International Journal of Law in Context (2022), **18**, 69–84
doi:10.1017/S1744552322000040

SPECIAL ISSUE ARTICLE

Marginally housed or marginally homeless?

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Abstract

The English homelessness scheme has been lauded as being one of the most progressive in the world for offering an individually legally enforceable right to housing to those people who meet the statutory criteria. Its definition of homelessness is also liberal by comparison with many other countries within Europe and beyond, extending significantly beyond the stereotypical rooflessness experienced by rough sleepers. Nevertheless, the scheme is highly selective and targeted, and assesses homelessness through a test of relative need, rather than enshrining a minimally acceptable standard of housing. It thereby creates a category of the marginally housed whose housing needs are assessed as insufficiently poor to be officially categorised as homeless, yet who are living in severely inadequate housing. To reduce the uncertainty and contingency of the current test, the paper proposes the adoption of a new test of habitability.

Keywords: homelessness; social policy; habitability; England

1 Introduction

The English homelessness scheme has been lauded as being one of the most progressive in the world for offering an individually legally enforceable right to housing to those people who meet the statutory criteria (Fitzpatrick and Watts, 2010). Its definition of homelessness is also liberal by comparison with many other countries within Europe and beyond, extending significantly beyond the stereotypical rooflessness experienced by rough sleepers (Pleace *et al.*, 2011). Nevertheless, the scheme is highly selective and targeted (Bengtsson, 2001), and its complex interrelationship with the 'waiting list' route into social housing means that it must differentiate between degrees of housing inadequacy in a way that commands political and public support, as well as achieving its policy objective of identifying those most in need (Fitzpatrick and Pleace, 2012). The term 'marginally housed' is used to describe those applicants whose housing needs are assessed as insufficiently poor to be officially categorised as homeless, yet who are living in severely inadequate housing.

These objectives would be difficult enough to achieve in a benign housing market. The reality is a housing crisis (Public Accounts Committee, 2019; Department for Communities and Local Government, 2017; Children's Commissioner, 2019) compounded by a decade of austerity that has simultaneously exacerbated homelessness and diminished the ability of authorities to deal with the influx of households in housing and other need (Ryder, 2020; Local Government Information Unit, 2020). The consequences of the COVID-19 pandemic are already creating further pressure on homelessness services and authorities have reported increased numbers of people applying as homeless as a result of financial hardship and associated pressures (Housing, Communities and Local Government Committee, 2020).

It is now broadly accepted that homelessness is intrinsically linked with the availability of housing, in the right locations and at affordable prices (Bramley and Fitzpatrick, 2018). The root of the problem is thus a lack of affordable housing options in certain areas, which puts individuals and groups in competition with each other (Rutter and Latorre, 2009). It is evident that the homelessness scheme alone cannot

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https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

deal with the magnitude of the housing crisis. Nevertheless, it is important that the statutory scheme operates as effectively as possible in identifying the most pressing need consistently and coherently.

The purpose of this paper is twofold. First, it analyses the conceptual integrity of the distinction in the statutory scheme between being homeless and experiencing a lesser degree of housing need, by exploring how that boundary is identified. Second, the paper considers the operational reliability of the homeless–not homeless dichotomy through an examination of the case-law, focusing specifically on situations in which the household is housed in accommodation that is in poor condition or overcrowded. It is argued that the inherently vague statutory language, the incorporation of a test of relative need, combined with the foundation of the scheme as a rationing device, mean it prioritises collective or relative fairness over individual need. The apparent generosity of the homeless definition is thus highly contingent. It does not enshrine a minimally acceptable standard of housing: an aspiration identified as a key ethical issue in housing (Watts and Fitzpatrick, 2020) and one given impetus by the Homes (Fitness for Human Habitation) Act 2018.

This paper starts by explaining the difficulty of defining homelessness, before identifying the impact of the English housing crisis on homelessness and more general housing need. The English scheme is then described, focusing on how it assesses poor-quality housing, as well as its interaction with the waiting list for public housing. Having established this framework, the paper analyses the courts' application of the statutory provisions, highlighting the uncertainty and contingency – the marginal status – that results from the current test. Finally, the paper proposes the adoption of a new test of habitability, drawing on the 2018 Act, to promote transparency and consistency within the homelessness scheme.

2 Defining homelessness

There is no single, agreed meaning of homelessness and defining it is far from straightforward (Pleace, 2016). Its meaning is contested and, like poverty, it is a relative concept that acquires meaning in relation to 'the housing conventions of a particular culture' (Amore *et al.*, 2011, p. 20). Definitions adopted by international agencies, governments, researchers or civil society vary widely, depending on language, socio-economic conditions, cultural norms, the groups affected and the purpose for which homelessness is being defined. As Neale observes, '[homelessness]is integral to the housing system and inseparable from other aspects of housing need' (Neale, 1997). In reality, housing need exists on a continuum from a state of rooflessness through to being adequately housed (Neale, 1997, p. 48). Drawing on international scholarship, O'Sullivan *et al.* adopt the definition of 'living in severely inadequate housing due to a lack of access to minimally adequate housing' (O'Sullivan *et al.*, 2010, p. 125). However, the authors recognise that the boundary between inadequate housing and homelessness rests not only on the severity of the deprivation, but also on a political decision that is embedded in the relevant economic, cultural and institutional contexts. Homelessness thus exemplifies one meaning of margin, as a space that is imprecise and indeterminate (Gurnham, this issue). Somerville argues that homelessness is multidimensional (Somerville, 2013) and it is now generally agreed that the experience of homelessness is not fully captured without a richer definition that goes beyond reference to deprivation of physical shelter (UN General Assembly, 2017).

