



Developments in affordability

1. The concept of 'affordability' is important in homelessness cases. It has a bearing on a number of issues:
 - a. whether someone is homeless in the first place (because they will be if it is not reasonable to continue to occupy unaffordable accommodation)
 - b. whether someone may have made themselves intentionally homeless, and therefore not entitled to the full housing duty under Part VII of the Housing Act 1996
 - c. whether accommodation offered to a homeless applicant is suitable
 - d. development of 'reasonable steps' to prevent or relieve homelessness
2. This paper aims to provide a short overview of some of the developments in the last couple of years, looking mainly at two key cases.

Legislation

3. The Homelessness (Suitability of Accommodation) Order 1996/3204 requires local authorities to consider whether accommodation is affordable by reference to the applicant's financial resources when deciding whether accommodation is suitable. This requires an objective assessment of the applicant's reasonable living expenses, as opposed to the subjective views of a housing officer.

Homelessness Code of Guidance

4. Set out below are the main sections in the Homelessness Code of Guidance that deal with affordability:

Homeless or threatened with homelessness

6.28 Affordability must be considered in all cases. The Homelessness (Suitability of Accommodation) Order 1996 requires the housing authority to consider the affordability of the accommodation for the applicant. The Order specifies, among other things, that in determining both whether it would be (or would have been) reasonable for a person to continue to occupy accommodation and whether the accommodation is suitable, a housing authority must take into account whether the accommodation is affordable for them and must, in particular, take account of:

- (a) the financial resources available to them;



(b) the costs of the accommodation;

(c) maintenance payments (to a spouse, former spouse or in respect of a child); and,

(d) their reasonable living expenses

Intentional homelessness

9.18 An applicant's actions would not amount to intentional homelessness where they have lost their home, or were obliged to sell it, because of rent or mortgage arrears resulting from significant financial difficulties, and the applicant was genuinely unable to keep up the rent or mortgage payments even after claiming benefits, and no further financial help was available. Housing authorities should be alert to the impact of economic abuse and control and coercion on a victim of domestic abuse's ability to meet rent or mortgage payments.

9.19 Where an applicant has lost a former home due to rent arrears, the reasons why the arrears accrued should be fully explored, including examining the applicant's ability to pay the housing costs at the time the commitment was taken on. Similarly, in cases which involve mortgagors, housing authorities will need to look at the reasons for mortgage arrears together with the applicant's ability to pay the mortgage commitment when it was taken on, given the applicant's financial circumstances at the time.

Assessments and personalised plans

11.20 Personalised housing plans should be realistic, taking account of local housing markets and the availability of relevant support services, as well as the applicant's individual needs and wishes. For example, a plan which limited the search for accommodation to a small geographic area where the applicant would like to live would be unlikely to be reasonable if there was little prospect of finding housing there that they could afford. The plan might instead enable the applicant to review accommodation prices in their preferred areas as well as extending their home search to more affordable areas and property types. In their interactions with applicants, housing authorities are encouraged to provide sufficient information and advice to encourage informed and realistic choices to be identified and agreed for inclusion in the plan.

Suitability of accommodation

17.46 Housing authorities will need to consider whether the applicant can afford the housing costs without being deprived of basic essentials such as food, clothing, heating, transport and other essentials specific to their circumstances. Housing costs should not be regarded as affordable if the applicant would be left with a residual income that is insufficient to meet these essential needs. Housing authorities may be guided by Universal Credit standard allowances when assessing the income that an applicant will require to meet essential needs aside from housing costs, but should ensure that the wishes, needs and circumstances of the applicant



and their household are taken into account. The wider context of the applicant's particular circumstances should be considered when considering their household expenditure especially when these are higher than might be expected. For example, an applicant with a disabled child may have higher travel costs to ensure that the child is able to access additional support or education that they require and so this should be taken into account when assessing their essential needs, and the income that they have available for accommodation costs.

