Neutral Citation Number: [2011] EWCA civ 1249

Case No: B5/2011/0234

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
Her Honour Judge Baucher
0CL40104

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 November 2011

Before :

LORD JUSTICE RIX
LORD JUSTICE SULLIVAN
and
LORD JUSTICE LEWISON

- -

Between :

ROBIBUL ALAM MITU	**Appellant**
- and -	
LONDON BOROUGH OF CAMDEN	**Respondent**

- -
- -

Martin Russell (instructed by **Moss Beachley Mullem & Coleman**) for the **Appellant**
Emma Godfrey (instructed by Andrew Maughan, Borough Solicitor) for the **Respondent**

Hearing date : 18 October 2011

- -

Judgment

Lord Justice Lewison:

1. Part VII of the Housing Act 1996 ("the Act") imposes duties on local housing authorities as regards the homeless. The nature of the duty varies according to the category or categories into which a homeless person falls.

    i) If a person is intentionally homeless but does not have a priority need the duty is a duty to provide advice and assistance: section 190 (3);

    ii) If a person is intentionally homeless and has a priority need the duty is a duty to provide advice and assistance and also to provide accommodation for a period to give him a reasonable opportunity to find accommodation: section 190 (2);

    iii) If a person is not intentionally homeless and has no priority need, the duty is a duty to provide advice and assistance: section 192 (2). The duty is thus the same duty as arises where a person is intentionally homeless but does not have a priority need; but in this category of case that duty is coupled with a discretionary power to secure accommodation for him: section 192 (3);

    iv) If a person is not intentionally homeless and has a priority need the duty is a duty to secure accommodation for him, unless the application is referred to another housing authority: section 193 (2).

2. In the summer of 2010 Mr Mitu applied to the London Borough of Camden ("Camden") under Part VII of the Act. He had become homeless as a result of a domestic dispute. He also said that he suffered from health problems with the result that he had a priority need. He suffered from epilepsy and had a history of anxiety, depression and anger management issues. He was taking medication relating to the epilepsy. His medical condition was assessed by Dr Jackson on the basis of Mr Mitu's patient notes kept by his GP but without having seen Mr Mitu. Ms Brown of Camden considered his application and on 13 September 2010 determined that Mr Mitu was intentionally homeless; and did not have a priority need. The letter concluded by stating:

> "The Council has a duty to provide you with advice and assistance to help you find your own accommodation."

3. Mr Mitu asked for a review of this decision, as he was entitled to do under section 202 of the Act. He made written representations to Camden; which were supplemented by further representations made on his behalf by solicitors. Those representations asserted that Mr Mitu was not intentionally homeless and had a priority need. They asserted that Ms Brown had applied the wrong legal test in deciding whether Mr Mitu had a priority need. They also said:

> "You refer to a medical report by our client's doctor Dr Jackson we do not know what report you have considered as neither the writer nor the client knows who Dr Jackson is."

4. Mr Bond of Camden carried out the review and gave his decision on 9 November 2010. The result of the review was that Mr Bond did not uphold the decision that Mr

Mitu was intentionally homeless; but confirmed the decision that he did not have a priority need. On the question of priority need Mr Bond first examined Ms Brown's original decision. He said that he was "satisfied that this was a reasonable decision, arrived at after following proper consideration of Mr Mitu's circumstances". Nevertheless he went on to consider the evidence for himself. His consideration included the following:

> "Your letter included no new medical information to consider and confirmed our existing understanding of Mr Mitu's medical condition … You have received a copy of the completed medical assessment form, completed by Dr Jackson on behalf of Mr Mitu's usual[ly] GP, Dr Emma Parsons using information taken from the patient's notes. You pointed out that your client did not know who Dr Jackson was but, in these circumstances, I am satisfied the information is reliable."