Nevertheless, the physical aspects of the dwelling are key components of many definitions of homelessness, reflecting 'the importance of the basic adequacy of housing' (Batterham, 2018, p. 10). As Batterham notes, adequacy is not absolute, but relative to the prevailing cultural standard. Setting the boundaries of what constitutes homelessness is a long-standing problem in the housing literature, and the line between homeless and inadequately housed has tended to be arbitrary and a blunt tool for assessing what is in reality a continuum of need (Watts, 2013). Inspiration for a minimum standard can be drawn from the right to adequate housing that finds expression in a number of international treaties, particularly the Universal Declaration of Human Rights (UDHR) 1948[1] and the International

[1]Art. 25(1).

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Covenant on Economic, Social and Cultural Rights.[2] Seven components of 'adequacy' are identified by the UN Committee on Economic, Social and Cultural Rights, many of which are recognised at least to some extent in English homelessness law. In terms of habitability – the focus of this paper – housing must guarantee physical safety and provide adequate space, as well as protection against the cold, damp, heat, rain, wind, other threats to health and structural hazards (UN, no date). As we shall see, the English standard enshrined in homelessness law is some distance from this benchmark.

A robust definition is clearly important in order to measure its extent but, in doing so, it becomes highly politically contentious when it implies that state-level action is required to reduce or eliminate homelessness (Gabbard *et al.*, 2007). The boundary between homeless and more general notions of housing exclusion is particularly contested (Sahlin, 2012) and this line is significant in England because individual legally enforceable rights are owed to those officially classified as homeless, but not to those experiencing lesser degrees of housing need. In English law, the main housing duty is reserved for those who fulfil further rationing criteria, but the Homelessness Reduction Act 2017 created new rights for all eligible homeless applicants, with the consequence that a classification of homelessness is a gateway to a series of graduated duties. By contrast, households not considered to be homeless must locate and maintain their own housing. As will be explained, the Privately Rented Sector (PRS) is the default for this category of marginally housed but it is notoriously expensive and insecure, and suffers from the poorest housing conditions. These households may also be able to apply to join the waiting list for public housing, subject to rationing criteria elaborated on below.

3 The English housing context

As outlined at the start, even before the COVID-19 pandemic and resultant impact on people's incomes, official homeless numbers were rising. However, these numbers pale into insignificance by comparison with the so-called hidden homeless. There is no official definition of hidden homelessness but it encompasses those who are staying temporarily with friends or relatives (Gabbard *et al.*, 2007) or living in cars, tents, squats, public transport or so-called 'beds in sheds' but have either not approached the local authority for help or have been turned away through unlawful gatekeeping practices (Downie *et al.*, 2018). There are no definitive data on this category but drawing on a range of datasets, the housing charity Crisis estimates that it affects 3.74 million adults (Downie *et al.*, 2018). Research commissioned by the National Housing Federation paints an even bleaker picture, estimating that 8.4 million people in England are living in an unaffordable, insecure or unsuitable home (National Housing Federation, 2019). I argue that the marginally housed – those rejected as being officially homeless – must be considered part of this body of hidden homeless. People on the margins of homelessness in a temporal sense, as explained below, are captured by the concept of 'threatened with homelessness'.[3] There is no equivalent provision for applicants whose housing is objectively severely inadequate but are turned down under the current test.

England has experienced a toxic cocktail of an increasingly pressurised housing market in key areas, combined with a diminishing social housing stock and the intensification of welfare-benefit restrictions associated with a political climate of austerity (Just Fair, 2015; Harris, 2018), including a limit on the level of rent attracting Housing Benefit or Local Housing Allowance (Harris, 2018; Fitzpatrick and Pawson, 2014). While England is still predominantly a nation of homeowners, ownership has become an unattainable status for an increasing portion of the population. For these households, the default is the PRS, which has doubled in size during the previous twenty years and is the second largest tenure, accommodating more households than the social sector (English Housing Survey (EHS), 2017–2018). As well as its core target group comprising the young and mobile, it increasingly houses those unable to access either owner-occupation or social housing (Nield and Laurie, 2019). Contentiously, it is also viewed as a solution to homelessness, despite the ending of

[2]Art. 11(1).

[3]Housing Act 1996, s. 175(5).

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

an assured shorthold being the primary cause of homelessness in England between 2012 and 2019 (House of Commons Library, 2020a).

The high cost of the sector is a significant obstacle to households on low incomes. Median rent is 68 per cent higher than in the social sector (EHS, 2017–2018) and this unaffordability has been compounded by the welfare-benefit cuts described above. As explored further below, the quality of housing is often poor and the inherent precarity of the predominant tenure (the assured shorthold)[4] makes it unsuitable for many households, including families with children. This lack of security is recognised by the statutory scheme that considers a person to be threatened with homelessness when a valid notice to quit is served.[5]

4 The English homelessness scheme

The specific duties owed to those classed as homeless were created in 1977,[6] some sixty years after local-authority housing was first developed on a mass scale (Cowan, 2011). The impetus for these rights stemmed from the desire to prevent families being split and children taken into care (Loveland, 1995), as vividly and agonisingly portrayed in Ken Loach's film, *Cathy Come Home* (1966, directed by Ken Loach, London, BBC). However, the bill's highly contested parliamentary passage was ultimately reflected in a significantly compromised and diluted Act that incorporated the moral judgments of the deserving/undeserving poor derived from the Poor Law (Cowan, 2019). The parliamentary debates reveal that MPs were particularly concerned to prevent 'scroungers and scrimshankers' from queue-jumping into highly sought-after local-authority housing (Loveland, 1995, p. 70). The individually legally enforceable right created by the Act is widely admired by those advocating for rights to housing (Fitzpatrick and Watts, 2010). Nevertheless, pragmatic compromise (Fitzpatrick and Watts, 2010) is at its core and, as will be discussed, political suspicion about potential abuse of the new scheme was reflected in the early case-law, particularly in the House of Lords (as it then was). As Cowan (2019, p. 107) explains: '[P]art of the legal history of the 1977 Act involved the highest courts providing narrow interpretations of the Act's provisions and duties' in order to give local authorities the maximum room for manoeuvre.'