Key cases pre-Samuels

5. In *Birmingham City Council v Balog* [2013] EWCA Civ 1582, the Court of Appeal allowed the local authority's appeal, finding that an assessment by a reviewing officer that the applicant could have reduced his living expenses without having to sacrifice essential amenities so as to make his rented accommodation affordable was the kind of analysis required by the Homelessness Code of Guidance (as it was then drafted).
6. In *Huzrat v Hounslow LBC* [2013] EWCA Civ 1865, the appellant was evicted because of rent arrears. There had been a shortfall between the rent and the Housing Benefit she received. The reviewing officer found that she had become intentionally homeless. On affordability, the reviewing officer found that she had deliberately failed to pay her rent as, considering her income and expenses, she could have afforded to make up the difference between her housing benefit and rent. It held that she had deliberately chosen to spend money on non-essential items, such as repaying a debt owed to a friend and by giving pocket money to her children, and that she could have comfortably reduced her spending so as to cover her rent so that it would have been reasonable for her to continue occupying the property. The Court of Appeal dismissed her appeal.
7. In *R (Farah) v Hillingdon LBC* [2014] EWCA Civ 359, the Court of Appeal upheld an appeal by a disabled single parent, who also had a shortfall between her rent and Housing Benefit. The Court of Appeal found that the reviewing officer's failure to explain which items of expenditure were considered to be excessive or exaggerated meant that the decision was flawed.

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

8. Ms Samuels was an assured shorthold tenant of a property in Birmingham, where she lived with her four children. She fell into rent arrears and was given notice to leave. When she applied to Birmingham as homeless, it was decided that she was intentionally homeless, on the basis that the loss of her accommodation was caused by her (deliberately) having failed to pay the rent.
9. At the time that she left the property her income was comprised solely of benefits, including Housing Benefit, Income Support, Child Tax Credits and Child Benefit.



Her rent was £700, a shortfall of £151.49 compared with what Housing Benefit was paying. The total of Ms Samuel's income compared with the totality of her reported expenses left her with a shortfall of £37 per month.

10. In the section 202 review, Birmingham's review officer said 'I consider that it is a matter of normal household budgeting that you would manage your household finances in such a way to ensure that you were able to meet your rental obligation', and concluded that the accommodation had been affordable for Ms Samuels.
11. Ms Samuels' appeal was dismissed in the county court and in the Court of Appeal.
12. Ms Samuels argued in the Supreme Court that the reviewing officer was wrong to treat her non-Housing Benefit as containing a surplus which could be treated as available to make up shortfalls between Housing Benefit and the rent.
13. The Supreme Court allowed her appeal and made a number of important findings:
 - a. Assessment of what is reasonable requires an objective assessment; it cannot depend simply on the subjective view of the case officer;¹
 - b. Affordability has to be judged on the basis that the accommodation is to be available 'indefinitely';²
 - c. Benefit levels are not generally designed to provide a surplus above subsistence needs for the family;³
 - d. The reviewing officer had therefore approached the issue wrongly. The question was not whether, faced with a shortfall, Ms Samuels could somehow manage her finances to bridge the gap; but rather, what were her reasonable living expenses (other than rent), that being determined having regard to both her needs and those of the children, including the promotion of their welfare.⁴

¹ Para. 34.

² Para. 34.

³ Para. 35.

⁴ Para. 36.