5. Over the next two pages Mr Bond assessed Mr Mitu's medical condition for himself, and came to the conclusion that he had no priority need. He said:

> "I am satisfied that Mr Mitu is eligible for assistance and homeless but that he is not in priority need for accommodation. This means that the Council's duty is to provide him with advice and assistance to help him find his own accommodation.
>
> I note that the Council has discretion to accommodate people who are not in priority need and also are not intentionally homeless. I am satisfied, having reviewed this case carefully, that there are no special circumstances that should persuade us to use our discretion to secure that accommodation is available to Mr Mitu."

6. The review letter concluded:

> "The Council does not have a duty to accommodate Mr Mitu on grounds of homelessness. However, the Council has a duty to provide him with advice and assistance to help him find his own accommodation."

7. The consequence of this decision was that Camden had the same *duty* to provide advice and assistance that arose when the initial decision was made. But Camden also had a discretionary *power* to secure accommodation for him. Mr Bond considered whether this power should be exercised and decided that it should not. In the case of Ms Brown's original decision this power did not arise, because of her finding that Mr Mitu was intentionally homeless. In crude terms, the effect of Mr Bond's review was that Mr Mitu had an upgraded status, but one that did not affect the Council's duties.

8. Mr Mitu appealed to the county court on the ground that Mr Bond had not followed the correct procedure in reaching his decision on the review. The procedure applicable to the review is governed by section 203 of the Act and by regulation 8 of The Allocation of Housing and Homelessness (Review Procedures) Regulations 1999. Section 203 (4) says:

> "(3) The authority … concerned shall notify the applicant of the decision on the review.
>
> (4) If the decision is—
>
> (a) to confirm the original decision on any issue against the interests of the applicant, …
>
> they shall also notify him of the reasons for the decision."

9. Regulation 8 (2) says:

> "If the reviewer considers that there is a deficiency or irregularity in the original decision, or in the manner in which it was made, but is minded nonetheless to make a decision which is against the interests of the applicant on one or more issues, the reviewer shall notify the applicant—
>
> (a) that the reviewer is so minded and the reasons why; and
>
> (b) that the applicant, or someone acting on his behalf, may make representations to the reviewer orally or in writing or both orally and in writing."

10. Mr Russell, appearing then as now for Mr Mitu, argued that Mr Bond should have given a "minded to find" notice under regulation 8 (2); or at the very least have explained why no such notice was necessary. HHJ Baucher disagreed; and dismissed the appeal. With the permission of Etherton LJ Mr Mitu appeals again.

11. Regulation 8 (2) applies where the reviewer considers that there is a deficiency or irregularity in the original decision. Before embarking on a discussion of what amounts to a deficiency it is, I think, important to be clear about what "the original decision" is. The local housing authority's duty to make decisions in homelessness cases is contained in section 184 of the Act. This provides, so far as relevant:

> "(1) If the local housing authority have reason to believe that an applicant may be homeless or threatened with homelessness, they shall make such inquiries as are necessary to satisfy themselves—
>
> (a) whether he is eligible for assistance, and
>
> (b) if so, whether any duty, and if so what duty, is owed to him under the following provisions of this Part.
>
> (2) They may also make inquiries whether he has a local connection with the district of another local housing authority in England, Wales or Scotland.
>
> (3) On completing their inquiries the authority shall notify the applicant of their decision and, so far as any issue is

> decided against his interests, inform him of the reasons for their decision."

12. Section 184 (1) contemplates two decisions. The first is whether the applicant is eligible for assistance. The second is whether any duty, and if so what duty, is owed to him under the Act. The second decision is thus concerned with the *duty* owed by the local housing authority; not whether the applicant is intentionally homeless or has a priority need. These questions are, in the terminology of section 184 (3), "issues" which need to be determined on the way to the ultimate decision. Nor is the decision concerned with the local housing authority's *powers* (as opposed to duties).