At its most basic, homelessness is the state of having no accommodation but the original Act contained no definition of 'accommodation'.[7] Consequently, establishing the boundaries of what constituted accommodation became one of the early legal battlegrounds. This issue was particularly important because of the perceived conflict between accessing publicly subsidised housing via the well-established waiting-list route and the then newly created homelessness duties. Poor-quality or overcrowded housing has always been recognised as giving priority on the waiting list.[8] Setting the bar for the minimum standard of accommodation too high therefore risks collapsing the distinction between the waiting list and homelessness schemes, thus potentially creating unfairness – or the perception of it – among waiting-list applicants.

A series of Court of Appeal decisions developed the 'obviously sensible notion' that there was a minimum standard, below which any accommodation would be disregarded even if there was a right to occupy it (Arden *et al.*, 2018/1982, para. 1.51). To achieve this outcome, the courts relied on the provision governing intentional homelessness which stated that a person would be intentionally homeless where they had left accommodation that was reasonable for them to continue to occupy.[9] In assessing that issue, local authorities were entitled to take into account the local housing conditions[10] and consequently it was decided in *Miles* that a rat-infested hut measuring 20 x 20 feet (6 x 6 metres)

[4]Housing Act 1988, s. 21.
[5]Housing Act 1996, s. 175(5).
[6]Housing (Homeless Persons) Act 1977.
[7]Housing Act 1996, s. 175.
[8]The current provision is Housing Act 1996, s. 166A(3)(c).
[9]Housing HP Act 1977, s. 17(1).
[10]*Ibid.*, s. 17(4).

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

without mains services was 'on the borderline' of what was acceptable for human habitation for a family of four.[11] Despite this low standard, the House of Lords rejected the idea that there was *any* minimum,[12] beyond the ordinary meaning of the word 'accommodation'.[13] The now infamous dicta of Lord Bridge in *Puhlhofer* reveals Their Lordships' attitude towards the Act:

> 'It is an Act to assist persons who are homeless, not an Act to provide them with homes …. It is intended to provide for the homeless a lifeline of last resort; not to enable them to make inroads into the local authority's waiting list of applicants for housing.'[14]

The decision thus reveals the tension at the heart of the Act that continues to be significant today: balancing the needs of those applying via the homelessness provisions against those applying through the waiting list. It highlights the homelessness scheme as a safety net, rather than a conduit into permanent, or settled, housing.

The decision in *Puhlhofer* was overturned by statute that inserted the requirement that the accommodation had to be 'reasonable to continue to occupy',[15] echoing the test for whether a person had become homeless intentionally that had been included from the inception of the Act.[16] A contentious feature of this criterion is that authorities are permitted to have regard to 'the general circumstances prevailing in relation to housing in the district of the local housing authority'.[17] The Act is thus ambivalent about specifying a basic minimum standard of housing. By making it relative rather than absolute, the Act locates the threshold between housing need and homelessness as subject to local circumstances and largely at the authority's discretion. As developed below, questions also exist about the factors that authorities may legitimately consider when reviewing their general circumstances. Contentiously, some judges appear to have suggested that authorities' own lack of resources may be a legitimate reason to deny that an applicant is homeless. It will be argued that this line of reasoning fundamentally undermines the purpose of the individually legally enforceable rights, as well as the recent policy trajectory of the Homelessness Reduction Act 2017, and should be firmly rejected. As previously highlighted, the homelessness boundary is marginal in the sense identified by Gurnham: 'impossible ever to determine' (Gurnham, this issue). While Gurnham suggests that indeterminacy can be positive, by keeping open the possibility of subsequent inclusion, it also creates a category that this paper has termed 'the marginally housed': households whose need is not officially recognised, despite its objectively demonstrable existence. As Bevan (this issue) clearly describes, the homeless are the epitome of a marginalised group. Perhaps ironically, those falling on the wrong side of the homelessness boundary are also marginalised, by being excluded from receiving state assistance.

As explained, in reality, housing need exists on a spectrum and is ill-suited to being categorised dichotomously as homeless or not homeless. Nevertheless, having committed to this model, boundaries between different groups or categories must be defensible (Amore *et al.*, 2011) and identify a consistent and coherent dividing line between homeless and not homeless. With regard to the physical adequacy of the home, I argue that this objective can best be achieved by replacing the inherently vague, relative standard of 'reasonable to continue to occupy' with a national standard of fitness for human habitation. Introducing this standard would reduce the marginality of this aspect of the homelessness scheme. It is acknowledged that housing conditions are only one reason for a homeless application and, consequently, this recommendation has limited reach. Nevertheless, with building standards a key focus of current policy and broader public debate, it is apposite to focus on this aspect of the homeless scheme.

[11] *R. v. South Herefordshire District Council ex p Miles* (1985) 17 HLR 82, 92.

[12] Except for the barrel that the Greek philosopher, Diogenes, chose to inhabit.

[13] *R. v. London Borough of Hillingdon ex p Puhlhofer* (1986) 18 HLR 158.

[14] *Ibid.*, at 169 (Lord Bridge).

[15] Section 14; now contained in Housing Act 1996, s. 175.

[16] Housing (Homeless Persons) Act 1977, s. 17(1).

[17] Housing Act 1996, s. 177(2).

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

5 Poor-quality housing

The Grenfell Tower tragedy thrust building safety into the limelight (see Carr *et al.*, this issue), but it has long been known that poor housing conditions can affect residents' health, safety and well-being. In 1989, the World Health Organization (WHO) created its housing principles from evidence 'documenting the direct links between poor housing conditions and increased risks of death, disease, and injury' (WHO, 1989, Abstract). Specifically in the UK, the independent Marmot Review commissioned by the government and published in 2010 concluded that housing is a 'social determinant of health', affecting physical and mental health inequalities throughout life (Marmot, 2010). A review undertaken ten years later has shown there has been little improvement, with marked regional differences in life expectancy, particularly among people living in more deprived areas. Furthermore, differences both within and between regions have tended to increase (Institute of Health Equity, 2020).

