the arrival of the twins, both specifying that the family were Priority I for rehousing. These two earlier recommendations were on a typewritten form headed 'Occupational Therapy Assessment and Recommendations in relation to Medical Priority Housing Application'. One is dated 16th December 1993. The other is undated but refers to G as being aged 10. It therefore probably dates from 1992. I make particular mention of these forms because Miss Judith Maxwell, who appeared for the appellants and conducted their case with great care, skill and patience, complained in strong terms of Lambeth's failure over the years to make comprehensive assessments. The judge evidently felt that Lambeth's real shortcoming was not in failing to assess the problem but in failing to solve it. I have to say that I completely agree with the judge about that. I shall have to come back to the various statutory duties to make an assessment.

Just before the occupational therapist's memorandum of 16th January 1996, Mrs A's solicitors had, on 12th January 1996, sent a letter before action enclosing a draft Form 86A. On 22nd January there was another abortive appointment at Lambeth's Homeless Persons Unit. Finally, on 16th March 1996 Lambeth Housing Services wrote to Mrs A:

> *Notification under section 64 of the Housing Act 1985 Part III (Housing the Homeless).*
>
> *Further to your application for housing assistance under the above Act, the Council is satisfied that you are homeless and in priority need and that you did not become homeless intentionally. Therefore the Council has a responsibility to*

A *secure you with permanent accommodation under the provisions of the Housing Act 1985 Part III (Housing the Homeless).*

And then a heading:

One offer of accommodation.
B *It is council policy to provide you with one offer of permanent accommodation with the right of appeal.*

Right of appeal
Where an offer is refused and the appeal is not upheld (i.e. there is no agreement for a further offer), you will be given a further opportunity to move into the
C *property. If you refuse the Council will have discharged its legal obligation to you. The Council will have no further obligation to rehouse you. The Council is currently considering the medical needs of you and your household in order to ensure that you are offered suitable property. We will write to you again shortly to let you know the result of our assessment.*
D *If you require any further information, please contact your caseworker, Ms S Afflick.*

On 27th March 1996 the solicitors wrote to Lambeth Legal Services saying, among other things:

E *We are pleased to confirm that our client has now received a letter from your housing department accepting that she is homeless.*

She has spoken to her case worker Mrs Afflick. Mrs Afflick has told her that the present policy is that all members of the family unit must have access to all parts
F *of any property that is offered. This effectively rules out anything other than a four bedroomed bungalow. The London Borough of Lambeth have no such bungalows.*

Our client has made it clear that she is prepared to consider housing association accommodation and/or accommodation out of the borough.

G *Even so, we would have thought that it might be possible to adapt accommodation within the borough if a less rigid view is taken of this family's requirements.*

That letter is of some importance because it seems to have been the basis of what was, at any rate initially, Mrs A's most important complaint in the judicial
H review proceedings, and one which, if established, might well constitute an error of principle and law on Lambeth's part. That is the contention in the Form 86A, that there has been a decision of Lambeth 'that Mrs A and her family have to remain in their present accommodation and will not be rehoused'.

Mrs Afflick has sworn an affidavit that the remark about G having to have
I access to all rooms was something that Mrs A said to her. She, Mrs Afflick, did not comment on it because she did not know who had made such a recommendation or why. Moreover, events since then have made it clear that Lambeth are continuing to try to rehouse the family, although the family's exceptional needs mean that that has been and is an exceptionally difficult task and one in which Lambeth
J has not yet been successful, at any rate in offering accommodation which the family has found acceptable.

The first offer of 18, Mount Earl Gardens, SW16 was made on 15th April 1996 and withdrawn as unsuitable by Lambeth itself on 13th May 1996. This court has admitted further evidence as to what has happened since the occasion when
K Hidden J gave leave on 22nd July 1996, and Owen J dismissed on 21st November 1996 the application for judicial review. Schiemann LJ, in granting leave to appeal

on 26th February 1997, gave the parties encouragement to put in further evidence bringing the matter up to date and, in any case, it would have been unrealistic for this court not to inform itself of the present situation.