Patel v Hackney [2021] EWCA Civ 897

Facts

14. Mr Patel and his family were evicted from their private rented accommodation, following a possession order made due to rent arrears. Shortly before the warrant for eviction was executed, Mr Patel made a homeless application.
15. After initially accommodating the family in section 188 accommodation, Mr Patel was found to be intentionally homeless. The family was therefore owed the more limited duty under section 190 Housing Act 1996. It was found that the failure to pay the rent was the cause of the accommodation no longer being available. However, in the section 184 decision letter, the decision-maker asserted that Mr Patel had underestimated the family's expenditure, and added an additional figure of £32 per week to reflect payments for 'white goods'. It was nevertheless decided that the accommodation had been affordable.
16. Mr Patel, unrepresented at this point, sought a review of that decision. Hackney issued a 'minded to' letter indicating that the original decision was likely to be upheld. Mr Patel submitted further representations in response, arguing that while it had been the original decision-maker who had added the figure for white goods, he nevertheless adopted the amount put forward. Mr Patel submitted that the white goods were an essential expense as the family had needed to replace their washing machine and fridge, purchasing second-hand units at their own expense.
17. At review stage, the section 184 decision was upheld. The review officer disregarded the expenditure submitted for white goods, stating that 'I do not believe this to be an essential expense' and that 'I believe that there is sufficient flexibility in your weekly expenditure to cater for such eventualities.' On the reviewing officer's calculations, the family's income exceeded their expenditure by just over £3, and it was thus decided that the accommodation was affordable.
18. In Mr Patel's appeal, particular reliance was placed on the finding of Lord Carnwath in *Samuels*: that an assessment of what living expenses were reasonable needs to be carried out objectively, and cannot depend simply on the subjective view of the case officer. Accordingly, summarily dismissing 'white goods' as 'non-essential', so the argument went, was contrary to the Supreme Court's guidance.
19. It was also argued that there appeared to be a tension or lack of consistency between paras. 17.45 and 17.46 in the Homelessness Code of Guidance, where reference is made in para. 17.45 to 'reasonable' living expenses (as per Article 2 of the Homelessness (Suitability of Accommodation) Order 1996) and to 'essential' expenses in para. 17.46.



20. The county court dismissed the appeal at first instance and Mr Patel appealed to the Court of Appeal.

Outcome

21. The Court of Appeal dismissed the appeal. It was held that, on the facts and evidence, a finding that there was 'sufficient flexibility' in the family budget was one that was open to the reviewing officer. The court also considered that, rather than any apparent tension or inconsistency, para. 17.46 of the Code added 'no more than an elaboration' of what level of expenditure it should be reasonable to take into account.

22. On affordability generally (at para. 13) the Court held:

It seems to me that paragraph 17.46 is no more than an elaboration of what level of expenditure it should be reasonable to take into account in deciding whether the accommodation was affordable. The statutory criterion of reasonable living expenses directs an enquiry into the needs of the particular applicant and his family and imposes an objective standard for determining whether any expenditure relied on to prove that the accommodation was unaffordable should be taken into account. Loss of accommodation through the non-payment of rent requires an explanation that must satisfy a test of reasonableness. This cannot be satisfied simply by reference to how the applicant has chosen to spend the money available to him at the relevant time. The statutory test requires the local housing authority to determine what in the particular case was a reasonable level of expenditure and the guidance in the Code suggests that this should be measured by what the applicant requires in order to provide as a minimum standard the basic essentials of life.

23. This case is another illustration of the lack of consistency in assessing affordability by local authorities when considering homelessness applications – precisely what was deprecated by the Supreme Court in *Samuels* (see e.g. para. 41 of *Samuels*).

24. Another take could be that the outcome of this case very much turned on its facts – as indeed will others looking at affordability. The relatively high level of rent arrears, combined with the somewhat unspecific figures given for white goods, is unlikely to have helped the appellant in this case.

25. Importantly the Court of Appeal did suggest (at para. 33) that expenditure for white goods could be considered a necessary and reasonable living expense, albeit more likely an occasional one as opposed to a regular outgoing.