Poor housing conditions exist in all the English housing tenures but in the PRS are worst across all indicators except overcrowding – an issue of long-standing concern. In 1996, the Law Commission recommended abolishing the restrictions that had led to the obligation contained in the Landlord and Tenant Act 1985[18] to become obsolete (Law Commission, 1996). Then, the sector housed only 7–8 per cent of households whereas it now accounts for 19 per cent (4.6 million households) (Ministry of Housing, Communities and Local Government, 2019–2020, p. 2) and consequently the problem is even more acute. The English Housing Survey estimates that in 2018, 25 per cent of homes in the PRS in England were in a condition that would fail the Decent Homes Standard (accounting for around 1.2 million homes) (EHS, 2017–2018, para. 2.19). This figure compares poorly with both the social-rented sector and those in owner-occupation at 12 and 17 per cent, respectively. Privately rented homes were also the most likely to have at least one Category 1 hazard under the Housing Health and Safety Rating System (Category 1 covers the most serious hazards). Fourteen per cent of privately rented homes had a Category 1 hazard in 2018, compared with 11 per cent of owner-occupied homes and 5 per cent of all social-rented homes. The PRS has the highest proportion of older housing, which may partially explain the poor conditions (Ministry of Housing, Communities and Local Government, 2019–2020, para. 2.26).

It is not possible to be certain about the numbers of households accepted as homeless because of poor-quality housing from the published data. Nevertheless, it is reasonable to infer that it represents a significant proportion. The English data show three main reasons for a local authority to accept a homeless application and, collectively, these groups account for approximately two-thirds of the total.[19] The last of these categories encompasses applicants whose homelessness has been caused by deficient housing.[20] Households experiencing poor property conditions are also represented on the authority's housing waiting list. Indeed, the most recent statistics show that inadequate housing conditions (including overcrowding) form the single largest group of those owed some form of preferential treatment in that queue.[21] It should be recognised that current social tenants are represented both on housing waiting lists[22] and in homelessness statistics.[23] As will be discussed further below, overcrowding is an issue in social housing and consequently affected households are likely to have applied for rehousing via one or both routes, depending on the severity of their situation.

The next section analyses the complex relationship between these two categories in the competition for the limited stock of social housing.

[18]Landlord and Tenant Act 1985, s. 8(1).

[19]MHCLG, Statutory Homelessness Live Tables, Table A2.

[20]The category also includes those who have left accommodation because of a natural disaster (e.g. fire or flood) or have left accommodation provided by HM forces or because of mortgage repossession.

[21]MHCLG, Local authority housing statistics, England 2018–19, s. 3.

[22]*Ibid.*, s. D.

[23]MHCLG, Statutory Homelessness Live Tables, Table A4.

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

6 Duties owed and interaction with the waiting list

The relative affordability of the social sector, its generally greater security of tenure[24] and often superior housing conditions make it a desirable destination, despite its progressively residualised nature (Forrest and Murie, 1988). Consequently, in many areas, demand for local-authority housing far exceeds supply[25] and authorities have operated housing waiting lists since at least the early twentieth century to ration access.[26] The homelessness duties thus exist alongside the allocations framework as distinct routes to accessing scarce social housing: a division consistently reflected in the structure of the legislation.[27] Empirical research strongly suggests that the homelessness legislation operates fairly at the macro level, in that tenants housed via the homelessness framework are more socially disadvantaged and experiencing a higher level of long-term housing need than those housed via the waiting list (Fitzpatrick and Pleace, 2012). Nevertheless, as Fitzpatrick and Pleace (2012, p. 233) explain: 'there have been persistent concerns about the apparent "moral hazard" intrinsic to the structure of the homelessness provisions, in that they may incentivise households to have themselves defined as homeless in order to gain priority access to social housing.'

As outlined, a finding of homelessness results in a series of graduated duties. Since 1998, the most common outcome for households following a homeless application is to be owed the full housing duty (Fitzpatrick and Pleace, 2012). Even that duty does not now lead automatically to a right to settled housing. That had been a routine practice prior to changes made under the Conservative government in 1996, as explained below. It is common in high-demand areas for households owed the full housing duty to spend time in temporary accommodation, which may be in bed-and-breakfast hotels or hostels, often of poor quality,[28] and may be located outside the local authority's area.[29] There also exists a category referred to colloquially as 'homeless at home' that comprises applicants who have been accepted as being homeless but who remain in their existing housing while waiting for suitable accommodation (discussed further below).[30]

Access via the waiting list is rationed through a legislative framework operated at the local level. Households must first be eligible to join the waiting list and, second, they must gain sufficient priority to 'bid' successfully for available housing.[31] The first step is governed by authorities' entitlement to apply eligibility preconditions,[32] for example that a person has lived in the area for a certain period of time, which can be as long as ten years.[33] The ability to apply these criteria was reintroduced in 2011 and acts as a significant barrier for some would-be applicants,[34] including those seeking to relocate. The second stage – relative priority on the list – is determined by a combination of centrally specified criteria and local priorities.

While the statutory allocations scheme broadly reflects the principle that housing need is a primary focus,[35] authorities also have wide discretion to take into account factors unrelated to housing need,

[24]Despite contingency being introduced via introductory and demoted tenancies and, more recently, fixed-term tenancies.

[25]The latest figures show nearly 1.2 million households on English authority waiting lists, with London accounting for 21 per cent of that total: MHCLG, Live Tables, Table 600, available at: https://www.gov.uk/government/statistical-data-sets/live-tables-on-rents-lettings-and-tenancies (accessed 28 February 2020).

[26]The Housing Act 1924.

[27]Homelessness is currently dealt with under Part 7 of the Housing Act 1996, whereas those applying via the waiting list are covered by Part 6.

[28]The latest official statistics put the number at 88,330; Statutory Homelessness Live Tables, Table TA1.