Nevertheless, the appeal relates essentially to the decision of Owen J on the situation revealed by the evidence before him. Owen J had before him, on the applicants' side, an affidavit of Mrs A, and two affidavits of Miss Deirdre Foster of the applicants' solicitors, and on Lambeth's side affidavits of Mrs Afflick, an assessment officer in the Housing and Emergency Services Unit of the Housing Department, Mrs Dorothy Quest, the manager of that unit, Mr Delroy Campbell, who is a team manager in that unit, and Mr MacEachern, who is G's social worker. The last mentioned affidavit was at one stage resworn with one additional paragraph, but I see nothing in the slightest sinister about that. The affidavits on both sides had numerous exhibits. These included a written assessment dated 12th August 1996 by Mr MacEachern of the needs of G and his family, G being described in that assessment as a child in need within the meaning of section 17(10)(c) of the Children Act, and a written assessment dated 6th September 1996 by an occupational therapist, Miss Pauline Sweeting, who had been instructed by the applicants' solicitors, relating to Mrs A and her needs. Although it may involve some repetition, I intend to quote from these reports, since it seems to me to show clearly that at that stage it was common ground, first, that the A family had a serious and urgent need for rehousing (that having been by then formally acknowledged by Lambeth in their notice under Part III of the Housing Act) and, second, that until the family was rehoused, the provision of further facilities at 18, Berry Lane would do little to help. Mr MacEachern's assessment said:

> *Mr and Mrs A have managed to care for their son over a long period of time in accommodation which is not suitable. The house is not suitable for G's needs and this impinges on his parents and his sisters. Mr and Mrs A do not have a social life as they are embarrassed to have friends round to the house as G has to have his incontinence pads changed on the floor of the front room which is the only suitable sized room for this task in the house. It is not possible for them to find baby-sitters who would be able to cope with G so Mr and Mrs A do not go out as a couple.*
>
> *All this causes great emotional stress on the relationship between Mr and Mrs A. This is exacerbated by the great physical demands laid on them by caring for G. Mr and Mrs A are very aware that the energy expended on caring for G could have an adverse effect on their other children and try their best to bring them up as best they can in the circumstances. This in its turn causes more stress on them. Mr and Mrs A are well able to care for their son and three daughters but their task would be made immeasurably more bearable if they had a house which met their needs as carers and met the needs of their disabled son.*
>
> *Conclusions:*
>
> *(1) It is essential that the family be found accommodation which meets their needs as a family which includes the special needs of Mr and Mrs A's son G.*
>
> *(2) The family need to have a social worker who can help and support them in liaising with other agencies, principally the Housing Department, the Education Department, and the Benefits Agency.*
>
> *(3) The family will need the continued services of the Community Occupational Therapy Section to ensure that any aids and adaptations which prove necessary are done.*

Miss Sweeting said in the conclusion in her assessment:

The couple as carers have a need for regular, ongoing social work support. They need the opportunity to discuss the emotional aspects of caring for G and practical assistance particularly in liaising with the other agencies involved with G. Mrs A described what she saw as a constant battle to get what she needs for G. For example, she currently has a problem obtaining an adequate supply of nappies from the health service. A social worker would have the knowledge of the welfare system to assist in such negotiations.

Conclusion

The family's present housing does not facilitate the task of caring for G. It lacks the necessary features and there is insufficient space for the specialist equipment needed. This in turn restricts the possibilities for respite care.

It is clear that the family need to move to more suitable accommodation. In the meantime I believe that there is little that could be done to alleviate the situation.

Miss Sweeting for some reason does not here acknowledge the considerable assistance that the family had been getting and were getting from Mr MacEachern.

There were two separate applications before Owen J, one on behalf of Mrs A herself, and one on behalf of G by Mrs A as next friend. Each application raised several issues, some common to both and some distinct. In brief summary, the issues were as follows: on Mrs A's application, first, to quash Lambeth's decision that the family would not be rehoused (I have already commented on this point as being the most important); second, to require Lambeth to assess and provide services to Mrs A under the Chronically Sick and Disabled Persons Act 1970 ('the 1970 Act'); third, to require Lambeth to assess Mr and Mrs A under the Carers (Recognition and Services) Act 1995 ('the 1995 Act'), and, fourth, to require Lambeth to use its powers under section 111 of the Local Government Act 1972 to acquire a property to rehouse the family. On G's application the relief sought was, first, to quash a decision not to assess G under the Children Act or under the 1970 Act; second, to order that there should be an assessment under the Children Act and, third, to order that Lambeth should make suitable provision under the 1970 Act.