13. Thus in the present case the initial decision under section 184 was a decision that Camden had a duty to provide advice and assistance. Section 203 (4) distinguishes between a "decision" and an "issue". Regulation 8 (2) also speaks of a deficiency in a "decision" and distinguishes that from "issues" on which the reviewer is minded to find against the applicant. Thus a thread running through both the primary legislation and the regulations is a clear and consistent distinction between the decision on the one hand, and issues on the other. Mr Russell argues that it is the *decision* that is subject to review, and that it is wrong to split a decision into discrete issues in order to consider whether there is a deficiency in the *decision*. In my judgment he is right.

14. The cases stress (as one might expect) that the words of the regulation must be interpreted in the light of their purpose. That purpose was described by Carnwath LJ in *Hall v Wandsworth LBC* [2004] EWCA Civ 1740 [2005] HLR 23 (§ 26):

> "Thus, the requirement for advance notice of the intended decision in certain cases does not derive directly from the statute itself. The thinking behind such a requirement seems to be that a bare right to make representations on the first decision will not be sufficient, *if that decision was itself flawed in some respect, so that it does not represent a full and reliable consideration of the material issues.* In that event the applicant's rights are reinforced in two ways: first, by requiring the reviewing officer to give advance notice of a proposed adverse decision and the reasons for it; and, secondly, by allowing the applicant to make both written and oral representations on it." (Emphasis added)

15. In *Banks v Kingston-Upon-Thames RLBC* [2008] EWCA Civ 1443 [2009] HLR 29 Lawrence Collins LJ said (§ 71):

> "… an important objective of reg. 8(2) is to ensure that, where the reviewing officer is minded to confirm a decision on different grounds, the applicant should be given an opportunity to make representations."

16. Carnwath LJ's explanation of the meaning of "deficiency" in *Hall v Wandsworth LBC* is the authoritative explanation. He said (§ 29):

> "29 …The word "deficiency" does not have any particular legal connotation. It simply means "something lacking". There is

> nothing in the words of the rule to limit it to failings which would give grounds for legal challenge. If that were the intention, one would have expected it to have been stated expressly. Furthermore, since the judgment is that of the reviewing officer, who is unlikely to be a lawyer, it would be surprising if the criterion were one depending solely on legal judgment. On the other hand, the "something lacking" must be of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard. Whether that is so involves an exercise of "evaluative judgment" … on which the officer's conclusion will only be challengeable on *Wednesbury* grounds.
>
> 30 To summarise, the reviewing officer should treat reg.8(2) as applicable, not merely when he finds some significant legal or procedural error in the decision, but *whenever (looking at the matter broadly and untechnically) he considers that an important aspect of the case was either not addressed, or not addressed adequately*, by the original decision-maker. In such a case, if he intends to confirm the decision, he must give notice of the grounds on which he intends to do so, and provide an opportunity for written and (if requested) oral representations." (Emphasis added)

17. This explanation has since been followed and applied many times: e.g. *Lambeth LBC v Johnston* [2008] EWCA Civ 690 [2009] HLR 10; *Banks v Kingston-Upon-Thames RLBC*; *Makisi v Birmingham City Council* [2011] EWCA Civ 355 [2011] HLR 27.

18. In *Bury MBC v Gibbons* [2010] EWCA Civ 327 [2010] HLR 33 Jackson LJ (with whom Sedley and Jacob LJJ agreed) said (§ 45):

> "Where the reviewer rejects the factual basis of the original decision and proposes to substitute a different factual basis leading to the same conclusion, it seems to me that the review has identified a "deficiency" within the meaning of reg. 8(2)."