[29]Housing Act 1996, s. 208.

[30]*Ali and Others v. Birmingham City Council; Moran v. Manchester City Council* [2009] UKHL 36, [2009] HLR 41.

[31]Housing Act 1996, s. 159(2)(a). Allocation includes nomination by the local authority to a tenancy of a Registered Social Landlord (RSL); Housing Act 1996, s. 159(2)(c).

[32]Housing Act 1996, s. 160ZA.

[33]Hillingdon Borough Council, 'The criteria for joining the housing register', available at: https://www.hillingdon.gov.uk/article/2164/Applying-for-social-housing (accessed 28 February 2020).

[34]*R. (Ward) v. Hillingdon LBC* [2019] EWCA Civ 692, [2019] HLR 30.

[35]Housing Act 1996, s. 166A(3).

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

including waiting time (Laurie, 2011).[36] The latest figures show that 52 per cent of applicants waited up to one year for housing and 15 per cent between one and two years. However, 17 per cent waited more than five years.[37] Statutorily homeless households are entitled to join the waiting list and are entitled to a 'reasonable preference' when authorities determine relative priority between applicants,[38] making a finding of homelessness a significant advantage beyond the other duties owed.

7 Reasonable to continue to occupy

This part of the paper analyses the case-law to determine where the courts have drawn the line between accommodation that means a person is homeless, rather than merely being inadequately housed. As explained, the requirement that the accommodation must be 'reasonable to continue to occupy' was added in 1986 following the House of Lords' judgment that no minimum standard applied. A contentious feature of this criterion is that authorities are permitted to have regard to 'the general circumstances prevailing in relation to housing in the district of the local housing authority'.[39] This ability to consider local conditions has been a consistent feature of the parallel test of intentional homelessness (Watts, 2013). The current Code of Guidance suggests that:

> 'This comparison might be appropriate, for example, where it was suggested that an applicant was homeless because of poor physical conditions in their current home. In such cases it would be open to the authority to consider whether the condition of the property was so bad in comparison with other accommodation in the district that it would not be reasonable to expect someone to continue to live there.
>
> 'Consideration of the general circumstances prevailing in the housing authority's district might also be appropriate in cases of homelessness due to overcrowding.'[40]

Thus, the Code reflects the interpretation that authorities should be concerned with the physical characteristics of the accommodation. It represents both a pragmatic response to a general shortage of affordable, decent housing and a mechanism for maintaining the distinction between the two routes into local-authority housing. I argue that this comparative element creates a marginal space that lacks transparency, undermines the initial generosity of the homelessness definition and, as will be analysed through the case-law, creates operational difficulties.

Because of the comparative element in the assessment of whether housing is 'reasonable to continue to occupy', it is fair to presume that in districts where housing standards are generally low, applicants must experience relatively worse conditions in order to be accepted as homeless compared with those seeking assistance in more affluent areas, where conditions are presumptively better. The official data reveal significant differences between authorities on the proportion of applicants rejected at the initial assessment, although the basis for that decision is not recorded (i.e. it may be unrelated to housing conditions) and so it is impossible to know whether the presumption is correct.[41]

We can see the comparative approach to housing conditions in operation in *Harouki*, in which it was held that statutory overcrowding, despite being a criminal offence,[42] does not necessarily mean that it is unreasonable for the applicant to occupy the accommodation.[43] This was a decision that

[36]*Ibid.*, s. 166A(6).

[37]CORE summary tables 2018–19, Table 1h, available at: https://www.gov.uk/government/statistics/social-housing-lettings-in-england-april-2018-to-march-2019 (accessed 28 February 2020).

[38]Housing Act 1996, s. 166A.

[39]*Ibid.*, s. 177(2).

[40]Code of Guidance, paras 6.26, 6.27.

[41]Live Tables on Homelessness, Detailed local authority-level tables, Jan–Sept 2019, available at: https://www.gov.uk/government/statistical-data-sets/live-tables-on-homelessness (accessed 23 March 2020).

[42]Housing Act 1985, s. 327.

[43]*Harouki v. Kensington and Chelsea RLBC* [2007] EWCA Civ 1000, [2008] HLR 16.

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

reflected the statutory Code of Guidance applicable at the time.[44] The authority's decision, upheld by the Court of Appeal, was that 'in comparison to the prevailing conditions relating to housing in this authority's area your circumstances of overcrowding are not considered to be exceptional'.[45] This case also illustrates the interaction between the parallel routes for accessing public-sector housing, explained above. The Haroukis were registered on the authority's waiting list and their overcrowding was reflected in an award of additional priority on that list. Nevertheless, according to the authority, there were twenty-one households ahead of them in that queue who were assessed as being in greater need of larger accommodation,[46] meaning that the family faced a long wait for larger accommodation.

Overcrowding is a significant and growing issue in both the PRS and the social sector. Nine per cent of social homes are overcrowded – the highest since data collection began in 1995–1996 and 2 per cent higher than in the PRS (EHS). These official statistics are calculated on the 'bedroom standard', which is considerably more generous than its statutory equivalent (EHS Glossary). Indeed, there is long-standing recognition that the statutory measure is outdated, not having been revised since 1935 (House of Commons Library, 2018), meaning that 'households that are statutorily overcrowded are so rare that a reliable estimate of numbers cannot be produced at a national level' (Office of the Deputy Prime Minister, 2004, para. 7).

It is irrational and unacceptable for a family to be subject to a criminal penalty for overcrowding and yet not be accepted as homeless. Research consistently demonstrates the negative mental and physical health consequences of overcrowded housing (House of Parliament Parliamentary Office of Science & Technology, 2018), as well as adverse impact on children's educational attainment (Shelter, 2005). It is notable that research conducted by the housing charity Shelter to produce a 'living home standard' in consultation with the British public significantly exceeds the current homelessness standard by identifying the need for space for personal privacy (Shelter, 2016, pp. 23–24). An acceptable amount of space also features in the definition of adequate housing agreed by the UN Committee on Economic, Social and Cultural Rights (1991).