The judge, after summarising the issues and the facts, dealt with points 1 and 4 on Mrs A's application. In doing so, he focused, and to my mind was absolutely right in focusing, on the rehousing problem. He summarised the essential submissions of the applicant on those points as being, first, that if Lambeth owned no suitable accommodation themselves they must acquire suitable accommodation and, second, that not to consider such a purchase would be so unreasonable as to be wrong in law and open to judicial review. The judge referred to some provisions of the Housing Act. I shall do the same. Section 9(1) to (4) of the Act confer on local housing authorities powers to provide housing accommodation by various means. Subsection (5), which was added by the Local Government and Housing Act 1989, is in these terms:

Nothing in this Act shall be taken to require (or to have at any time required) a local housing authority itself to acquire or hold any houses or other land for the purposes of this Part.

Section 22 provides as follows:

A local housing authority shall secure that in the selection of their tenant a reasonable preference is given to –

(a) persons occupying insanitary or overcrowded houses,

(b) persons having large families,
(c) persons living under unsatisfactory housing conditions, and
(d) persons towards whom the authority are subject to a duty under section 65 or 68 (persons found to be homeless).

Section 22 is in effect supplemented by section 3 of the 1970 Act which adds the chronically sick and disabled to the preferred categories. Arguably, therefore, the A family fell within all five statutory heads. Part III of the Act is concerned with housing the homeless. Section 58 defines homelessness, and by subsection (2A) and (2B) reverses by statute the law as stated by the House of Lords in *R v Hillingdon London Borough Council, ex parte Puhlhofer* [1986] AC 484 (see now also *R v Brent London Borough Council, ex parte Awua* [1996] AC 55). Section 59 establishes categories of priority needs. Section 62 imposes a duty on a local housing authority to enquire into cases of possible homelessness. Section 65 imposes the principal statutory duty and subsection (2) is in these terms, where they are satisfied that he has a priority need and are not satisfied that he became homeless intentionally, they shall (and then subject to an exception which I can leave out) secure that accommodation becomes available for his occupation. Section 69(1), as substituted by the Housing and Planning Act 1986, is in these terms:

A local housing authority may perform any duty under section 65 or 68 (duties to persons found to be homeless) to secure that accommodation becomes available for the occupation of a person –
(a) by making available suitable accommodation held by them under Part II (provision of housing) or any enactment, or
(b) by securing that he obtains suitable accommodation from some other person . . .

Section 71 requires a local housing authority, in performing its functions under Part III, to have regard to any guidance from time to time given by the Secretary of State. The judge said that section 22 made clear that a local housing authority must carry out a balancing exercise. It must weigh the claims of one needful applicant against those of another. No claimant, however strong his needs, has an absolute right to be rehoused immediately. Section 22 is not of course in Part III of the Act, but, by referring expressly to homeless persons, it does appear to bring them within the balancing exercise required by section 22.

The judge recognised that Lambeth, like any other local housing authority, had power to add to its housing stock, but said that the decision whether or not to acquire property in order to provide accommodation was for the local housing authority to decide. He put it this way:

As to that I am satisfied that Parliament intended that the local authority should make the decision and not the judge. I can only interfere if the local authorities are shown to have been Wednesbury *unreasonable (see* Associated Provincial Picture Houses v Wednesbury Corporation *[1948] 1 QB 233).*

The judge did not in terms decide the precise meaning or apply section 9(5) of the Act. The judge considered that he should approach the matter on the basis of the time that had elapsed since Lambeth first became aware of the problem. He expressly decided that he was not limited to considering the period since the formal recognition of homelessness in March 1996. The judge noted that four offers had been made (and it is not suggested that any of these was not made in good faith) the first having been made on 15th April 1996. That was 18, Mount Hill Gardens, to which I have already referred. Another, in October 1996, was 24, Elm