19. However, as noted, Carnwath LJ said in *Hall v Wandsworth LBC* that the "something lacking" must be of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard. How one judges the relative importance of a flaw was explained in *Banks v Kingston-Upon-Thames RLBC*. Lawrence Collins LJ said (§ 72):

> "… although the original decision itself cannot be faulted, it came to have a deficiency which was of sufficient importance to justify the additional procedural safeguard, *in the sense that further representations made in response could have made a difference to the decision that the reviewing officer had to make*." (Emphasis added)

20. *Banks v Kingston-Upon-Thames RLBC* was a case in which this court held that regulation 8 (2) should be interpreted so as to cover events that took place *after* the original decision which falsified the basis of that decision. The application of a

purposive interpretation meant that the literal wording of the regulation could be stretched in the applicant's favour. I do not see that decision as a warrant for deciding that if the case falls within the literal wording of the regulation, the wording of the regulation which is designed to protect the applicant should be interpreted more narrowly to his disadvantage.

21. In written submissions (although not in oral argument) some reliance was placed on what Lord Neuberger of Abbotsbury said (obiter) in *Holmes-Moorhouse v Richmond-Upon-Thames LBC* [2009] UKHL 7 [2009] 1 WLR 413, 428. Lord Neuberger (with whom Lords Hoffmann and Walker of Gestingthorpe agreed) said (§ 51):

> "Further, as the present case shows, a decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial (objectively, or in the eyes of the decision-maker) to affect the outcome; sometimes it is obvious from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes, there is more than one reason for the conclusion, and the error only undermines one of the reasons; sometimes, the decision is the only one which could rationally have been reached. In all such cases, the error should not (save, perhaps, in wholly exceptional circumstances) justify the decision being quashed."

22. In the present case the question is not (or not simply) whether Ms Brown's original decision can stand or even whether Mr Bond's ultimate conclusion can stand. It is whether, on the way to reaching his ultimate conclusion, Mr Bond ought to have given a "minded to find" notice under regulation 8 (2). This is a procedural rather than a substantive question. It is not an issue that Lord Neuberger addressed (because it did not arise in *Holmes-Moorhouse v Richmond-Upon-Thames LBC*).

23. In *Lambeth LBC v Johnston* Rimer LJ said (§ 51):

> "…reg.8(2) is not a discretionary option that the review officer can apply or disapply according to whether or not he or she considers that the service of a "minded to find" notice would be of material benefit to the applicant. Regulation 8(2) imposes a dual, mandatory obligation upon the review officer. First, to "consider" whether there was a deficiency or irregularity in the original decision or in the manner in which it was made. Secondly, if there was—and if the review officer is nonetheless minded to make a decision adverse to the applicant on one or more issues—to serve a "minded to find" notice on the applicant explaining his reasons for his provisional views. In my judgement, there is no discretion on the review officer to give himself a dispensation from complying with either of those obligations. As regards the first part of it, I have referred to the fact that it is not a purely subjective exercise but that failure to arrive at the right "consideration" can be challenged on usual public law grounds. As regards the second part, the

> language of reg. 8(2) is unambiguously mandatory—"the reviewer shall notify …"."

24. Rimer LJ went on to say (§ 52) that a "minded to find" notice may be more valuable in some cases than in others. On the facts of that case the applicant knew what was in issue and had in fact had the chance to make representations on those issues. Nevertheless this court held that the reviewing officer had a duty to give a "minded to find" notice. As Rimer LJ explained (§ 53):

> "It is one thing for an applicant to be able to make representations on the matters in issue and then apprehensively await the review officer's decision, whichever way it may go. It is quite another for an applicant, not just to be able to make such representations, but then also to be given (i) advance notice of the review officer's reasons for his provisionally adverse views, and (ii) the opportunity not just to make further *written* representations as to why those views are not justified by his reasons, but also *oral* representations to that effect. Previously the applicant will simply have addressed the issues as best he can. Now he will have the opportunity to respond specifically to the review officer's own reasons as to how he proposes to deal with the issues. That is a most important advantage to the applicant. It may well, in many cases, enable him to engage in no more than an exercise of advocacy. But advocacy can turn a case. There can be few judges who, having formed a provisionally adverse view on a skeleton argument advanced in support of a case, have not then found their view transformed by the subsequent oral argument for which, in the art of advocacy, there is no comparable substitute. The opportunity open to an applicant to try, by written and/or oral argument, to persuade the review officer that his reasoning for his provisional conclusion is mistaken is—at the very least—potentially of great benefit to an applicant. To be deprived of that right is or may be seriously prejudicial."