Abdullah, in which an estranged wife was required by her husband to sleep in the living room with their son,[47] further demonstrates the gap between Shelter's living home standard and the homelessness threshold. The authority justified the acceptability of the overcrowding by finding that it was not so severely overcrowded as to make it unreasonable for her to continue to occupy because 'many families are living in permanent and temporary accommodation using their living area as a sleeping area'[48]: an outcome accepted by the Court of Appeal, despite a frank admission that the situation was 'certainly not good'.[49]

While acknowledging the pragmatic rationale for a comparative approach, the current standard lacks transparency and creates households whose need is unrecognised, namely the marginally housed. Furthermore, as will be discussed below, a number of cases have held that authorities may legitimately consider the scarcity of available housing when considering whether a person is homeless. If this line is pursued, it will result in further contingency and uncertainty.

8 Articulating housing standards: reasonable or suitable?

This section analyses the series of cases in which the courts have drawn explicit links between the standards to be applied when the authority is, first, assessing whether the applicant's housing is 'reasonable to continue to occupy' and therefore whether they are homeless and, second, when discharging its homeless duty and establishing whether the accommodation that has been proposed for that applicant is suitable.[50]

[44] *Ibid*., at para. [5].
[45] *Ibid*., at para. [10].
[46] *Ibid*., at para. [10].
[47] *Abdullah v. Westminster City Council* [2011] EWCA Civ 1171, [2012] HLR 5.
[48] *Ibid*., at para. [17].
[49] *Ibid*., at para. [10] (Mummery L.J.).
[50] Housing Act 1996, s. 210.

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

In the former cases, the accommodation must be 'reasonable to continue to occupy' whereas in the latter the standard is that the accommodation is 'suitable'.

The symmetry between these two tests formed a key part of the Court of Appeal's reasoning in *Harouki*. It will be recalled that the court denied that statutory overcrowding made the Haroukis' house unreasonable to continue to occupy and, in reaching that conclusion, the court compared the test of suitability, claiming that it recognises that accommodation is not necessarily unsuitable because it is statutorily overcrowded. However, it is difficult to understand the justification for that conclusion. The relevant provision requires authorities to have regard to their duties regarding slum clearance, overcrowding and housing conditions[51] and Houses in Multiple Occupation,[52] and those parts of the Housing Act 1985 concern authorities' powers and duties to take action against those conditions. Therefore, a more logical interpretation is that authorities should avoid housing a person in overcrowded or poor-quality housing. As explained, the version of the Code of Guidance then in force endorsed the conclusion that statutory overcrowding would not necessarily mean that the accommodation was not reasonable to continue to occupy. By contrast, the current Code is non-committal, merely reminding authorities to 'be mindful of these provisions'.[53]

There is superficial appeal in the tests having the same threshold, since they both concern whether a household should be expected to live in specific accommodation. Further impetus is given to this justification by the fact that the same requirement for affordability applies to each.[54] Nevertheless, a more compelling argument is that 'suitable' accommodation should be judged against a higher standard. If an applicant's current housing is sufficiently poor, when assessed against local conditions, to cross the homeless threshold, it is irrational to provide housing of the same standard to discharge the homelessness duty. Clearly, suitability encompasses more criteria than the physical condition of the accommodation, and the location of alternative housing has been particularly contentious, as authorities in areas of high demand have been permitted to discharge their duty with an offer of housing outside of their own borough.[55] Unsurprisingly, London authorities house significantly larger proportions of households in out-of-borough placements than do authorities outside of London (House of Commons Library, 2020b).

Two years after *Harouki*, the House of Lords decided the important case of *Ali and Moran*.[56] The cases, heard separately in the Court of Appeal,[57] were conjoined in this final stage on the basis that 'common to both' was the meaning of accommodation that was 'reasonable to continue to occupy'.[58] Parallels were again drawn with the requirement of suitability; indeed, the leading practitioner text suggests that the House of Lords 'came close to eliding the two concepts' (Arden *et al.*, 2018/1982, para. 4.69). Lady Hale relied on Lord Hoffmann's dicta in *Awua*[59] linking the degree of unsuitability with the length of occupation.[60] Adopting the same reasoning, Lady Hale justified allowing authorities to leave applicants for a limited period in their current housing which it had decided was not reasonable for them to continue to occupy (the so-called 'homeless at home'):

[51]Housing Act 1985, Parts 9, 10.

[52]Housing Act 2004, Parts 1–4.

[53]Code of Guidance, para. 17.26.

[54]The Homelessness (Suitability of Accommodation) Order 1996, SI 1996/3204.

[55]See also *Lomax v. Gosport BC* [2018] EWCA Civ 1846, [2018] HLR 40.

[56]*Ali and Others v. Birmingham City Council; Moran v. Manchester City Council* [2009] UKHL 36, [2009] HLR 41.

[57]*Manchester City Council v. Sharon Moran v. The Secretary of State for Communities and Local Government; Rosemary Richards v. Ipswich Borough Council v. The Secretary of State for Communities and Local Government* [2008] EWCA Civ 378, [2008] HLR 39; and *Birmingham City Council v. Abdishakur Aweys, Abdiladif Mohammed Ali, Amina Abdulle, Muhidin Adam, Nimo Sharif, Helena Omar* [2008] EWCA Civ 48, [2008] HLR 32.

[58]*Ali and Others v. Birmingham City Council; Moran v. Manchester City Council* [2009] UKHL 36, [2009] HLR 41, at [9] (Lady Hale).

[59]*R. v. London Borough of Brent ex p Awua* (1995) 27 HLR 453.

[60]*Ali and Others v. Birmingham City Council; Moran v. Manchester City Council* [2009] UKHL 36, [2009] HLR 41, at [41]–[42].