Park Road, SW3. Again, that offer was withdrawn by Lambeth on the advice of the occupational therapist. In November 1996 there was a suggestion of 94 Elm Park, SW2, which was owned by Lambeth but managed by a Lambeth self-help co-op. Mrs A took the view that those premises were unsuitable. Miss Linehan, in her affidavit on behalf of Lambeth, says that she reluctantly agreed with Mrs A. That offer was also withdrawn. The judge referred to other passages in the affidavit of Miss Linehan which vividly demonstrates the truly dreadful problems confronting Lambeth Housing Department and relevant to the balancing exercise to which the judge referred. Miss Linehan deposed that Lambeth's housing stock consists of 43,000 properties, many of which are in poor repair. She deposed also that Lambeth was at the time the affidavit was sworn facing more than 1,000 separate pieces of litigation, based on alleged failure to repair the housing stock. The judge then considered – this was still in relation to points 1 to 4, the rehousing issue – Lambeth's functions and duties under sections 17 and 20 of and Schedule 2 to the Children Act, section 2 of the 1970 Act and section 1 of the 1995 Act. It was appropriate for the judge to do that, especially in view of the departmental circular, 10/92, which we were shown by Miss Maxwell and which was relevant because of the need under section 71 of the Housing Act to refer to guidance from the Secretary of State. A paragraph in that circular stresses the need for overall assessment of housing needs and for co-operation between different arms of a local authority. The circular says:

> *The aim should be to provide a seamless service for clients with a mutual recognition of all authorities' responsibilities.*

That is, with respect, the sort of prose which comes easily to ministerial advisers at departmental headquarters. It seems to me that it is an aspiration and not an operating manual that can be relied on invariably to produce those results. Neither ministerial circulars, nor declaration or exhortation from this court, can automatically raise the standard of day to day administration in a hard pressed local authority providing services for some of the least affluent parts of London. But an exhibit to the affidavit of Miss Mary Ojukwe, to which I shall have to return, does seem to show that at last, and better late than never, there has been a real attempt at inter-disciplinary problem-solving. I refer in particular to the exhibited minutes of two meetings on 15th January and 27th February 1997, where a large number of fairly senior officers from different parts of Lambeth attended meetings to try and deal with this problem. There is also a memorandum dated 8th May 1997 from Miss Susanna White, who is the Assistant Director Adult Services to Christina Omideyi of the Legal Services Department, which also shows a realistic and practical approach to the detail of what is required to provide suitable accommodation for this family.

The judge referred in his judgment to the applicants' reliance on the decision of the Court of Appeal in *R v Gloucestershire County Council, ex Parte Barry* (1997) 1 CCLR 19; [1996] 4 All ER 421, a decision from which Hirst LJ dissented. That decision was reversed by the House of Lords: (1997) 1 CCLR 40; [1997] 2 WLR 459. That reversal can only tend to confirm the judge's decision on the housing point, although I place no reliance on it since we have, in the event, heard no submissions from counsel about that case. The judge expressed his conclusion in these words, after referring to the second affidavit of Miss Foster dealing with the strain and anxiety that Mrs A was by then suffering from. The judge said:

> *It would be a hard person, indeed, who is not moved by this picture. It is a picture of selfless people who have devoted their life to the care of a child, who needs that*

care, who are being pushed to the extreme. However, I cannot say that the local authority has performed an unreasonable balancing exercise. The question is: Was what the local authority did unlawful and Wednesbury *unreasonable? I am bound to find that this is not shown. I make a request that all possible efforts should be continued. It is right that the Applicant may have to settle for second best, but, of course, I cannot know what all the conflicting other factors are. That which I have quoted from Miss Linehan's affidavit is, of course, another factor and a strong one and it does appear that what the local authority has done is to consider all the factors. Certainly it is not shown that they have been unreasonable and that they should have exercised their undoubted power to purchase that other property at this stage.*

Rightly, the local authority has not shut out the possibility of using its powers to acquire land and, I am bound to say, that to have waited only from March to July, even bearing in mind the earlier history, was not long enough. [I interpose that it is clear that what the judge meant by that is not so long as to make the decision unreasonable.] Of course, inevitably there will be disappointment, that is the sad result of bringing proceedings which are unsuccessful. What I would certainly ask should be done is that those passages, which I have quoted from the Applicant's affidavit, should be borne in mind and possibly attached to the application by this family since the picture painted is of a family being stretched to breaking point.