25. In her very attractive argument Ms Godfrey, appearing for Camden, submitted that a flaw in a decision would only amount to a "deficiency" if (a) it was a relevant flaw, in the sense that it was a flaw in the reasoning on an issue on which the reviewing officer was minded to find against the applicant despite the existence of that flaw; and (b) it was a sufficiently serious flaw to justify the invocation of the additional procedural safeguard. Thus a flaw in the reasoning of the original decision on an issue on which the reviewing officer was minded to find in the applicant's favour would not count as a "deficiency".

26. The first of these submissions entails writing words into the regulation that are not there. This particular appeal to a purposive construction, in my judgment, narrows the purpose of the regulation as explained by Carnwath LJ (see §14 above). It also narrows Carnwath LJ's authoritative explanation of what a "deficiency" means (see § 16 above). The second of these submissions does not take into account Lawrence Collins LJ's explanation of how one is to approach the question when the additional procedural safeguard is justified (see §19 above). In the case of a regulation which is

plainly intended to give protection to an applicant who is (or is likely to be) homeless, I see no warrant for excluding from the ambit of the regulation cases which fall within its literal words.

27. If one is looking for an analogy, it seems to me that a proper analogy is an application for permission to appeal to this court. The Court will consider the application on paper. If permission is refused then in almost all cases the appellant is entitled to renew his application orally. In the case of a review under section 202 the "minded to find" letter gives the applicant one last chance to persuade the reviewing officer not to confirm the decision. I do not consider that the applicant should be deprived of that chance because the reviewing officer thinks that further representations will make no difference. That, in my judgment, would be to prejudge the very issue that further representations might be expected to address.

28. In the present case Mr Bond disagreed with Ms Brown's conclusion on the question whether Mr Mitu was intentionally homeless. Nevertheless he confirmed the decision that Camden's duty was limited to providing advice and assistance, because he considered that her decision that Mr Mitu did not have a priority need was correct. Thus he confirmed the decision, but decided an issue against Mr Mitu's interest. At first blush the question whether Mr Mitu was intentionally homeless seems to me an "important aspect of the case" and the fact that Mr Bond disagreed with Ms Brown seems to me to show that he must have considered that her *decision* did not address this question adequately. It was not a reliable consideration of the material issues. Looking at the matter broadly and untechnically, it seems to me that if the reviewing officer considers that the original decision maker was wrong on an important aspect of the case, then he has identified a deficiency in the original decision. To use Carnwath LJ's phraseology, he confirmed the decision despite finding that there was a deficiency in the original decision. To use Lawrence Collins LJ's formulation, he confirmed Ms Brown's decision on different grounds. He should therefore have given a "minded to find" notice under regulation 8 (2). To hold otherwise means that the reviewing officer has the power to decide, in effect, that nothing the applicant can say will cause him to change his mind on the issue on which he has found against the applicant. This would give him the very dispensing power that Rimer LJ said he did not have.

29. In his representations Mr Mitu, through his solicitors, had called into question the reliability of Dr Jackson's assessment. Mr Bond nevertheless concluded that Dr Jackson was reliable. Further representations on that question would have given Mr Mitu a chance to persuade him that he was wrong. In addition the fact is that in the present case Mr Bond considered whether Camden should exercise its discretionary power to secure accommodation for Mr Mitu; and decided that it should not. Whether or not he was legally obliged to consider that question, if Mr Mitu had had advance notice that he was minded to reach that decision, he would have had the opportunity to persuade Mr Bond that the discretion should have been exercised in his favour.