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

> 'There may be cases where it would not be unreasonable for a homeless person to be expected to continue to occupy for a short period accommodation which it would not be reasonable for him to occupy for a long time while the authority looks for accommodation which will release it from its duty.'[61]

However, bringing the tests together results in the same reasoning being applied in two different situations: first, the point at which a person becomes homeless (the issue in *Moran*) and, second, the lawful scope for authorities to leave applicants who are accepted as being homeless (because they are occupying housing that is not reasonable to continue to occupy) in their current accommodation (the issue in *Ali*). In relation to the latter question, Lady Hale emphasised that the court should be slow to accept that an authority had breached its duty. Justifying that approach, she emphasised the scarcity of suitable housing.

In a place such as Birmingham, there are many families in unsatisfactory accommodation, severe constraints on budgets and personnel, and a very limited number of satisfactory properties for large families and those with disabilities. It would be wrong to ignore those pressures when deciding whether, in a particular case, an authority had left an applicant in her present accommodation for an unacceptably long period.[62]

Bringing the two tests together created the idea that there are degrees of unreasonableness or unsuitability and, as Peaker has argued, effectively adds the word 'indefinitely' into the statutory wording 'reasonable to continue to occupy' (Peaker, 2009). Thus, the logical understanding is that a person would only be homeless where they are occupying housing that it is unreasonable for them to continue to occupy *indefinitely*. As we have already seen, authorities are entitled to compare the applicant's current housing with local conditions. This additional proviso may have the effect of making it easier for authorities to deny that the housing is sufficiently unreasonable to qualify the person as homeless.

Most contentiously, the near-elision of the tests implies that authorities may take into account not only the physical characteristics of local housing conditions, but also their relative scarcity. The extent to which authorities are entitled to take (limited) resources into account is mired in uncertainty. The leading practitioner text states the orthodox principle: 'While the resources available to an authority will be relevant to how it discharges its duty, they are not relevant to the question whether there is a duty at all' (Arden *et al*., 2018/1982, para. 12.49).

Nevertheless, Lady Hale subsequently returned to this issue, albeit in *obiter dicta*, where she relied on the wording of the provision to argue that

> '"general circumstances in relation to housing" and not "the general condition of the housing stock in the area" … strongly suggests that regard may be had, not only to the quality of housing available locally, but also to the *quantity*.'[63]

As explained, the Code of Guidance, which reflects the usual practice, refers only to the physical conditions of the property in which the applicant is living. Following Lady Hale's dicta, budgetary constraints might be considered relevant at the first stage, namely in deciding whether a person is homeless. It is argued here that it would be an extremely retrograde step to allow authorities to consider budgetary constraints when deciding whether an applicant is homeless since it would introduce another unwelcome and unjustified layer of discretion and opacity. *Ali and Moran* predates the Homelessness Reduction Act 2017, which extends authorities' homelessness duties to include a broader range of applicants. Given its direct conflict with the trajectory of that Act, it is hoped that courts do not pursue this line of reasoning.

[61] *Ibid*., at para. [4].
[62] *Ali and Others v. Birmingham City Council; Moran v. Manchester City Council* [2009] UKHL 36, [2009] HLR 41, at [50].
[63] *Yemshaw v. Hounslow LBC* [2011] UKSC 3, [2011] HLR 16, at [5], emphasis in original.

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

9 Raising the standard

The relationship between the tests of 'reasonable' and 'suitable' has been considered more recently. The Court of Appeal in *Temur* acknowledged that the tests involve related concepts[64] but held that the standard applied in each is different. The specific issue was whether, in deciding whether an applicant is homeless, the authority is required to assess their current accommodation for potential hazards under the Housing Act 2004. The court decided that there is no such requirement but that it may be necessary under the duty to provide successful applicants with suitable accommodation.[65] It was argued above that it is logical that 'suitable' should be a higher standard than 'reasonable', but here I make the case for hazards under the Housing Health and Safety Rating System (HHSRS) to form part of the assessment as to whether accommodation is reasonable to continue to occupy. Indeed, the Homes (Fitness for Human Habitation) Act 2018 provides impetus to make the HHSRS a central feature of authorities' decision-making on housing standards.

The 2018 Act 'promotes a startlingly simple objective' (Bevan, 2019, p. 900) by requiring landlords to provide homes that are fit for human habitation and gives tenants the right to act against their landlord to remedy poor housing conditions.[66] Hitherto, local authorities had sole responsibility for enforcing property standards through the HHSRS mechanism[67] and it is widely acknowledged that they have been hampered by severe budgetary constraints (Bevan, 2019; Carr *et al.*, 2017). There is also significant geographical variability in enforcement actions. For example, Newham Borough Council's enforcement actions account for 70 per cent of all activity in London and 50 per cent nationwide.[68] To determine whether a dwelling is unfit for human habitation, courts are directed by the Act to consider various facets of the property's condition (including its state of repair, ventilation and freedom from damp) and determine whether any constitutes a hazard, by reference to the HHSRS. Hazards are categorised according to their severity, with Category 1 being the most serious, which, under the existing regime, requires authorities to take enforcement action.[69] An undoubted benefit of the Act is that it does not require an official hazard assessment to be conducted; in straightforward cases, tenants' own evidence is likely to be sufficient (Bevan, 2019).

The Act represents a significant achievement in requiring landlords to provide homes that are fit for human habitation. However, no minimum standards apply (Defoe and Thompson, 2020) and the statutory wording appears relatively restrictive: a property is to be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition. The HHSRS has also been criticised for its complex and unwieldy nature. Following a consultation exercise in February 2019, the government announced its intention to update and simplify assessment processes and provide better guidance to landlords and tenants (HHSRS, 2019). However, no action has yet been taken. Despite the deficiencies of the HHSRS, it is proposed here that the identification of a Category 1 hazard should automatically result in a finding of homelessness. This test should replace the current comparative test that it has been argued here lacks transparency, is unacceptably discretionary and unduly contingent on local housing standards. The HHSRS offers the benefit of being a well-established standard that has been endorsed and given wider application by the 2018 Act. Marginal cases will remain because the application of any test rests on professional judgment but applying this benchmark in the homelessness context helps to delimit the watery edge of the lake, to employ Gurnham's (this issue) apt metaphor for the constantly shifting nature of the boundary between homeless and not homeless. It promotes transparency at the individual level, greater consistency between local authorities and coherence in housing law and policy.