The judge dealt with the remainder of the application in a fairly summary way. He said this:

As far as assessments are concerned, in my judgment the application is misconceived. There have been, as I understand it, no refusals. There may have been a neglect to make assessments or full assessments, but the position is abundantly clear. What this lad needs, and what his parents need, is a new home. If they have the new home there will be no reason why there should not be, for instance, a shower in the bathroom, a hoist, property where he can use the chair which is now too big, and then the overcrowding could be avoided. So, in my judgment, upon what I have heard, the provision of a new home is the problem in this situation and the other problems are much less, certainly I do not consider that it would be right for me to make the orders which I am now considering [they were the orders in respect of assessment] since, firstly, some assessments have been made, secondly, that which an assessment would show is already clear and thirdly, in any event, if there has been a refusal it would be possible for [Mrs A] to make an application to the Secretary of State in respect of two Acts which are mentioned. In these circumstances the first application must be dismissed.

The explanation of the reference to 'two Acts' is that there are rights of complaint to the Secretary of State under section 7 and following sections of the Local Authority Social Services Act 1970 in regard to the exercise or non-exercise of local authorities' social service functions under two Acts which have been mentioned, the 1970 Act and the 1985 Act. The judge then dealt in a similar summary fashion with the second application in respect of G.

I must at this stage refer briefly to what has happened since 21st November 1996. When Schiemann LJ gave leave in February, he said that Lambeth should consider putting in further evidence as to recent events. In the event, the appellants' solicitor, Mr Michael Petrou, swore an affidavit on 4th December 1996 exhibiting sufficient correspondence to give a general idea of what has been happening in the meantime. Miss Ojukwu of Lambeth Legal Services swore an

affidavit on 9th December, that is the day before the hearing began yesterday. The affidavit was six pages long and had a 75 page exhibit. We were told that the affidavit had been dispatched by courier after being sworn, but when the hearing began it had not reached the court. The consequence was that no copies had been seen, either by Miss Maxwell and those instructing her, or by the court; nor indeed were copies even then available when the hearing began yesterday. It seems to me deplorable that the London Borough, which has been on notice for nine months that further evidence was required, should show so little consideration either to the applicants or to this court.

Lambeth does itself no favours if it is seeking to appear as a responsible and competent local authority. However, Miss Maxwell did not object to the affidavit being put in. It was copied and has been seen by the court.

The picture that emerges is as follows. On 28th February a formal offer was made of premises for rehousing at 24, Kenchester Close on the Mawbey Grove Estate. That is a council estate in a different part of the borough. It is between New Covent Garden and the Oval. The accommodation offered was a four bedroomed, wheelchair adapted flat. It was, I think, purpose-built accommodation for the disabled. On 4th March G was assessed by a community occupational therapy team. On 25th March the property was inspected by Mr and Mrs A with a surveyor and their own occupational therapist instructed by their solicitor. On 11th April there was a letter from the solicitors giving a reasoned refusal of the accommodation, that letter consisting of more than four closely typed pages. I will not attempt to summarise it more than by saying that essentially it rejected the accommodation because it was too small, because of problems with access and because of its location, particularly in relation to where the elder children are at school. On 19th June an appeal against the offer being suitable was turned down by Miss Drummond, the responsible officer of Lambeth who hears such appeals. On 30th June there was a report by Mr David Gedala, an occupational therapist with Lambeth, noting various drawbacks in the accommodation, but saying that ultimately his evidence would be that it met the physical and care needs of the family. On 18th July there was a file note by Mr MacEachern which has properly and in performance of its statutory duty been revealed by Lambeth, which shows Mr MacEachern, the social worker, being very critical of the standard of accommodation offered. It also appears from the material that three other properties were considered earlier. One was a 4 bedroomed accommodation which was wheelchair adapted. It seems to have been rather larger. It was occupied by a single elderly wheelchair-bound man who ultimately declined to move to other accommodation. Finally, the new material shows that G is now, since September 1997, at the Priory School, South Norwood, which is another special school for older children. He has made a good start there. S is now at school in Croydon. That is a long way to the south of where the accommodation is offered.

