House of Lords on appeal from QBD, before Lord Diplock Lord Fraser of Tullybelton Lord Keith of Kinkel Lord Bridge of Harwich Lord Brightman. 25th November 1982

Lord Diplock, my lords.
I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bridge of Harwich. I agree with it and would allow the appeal and concur in the order which he proposes.

Lord Fraser of Tullybelton, my lords,
I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it, and with the order proposed by him.

Lord Keith of Kinkel, my lords,
I have had the benefit of reading in draft the speech to be delivered by my noble and learned friend. Lord Bridge of Harwich. For the reasons which he gives I would allow the appeal and concur in the order which he proposes.

Lord Bridge of Harwich, my lords,
The Housing (Homeless Persons) Act, 1977 has been, and will no doubt continue to be, a fruitful source of litigation. The rights of an applicant for accommodation under the Act, and the corresponding duties of the housing authority, depend upon three questions with respect to the applicant:

1. Is he homeless or threatened with homelessness?
2. If yes, has he a priority need?
3. If yes, did he become homeless intentionally?

The primary duties of the housing authority are fourfold:

1. If the housing authority have reason to believe that the applicant may be homeless or threatened with homelessness, they must make such inquiries as are necessary to satisfy themselves of the answers to the three questions indicated above ("*the duty to inquire*"): section 3(1) and (2).
2. If they have reason to believe that he may be homeless and have a priority need, they must accommodate him pending the outcome of their inquiries ("*the temporary housing duty*") : section 3(4).
3. If they are satisfied that questions (1) and (2) should be answered affirmatively, but are not so satisfied as to question (3), they must provide permanent accommodation for the applicant ("*the full housing duty*"): section 4(5).
4. If they are satisfied that all three questions should be answered affirmatively, they must provide him with interim accommodation and with advice and assistance ("*the limited housing duty*"): section 4(2) and (3).

Normally there will be no room for dispute as to whether or not an applicant is (a) homeless or threatened with homelessness or (b) has a priority need. But the question whether or not a person became homeless intentionally may frequently give rise to difficulties, as is shown by the many reported cases on the subject, including two in your Lordships' House: ***Din (Taj) v. Wandsworth London Borough Council*** [1981] 3 W.L.R. 918; ***Reg. v. Hillingdon London Borough Council, Ex pane Islam (Tafazzul)*** [1981] 3 W.L.R. 942. Moreover, it is the resolution of this question, when disputed, which is of crucial importance both to the applicant and to the housing authority because of the great practical differences in effect for both parties between the full housing duty and the limited housing duty. The rights claimed by the respondent to the present appeal probably turn in the end on the question of intentional homelessness. But the issue for your Lordships' decision on this occasion is concerned, not with the substance of that question, but with the procedure by which that and other questions under the Act ought properly to be resolved.

The respondent instituted these proceedings in the Thanet County Court on 29th January 1982. By his particulars of claim he pleads, in effect, that since 21st December 1981 he and his family have been homeless (although accommodated at the home of a friend) and in priority need and that his frequent applications to the appellant housing authority for accommodation since that date have been refused. The pleading makes no reference to any decision of the appellants notified to the respondent pursuant to section 8 of the Act, but asserts, baldly and boldly, that the appellants owe to the respondent and are in breach of both the temporary and the full housing duty. The prayer for relief claims, *inter alia,* a declaration to that effect, consequential mandatory injunctions and damages. I mention in passing that the appellants might well have applied to strike out the pleading as it stands as disclosing no cause of action, but this would probably only have led to an amendment of the pleading to identify and particularise the precise issues which the respondent seeks to litigate. Sensibly, no doubt, the parties sought and obtained a consent order from Master Elton which (a) transferred the proceedings to the Queen's Bench Division of the High Court and (b) ordered trial of a preliminary issue as to whether the proceedings were properly brought by action or could only be brought by application for judicial review. That issue was heard before Milmo J. on 30th April 1982, when Mr. Scrivener Q.C., for the appellants, conceded that the learned judge was bound by the decision of the Court of Appeal in ***De Falco v. Crawley Borough Council*** [1980] 1 Q.B. 460 to decide the issue in favour of the respondent. The learned judge granted an appropriate certificate under section 12 of the Administration of Justice Act 1969 for appeal direct to your Lordships' House and in due course leave to appeal was granted.

The procedural issue on which the appeal turns will naturally fall for decision in the light of the principles expounded in the speech of my noble and learned friend, Lord Diplock in the case of ***O'Reilly v. Mackman*** in which judgment has just been delivered. But before attempting to apply those principles, it is necessary to analyse the functions of housing authorities under the Act of 1977. These functions fall into two wholly distinct categories.