[64] *Temur v. Hackney LBC* [2014] EWCA Civ 877, [2014] HLR 39, at [55].

[65] *Ibid*., at para. [48].

[66] Homes (Fitness for Human Habitation) Act 2018, s. 1 inserts new s. 9A into the Landlord and Tenant Act 1985.

[67] Housing Act 2004.

[68] Hansard HC Homes (Fitness for Human Habitation) Bill, 3rd reading, vol. 638 col. 537 (Karen Buck MP, 26 October 2018).

[69] Housing Act 2004, s. 5.

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

As explained, the 2018 Act provides tenants with a new enforcement right, although the Act does not specify the route for tenants to seek a remedy. Bevan (2019) suggests that an action for specific performance or a claim for damages are the most likely options. The ability to take direct action has been generally welcomed, but may have an undesirable and presumably unintended consequence at its intersection with homelessness law – that is, the potential for authorities to deny a homeless application because of poor housing conditions, with the justification that tenants can enforce their rights against landlords. In other words, authorities may effectively attempt to turn a right into an obligation before they will consider a homeless application. This risk is not merely paranoid speculation. Gatekeeping activities have a long and ignominious history in homelessness law (Laurie, 2021) and this technique may well appeal to some cash-strapped authorities. Whereas gatekeeping is regarded as an unlawful form of resource management, the self-responsibilisation agenda forms a key plank of welfare provision (Lowe and Meers, 2015) and embraces the ideal of active citizen participation. Cowan (2019) argues that the Homelessness Reduction Act 2017 applies a neoliberal rationale to homelessness law, in which the applicant is recast as citizen-consumer. In this new role, applicants are statutorily required to undertake steps identified by – and preferably agreed with – the authority to retain suitable accommodation.[70] While the Code of Guidance cautions authorities not to impose unrealistic targets,[71] the requirement for the applicant to be an active participant comes with the threat of sanctions if they 'unreasonably' refuse to co-operate.[72]

Analogies can be drawn with the reaction by certain authorities to applications from victims of domestic violence, in which victims were expected to remain in the family home and exclude a violent partner through an injunction (Davis, 1992). The Court of Appeal has made it clear that the availability of alternative remedies does not justify the authority's decision that an applicant was intentionally homeless, having left the family home.[73] Nevertheless, concerns persist that authorities may effectively attempt to incorporate such steps through the new duties under the Homelessness Reduction Act 2017, described above (Rubens and Moss, 2018).

Any strategy that requires an applicant to initiate legal action against their landlord should be firmly rejected by the courts hearing homelessness appeals. The absence of legal-aid provision to support tenants was highlighted during the parliamentary passage of the bill.[74] This lack of legal advice made some fear that those suffering from the worst housing conditions would be the least able to pursue an effective claim.[75] As Bevan (2019, p. 911) observes, the absence of legal-aid funding to pursue housing claims is 'an oft-overlooked but vital piece in the jigsaw of housing provision in England'. The existence of housing-law advice deserts is well established (Bevan, 2019), with the consequence that rights become merely symbolic (Carr *et al.*, 2017).

10 Conclusions

This paper has argued that, despite the high regard in which the English homelessness scheme is held, there are fundamental issues with its identification of homelessness. At the most basic level, it starts from a flawed premise that there is a clear dividing line between being homeless and lesser degrees of housing inadequacy. More specifically, the foundation of the test for assessing the physical adequacy of the applicant's current housing, whether accommodation is 'reasonable to continue to occupy', creates a marginal space that is undefined, contingent and lacks transparency. Allowing local authorities to draw comparisons with general housing conditions is a pragmatic response to a shortage of decent-quality, affordable housing but questions have arisen about the meaning of 'general conditions'

[70]Housing Act 1996, s. 189A(4)(a).

[71]Code of Guidance 11.20.

[72]Housing Act 1996, s. 193C.

[73]*Bond v. Leicester City Council* [2002] HLR 6.

[74]Hansard Public Bill Committee PBC (Bill 10) 2017–2019 pp Hansard HL Homes (Fitness for Human Habitation) Bill, 2nd reading, vol. 794 cols. 456, 462, 464, 465.

[75]*Ibid.*, col. 452 (Lord Best, 23 November 2018).

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press

and, specifically, whether it includes lack of resources. Permitting authorities to take into account their resources is a retrograde step and contradicts the policy ethos of the Homelessness Reduction Act 2017. The relevant cases predate the 2017 Act, so it is to be hoped that the courts would now decide differently.

While accepting that the boundary between homeless and not homeless will remain a marginal space, it has been advocated in this paper that the Homes (Fitness for Human Habitation) Act 2018 has the potential to drive up standards and gives impetus to defining homelessness caused by poor housing conditions with reference to the standard of 'fit for human habitation'.

Conflicts of Interest. None

Acknowledgements. I am extremely grateful to Dr Jiufeng Chang for his assistance with researching the case-law and to my colleague Dr Harry Annison who provided constructive comments on an earlier draft. I would also like to thank my colleagues in the Centre for Law, Policy & Society who patiently listened to various iterations of my paper and made many helpful suggestions. Finally, I am grateful to Professor David Gurnham for organising the workshops that fed into this Special Issue. As well as providing useful feedback, the participants helped me to feel connected in a socially distanced world.

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Cite this article: Laurie E (2022). Marginally housed or marginally homeless? *International Journal of Law in Context* **18**, 69–84. https://doi.org/10.1017/S1744552322000040

https://doi.org/10.1017/S1744552322000040 Published online by Cambridge University Press