30. I would allow the appeal.

Lord Justice Sullivan:

31. I agree.

Lord Justice Rix :

32. I am grateful to Lord Justice Lewison for setting out the material in this appeal. I agree with him that this appeal should be allowed, and in particular that the determinative factor is that the deficiency or irregularity identified by the reviewer in respect of the issue of intentional homelessness meant that, if he was minded, as he was, to uphold the original decision in finding that Mr Mitu was not a priority case, his ultimate decision on review would be that Mr Mitu was owed a section 192(2) duty, coupled as it was with a section 192(3) discretion, rather than a stand-alone section 190(3) duty. The effect of the reviewer's way of looking at Mr Mitu's application was that there was not only an inadequacy in dealing with the question of intentional homelessness but also and in any event an inadequacy in giving consideration to the question of Camden's discretionary power under section 192(3). In such circumstances, the reviewer was obliged by regulation 8(2) to give Mr Mitu notice of what he was minded to decide and why, and to afford Mr Mitu an opportunity to make further representations, oral or in writing. It is ultimately clear in the light of Lewison LJ's analysis that, even though the content of the section 192(2) duty is the same as the content of the section 190(2) duty, the fact that the former duty, unlike the latter duty, is coupled with a discretionary power to secure accommodation for the applicant entails that the statutory notice and the right to make further representations in the knowledge of what the reviewer is minded to decide are valuable rights which, on a purposive construction of the regulation, fairness to the applicant requires him to be afforded.

33. I add a few observations of my own, both because we are differing from the judge, and also because the process of reasoning which leads me to that conclusion is not in all respects identical to that of Lewison LJ.

34. Where, with respect, I differ from Lewison LJ is that I would regard the jurisprudence of this court as teaching that the regulation is to be interpreted purposefully and not literally, and that in that connection it requires something more than the mere finding of *any* deficiency or irregularity: what is needed is the finding of a deficiency or irregularity of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard. That involves the reviewer both in finding an inadequacy in the original decision and in an evaluative judgment that the inadequacy is material to the fairness of the procedure. It seems to me that this is the result of the decisions in this court in *Hall v. Wandsworth LBC* and *Banks v. Kingston-Upon-Thames RLBC*.

35. Thus in *Hall v. Wandsworth LBC* Carnwath LJ emphasised that what was needed was that –

> "that decision was itself flawed in some respect, so that it does not represent a full and reliable consideration of the material issues" (at para 26).

Carnwath LJ went on (at para 29) to describe the necessary deficiency in broad terms – "It simply means "something lacking" – but he again underlined the need for something more, viz –

> "On the other hand, the "something lacking" must be of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard. Whether that is so involves an "evaluative judgment"…on which the officer's conclusion will only be challengeable on *Wednesbury* grounds."

36. That language was picked up and again emphasised by Lawrence Collins LJ in *Banks v. Kingston-Upon Thames RLBC* when he said:

> "71 A literal interpretation of reg.8(2) would make it difficult to reach the conclusion that "there is a deficiency…in the original decision". On a literal approach the natural meaning of the words suggests that the focus is on the position as at the date of the decision…But…I was convinced by the argument for Mr Banks that a purposive construction should be given to reg.8(2) to ensure that its objective is achieved. Mr Banks having become homeless, the original decision had become deficient in that it did not address the question of priority need…
>
> 72 Consequently I am satisfied that, although the original decision itself cannot be faulted, it came to have a deficiency which was of sufficient importance to justify the additional procedural safeguard, in the sense that further representations made in response could have made a difference to the decision that the reviewing officer had to make."

37. That requirement of "sufficient importance" is one that the reviewer himself must be able to evaluate. In the present case there is no sign or any evidence that the reviewer did consider for himself at all the regulation 8(2) question of whether he ought to give the statutory notice. It is however plain that, once the reviewer was minded to find that Mr Mitu's homelessness was not intentional, then, even if he was minded to confirm the finding that he was not in priority need, he had to consider the section 92(3) power to secure accommodation for Mr Mitu. He did consider that (see at para 5 above), but without the aid of any further representations that Mr Mitu might have been able to provide, with particular attention to that discretion, which, if the reviewer had given notice of his provisional decision and its reasons, it would have been obvious to Mr Mitu or his advisors to address.