Going forward: applying *Samuels*

26. *Samuels* has had some wider application outside of the framework of the Housing Act 1996. In AS/20/01/41413, Judge Ripley of the Asylum Support Tribunal referred to *Samuels* in finding that the appellant's sponsor did not have sufficient funds to provide for the essential living needs of himself, his children and his wife (the appellant) by reference to the sponsor's income from Universal Credit,⁵ which was accepted to be a subsistence benefit: '*It is for the support of those individuals who are entitled to claim it and should not be used to subsidise the support of additional family members.*'⁶ In that particular case, the appellant was found not to be destitute due to another source of income held to be available to her sponsor.
27. Care may need to be taken in terms of reliance on AHAS⁷ guidance (or similar) – this was referred to in *Patel*. The Supreme Court was clear that objective measures are important in terms of consistency of decision-making, and so any suggestion that applicants require less to live on than subsistence benefits provide should be countered.
28. In terms of case preparation, the importance of means statements (a template is annexed to this paper) and an understanding of benefits and deductions from benefits⁸ is difficult to overstate.⁹ An understanding of what each element of Universal Credit is meant to be for is also likely to be helpful.
29. See, for example, the approach of the High Court in *R. (on the application of Tiemo) v Lambeth LBC* [2020] EWHC 1193 (Admin), in which the claimant sought to challenge by judicial review the suitability of section 188 accommodation on the basis of affordability. Her challenge was refused in part because she had not yet made a claim for Housing Benefit.

⁵ Para. 8: 'it was accepted that, if the only income the appellant received was the Universal Credit that was due to the sponsor and their eldest daughter, that this would not be sufficient to meet her essential living needs and that of their younger daughter.'

⁶ Para 17. The author is aware of at least one other case from the Asylum Support Tribunal in which this finding led to the conclusion that the appellant was indeed destitute, and therefore entitled to section 95 asylum support.

⁷ Association of Housing Advice Services - "representing housing needs departments since 1990."
<https://www.ahas.org.uk/>

⁸ Regulations 58 and Schedule 6 Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013/380 provide the main framework for deductions from Universal Credit. See also The Social Security (Overpayments and Recovery) Regulations 2013/384.

⁹ Appendix 4 of the DWP's Overpayment Recovery Guide is quite helpful on providing an overview of deductions: https://www.gov.uk/government/publications/benefit-overpayment-recovery-staff-guide/benefit-overpayment-recovery-guide?mc_cid=162dd76db2&mc_eid=66604b8863#appendices (updated 12th May 2021)



CHAMBERS

30. Advisers may also want to consider how long it will be reasonable for an applicant to continue to occupy accommodation that is, or is becoming, unaffordable. In *Safi v Sandwell* [2018] EWCA Civ 2876, the Court of Appeal held that when considering whether an applicant is homeless, a local authority had to ask itself whether their continued occupation was reasonable for the foreseeable future, not just the present; in *Samuels* the approach was different.

Matthew Ahluwalia
Garden Court Chambers
27th October 2021



Template means statement

Name:

Address:

Date of birth:

Who else would normally be in your household (e.g. spouse, children, other dependents):

Is anyone in your household or in your care disabled:

Bank accounts

Account name	Account number	Account type (e.g. current, savings)	Date of last statement	Amount (£)

Income

Source	Amount (£)	Frequency (weekly, monthly etc.)
Earnings/salary		
Benefits (please specify which benefits) ¹⁰		
Benefits (please specify)		
Child support payments		

¹⁰ If income from benefits include money for rent/housing costs, please specify.



Other maintenance payments		
Money from family/friends		
Income from loans		
Other income (please specify)		
Other income (please specify)		
Total		

Any other income or capital (e.g. cash in hand, investments, shares, assets worth over £500):

Outgoings

Expenditure	Amount (£)	Frequency (weekly, monthly)
Housing costs (rent/mortgage)		
Food		
Travel		
Heating bill		
Water bill		
Electricity bill		
Mobile phone		
Internet		
Child support payments		
Other expenditure (please specify) ¹¹		
Other expenditure (please specify)		
Total		

¹¹ Deductions from benefits (e.g. because of sanctions or money owed to the DWP) could go here.



Debts and loans¹²

Creditor	Payment amount (£)	Payment frequency	Current debt total

Any other expenditure (e.g. recent one-off purchases, money transfers):

Signed:

Print name:

Dated:

¹² Including rent arrears, benefit overpayments etc.