Mr Giffin has submitted that more recent events show that Lambeth has performed its statutory duties and that the basis of the application, at any rate so far as it relates to housing, has been subverted. Miss Maxwell does not accept that on behalf of Mrs A and her family. It seems to me that this court cannot adjudicate on whether 24, Kenchester Close, either with or without the adaptations mentioned in the report to which I have referred, is suitable accommodation. That issue could be decided only by further judicial review proceedings, although I (and I think the other members of this court) would express the strongest hope that no further proceedings are considered appropriate.

The task of this court is to hear the appeal from Owen J. It seems to me that in hearing it, it should be assumed that Lambeth in good faith takes the view that it

has now performed its statutory duty, and that Mrs A in good faith and on advice disputes that. This, it seems to me, is by no means a case such as *Ainsbury v Millington* [1987] 1 WLR 379, in which it could be said that subsequent events have made the determination of the appeal academic or hypothetical.

The position is, however, that the offer of 24, Kenchester Close is still open. Mr Giffin, having taken specific instructions, confirms that he is willing on behalf of his clients to give an undertaking that if that property is, even at this late stage, accepted by the A family, the various works mentioned in the report dated 8th May 1997 would be carried out.

As I have said, what this court has to do is determine the appeal from Owen J. There are nine grounds of appeal in the notice of appeal against the rejection of Mrs A's application. The first is that the judge was wrong to defer questions under the Children Act, the 1970 Act and the 1995 Act until the issue of rehousing is resolved. Miss Maxwell has urged on us that comprehensive assessments were needed. She has said that only comprehensive assessments can meet the answer. I have to say that I do not accept that at all. There have been numerous assessments in this case, to some but not all of which I have referred. It may be that some are better than others. It may be that some do not explicitly state under what statute or statutes they have been made, but judicial review is a discretionary remedy. The judge exercised his discretion properly and, if I may say so, with eminent good sense, when he said that 'What this lad needs and what his parents need is a new home.' Everyone knows the problem. What is needed is a sincere and determined resumption of the search for a solution.

The second ground of appeal is connected with the first. It seems to me that any correction of a lack of formal assessment in the past would simply be a bit of tidy minded putting the files in order and would not assist the resolution of the real problem.

Grounds 3 and 4 relate to the judge's interpretation of section 9(5) and section 69(1) (a) of the Housing Act. I think the judge was clearly right in his understanding of those sections. Indeed, I think that he could, as the respondent's notice asks, have gone further and said that section 9(5), whatever the historical reasons for its enactment, is in plain terms and makes it exceptionally difficult for any challenge by judicial review of a decision by a local housing authority not to exercise the powers which it has under sections 9 and 17 of the Housing Act in order to add to its housing stock. The same applies *a fortiori* to section 111 of the Local Government Act 1972 if it is relevant at all to this case.

Grounds 5 and 6 are connected with the judge having stated, as he seems to have done, that the specific statutory duty to rehouse arose only in March 1996. It seems to me that the judge may have been wrong on that, particularly in view of section 62 of the Act, to which he may or may not have been referred in the course of the hearing. However this court did not call on Mr Giffin so I say no more on that. The judge made plain that he did in fact, in approaching the matter, take account of all the facts, not merely from March 1996, but the whole history from the beginning of the 1990s. In those circumstances, it seems that any possible error on that point is one which had no material effect on the judge's decision.