38. A question arises as to how the decision in this court in *Lambeth LBC v. Johnston* fits into the jurisprudence. That was decided in the interval between *Hall* and *Banks*. It was a more complicated case where Lambeth's review decision had already been quashed once as *Wednesbury* unreasonable and what was at issue was a second

review which had also upheld the original decision, viz that Mr Johnston was not a vulnerable person in priority need. However, the original decision was flawed by Lambeth's failure to make any enquiries during the lengthy period between Mr Johnson's interview (in October 2004) and the decision (in November 2005), and a fortiori where the first view of the matter following interview was that Mr Johnston *was* in priority need. Such enquiries would have revealed, on the basis of medical evidence, that Mr Johnston was not only an alcoholic but was now suffering from drug addiction and severe depression. Even so, these matters were known about and addressed in the representations made to the reviewing officer by the time of the second review. For that reason it was submitted on behalf of Lambeth that the flaw in the original decision did not matter: and the second reviewer made a witness statement to the effect that she had considered and rejected the need to send a "minded to" notice on that ground. In the county court the recorder allowed Mr Johnston's appeal. He said that he was not persuaded that the sending of a "minded to" notice was otiose or had been effectively addressed in correspondence (at para 31).

39. Lambeth's appeal to this court was dismissed. Rimer LJ said that Lambeth's submissions were compelling but ultimately failed. It was not in dispute that the original decision was flawed. But it was submitted, on the basis of the second reviewer's evidence, that consideration had been given as to the sending of a notice and that her decision in her discretion not to do so could not be upset. However, it was plain that the statute did not provide for a purely subjective discretion in the reviewer but for a consideration of whether there had been a flaw which could be challenged on the usual public law grounds. I refer to the passages from Rimer LJ's judgment cited by Lewison LJ at paras 23/24 above, and to the language in which Rimer LJ had rejected the "discretionary option" which he regarded as being contended for. Rimer LJ therefore concluded:

> "54 In the circumstances, I have come to the conclusion that Ms Samuels' failure to consider that this was a case in which the facts required the giving of a "minded to find" notice to Mr Johnston under reg.8(2) was indefensible and unlawful. I regard that failure as having vitiated the integrity of her review decision. I consider that Mr Recorder Barker was properly entitled to find and conclude that it meant that her review decision of February 1, 2007 was fatally flawed."

40. Thus in the context of *Hall* and *Banks* I would understand the judgment of Rimer LJ as addressing the facts and findings of that case. The submission that the reviewer had a subjective discretion whether or not to send a notice, depending on whether it seemed to her that further submissions would be of any benefit to the applicant, could not succeed. Moreover, the recorder in the county court, with this court's agreement, found that, despite the attractive submissions as to the usefulness of further representations, that was a case where further representations were not rendered otiose, or, as Rimer LJ said, "the facts required" the giving of the statutory notice. In circumstances where it is plain that the flaw in the original decision was unarguably

material, but what was in effect being submitted was that the subsequent representations had necessarily exhausted what could usefully be said on the applicant's behalf, the decision is wholly understandable. However I do not regard *Lambeth* as undermining the teaching of *Hall* and *Banks* that, giving to regulation 8(2) a purposive construction, it is not simply *any* flaw in an original decision which triggers the need for a notice and reasons, but what might be described as a material or relevant flaw in the sense of being of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard.

41. If, therefore, in the present case, it could have made no difference to Mr Mitu whether he failed on the ground of intentional homelessness or on the ground of not being in priority need, I would have considered that the flaw identified in the original decision's conclusion about the former issue could not have mattered, since the reviewer decided that issue entirely in Mr Mitu's favour. As it is, however, the flaw did matter, and I agree that this appeal should be allowed.