Ground 7 is connected with grounds 1 and 2. Again, it seems to me that the answer is that rehousing is the real problem and that other facilities, that is hoists, frames, special bathing and toilet facilities, special beds and commodes must for the most part await the successful completion of rehousing. It appears from the evidence that Mr and Mrs A were provided with some of these facilities but simply had to store them or send them back because there was not room for them to be

used. However, Miss Maxwell has mentioned particular problems in connection with the supply of bed linen and the supply (possibly) of temporary padding to prevent accidental injury to G while he remains in the present flat. That is no doubt something that Lambeth should and will bear in mind. It cannot, however, affect the judge's basic conclusion on that point.

Ground 8 is that there is no evidence of assessments having been made. I have to say that that seems to me a misconceived ground. Mr MacEachern, who has given long and loyal help to this unfortunate family, has in his evidence referred to a considerable number of assessments, some made by him and some made by other officers within Lambeth.

Finally, it is said that the judge disregarded the evidence that the cost of keeping G in full time care would be £2,000 a week. It seems to me that the judge did take that into account. However, as Miss Maxwell accepted when questioned on this point, the fact is that there is no indication of any serious cost benefit analysis of the financial implications ever having been carried out. It may be that it would have been useful if it had been. The figure of £2,000 a week, striking though it is, cannot by itself carry very much weight unless set against the position as it would be if the family is rehoused. I mention that in particular because it is clear from the evidence that Mr A wishes to get back to work as soon as possible, and it may well be that even with the provision of hoists, a considerable amount of expensive home care help would be necessary if there is to be any possibility of Mr A going back to work.

As regards the application on behalf of G, that has six grounds of appeal. 1, 2 and 3 are, in substance, a reflection of 1, 2 and 5 in Mrs A's appeal and exactly the same considerations apply to them. I would only add that the judge could also have referred, so far as failure to assess or provide services under section 2 of the 1970 Act is concerned, that the statutory complaints procedure under the Local Authority Social Services Act 1970, which I have already mentioned, may provide a more suitable means of redress in a case where no question of law arises (see the observations of the Court of Appeal in *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73).

Ground 5 of G's notice of appeal is linked with ground 5 on his mother's appeal. Ground 5 is linked with ground 2. I need say no more about those.

As regards ground 6, it is clear from the decision of the House of Lords in *O'Rourke v Camden London Borough Council* [1997] 3 WLR 86 that that ground of appeal could not have succeeded.

I have tried to deal fully with the appellants' submissions because this is a very sad and very serious case, in which Miss Maxwell and those instructing her have plainly taken enormous care to prepare to say, and have said all that could be said, in support of the appeal. But, in my judgment, the judge's judgment is unassailable in law, except possibly for the one immaterial point that I have mentioned. It seems to me that it is also unassailable as an exercise of discretion. I would repeat, as earnestly as I can, the judge's exhortation to Lambeth to continue to show energy and patience and co-operation between the various departments involved in order to try and meet the appellants' dire needs, and to do so regardless of the dispute as to whether or not the offer of 24, Kenchester Close has discharged Lambeth's duty. Miss Maxwell and those instructing her and her clients will, for their part, seriously consider the question of whether an undertaking to carry out the works referred to in the report of 8th May ought not, even at this stage, to lead them to regard 24, Kenchester Close, even if it is a second best, as something which may alleviate their present condition.

However that may be, it seems to me that the appeal must fail. I would dismiss the appeal. A

MR JUSTICE HARMAN: I agree with the judgment of my Lord which has dealt comprehensively with every issue raised by this appeal. I would only add that the appalling problems facing the applicants clearly create difficulties in solving them, but the provision of adequately large and properly adapted accommodation is, in my view, the need which, if satisfied, would enable many other of the problems raised to be tackled. I agree that we cannot on this appeal reach any conclusion about the offer of 24, Kenchester Close, but Lambeth have clearly made serious efforts to meet the exceptional problems raised by this case. For the reasons given by Robert Walker LJ, I agree that this appeal must be dismissed. B C

LORD JUSTICE HIRST: I also agree that the appeal should be dismissed.

Order: Appeal dismissed. D
Order nisi against the Legal Aid Fund with nil contribution.
Legal aid taxation of the appellants' costs.