On the one hand, the housing authority is charged with decision- making functions. It is for the housing authority to decide whether they have reason to believe the matters which will give rise to the duty of inquiry or to the temporary housing

duty. It is for the housing authority, once the duty of inquiry has arisen, to make the appropriate inquiries and to decide whether they are satisfied, or not satisfied as the case may be, of the matters which will give rise to the limited housing duty or the full housing duty. These are essentially public law functions. The power of decision being committed by the statute exclusively to the housing authority, their exercise of the power can only be challenged before the courts on the strictly limited grounds (i) that their decision was vitiated by bias or procedural unfairness; (ii) that they have reached a conclusion of fact which can be impugned on the principles set out in the speech of Lord Radcliffe in ***Edwards v. Bairstow*** [1956] A.C. 14; or (iii) that, in so far as they have exercised a discretion (as they may require to do in considering questions of reasonableness under section 17(1)(2) and (4)), the exercise can be impugned on the principles set out in the judgment of Lord Greene M.R. in ***Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*** [1948] 1 K.B. 223. All this is trite law and the contrary has, so far as I know, never been argued in any case which has come before the courts under the Act of 1977.

On the other hand, the housing authority are charged with executive functions. Once a decision has been reached by the housing authority which gives rise to the temporary, the limited or the full housing duty, rights and obligations are immediately created in the field of private law. Each of the duties referred to, once established, is capable of being enforced by injunction and the breach of it will give rise to a liability in damages. But it is inherent in the scheme of the Act that an appropriate public law decision of the housing authority is a condition precedent to the establishment of the private law duty.

When the Court of Appeal, of which I was a member, decided ***De Falco's case*** *(supra),* we did not, of course, have the benefit of Lord Diplock's analysis of the consequences of the introduction in 1977 by the amended Order 53 of the Rules of the Supreme Court of the new public law procedure by way of an application for judicial review. That apart, I believe our decision was influenced by a failure to appreciate the significance of the dichotomy of functions to which I have drawn attention in the two foregoing paragraphs and a consequent misunderstanding of the true effect of the earlier Court of Appeal decision in ***Thornton v. Kirklees Metropolitan Borough Council*** [1979| 1 Q.B. 626. The view expressed in ***De Falco*** *(supra)* by Lord Denning M.R. at p.476 and by myself at p.480, that an applicant for accommodation under the Act of 1977 who wishes to challenge the housing authority's decision that he was intentionally homeless can do so either by action or by application for judicial review, I can now see to have been based on false reasoning. I am the more ready to say so since Lord Denning has also subsequently resiled from his previous opinion: see ***Lambert v. Baling London Borough Council*** [1982] 1 W.L.R. 550 at p.557.

Thornton v. Kirklees Metropolitan Borough Council *(supra)* was an appeal from a decision to strike out the plaintiff's particulars of claim in the county court on the ground that they disclosed no reasonable cause of action. The sole issue canvassed on the appeal was whether a breach of the duty under section 3(4) of the Act (what I have called the temporary housing duty) gave a cause of action in damages against the housing authority, which was essential to found jurisdiction in the county court. The Court of Appeal held that it did. On such an application to strike out, the court necessarily assumed the truth of the facts pleaded and these were taken sufficiently to allege both the existence and the breach of a duty owed to the plaintiff under section 3(4). On these assumptions the decision was, in my respectful view, correct. But the decision is authority for no more extensive proposition than that once the existence of a duty resting on a housing authority under the Act of 1977 to provide accommodation, whether temporary or permanent, has been established, an action for damages for breach of that private law duty lies. It is to be noted that in that case the housing authority did not object to the proceedings in the county court as an abuse of process. If they had done so, they would have been entitled, for the reasons which I am about to develop, to have the action struck out on that ground.

After reference to ***Thornton*** *(supra),* in ***De Falco*** *(supra) 1* said, at p.480: *" If an ordinary action lies in respect of an alleged breach of duty, it must follow, it seems to me, that in such an action the plaintiff as well as claiming damages or an injunction as his remedy for the breach of duty can claim any declaration necessary to establish that there was a relevant breach of duty, and, in particular, a declaration that a local authority's decision adverse to him under the Act was not validly made."*

In the light of the dichotomy between a housing authority's public and private law functions, this is a *non-sequitur*. The fallacy is in the implicit assumption that the court has the power not only to review the housing authority's public law decision but also to substitute its own decision to the contrary effect in order to establish the necessary condition precedent to the housing authority's private law liability.

I have already indicated my agreement with the views of my noble and learned friend, Lord Diplock, as expressed in ***O'Reilly's*** case, and I grate- fully adopt all his reasons for the conclusion that: *" It would ... as a general rule be contrary to public policy and as such an abuse of the process .of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."*

Does the same general rule apply, where the decision of the public authority which the litigant wishes to overturn is not one alleged to infringe any existing right but a decision which, being adverse to him, prevents him establishing a necessary condition precedent to the statutory private law right which he seeks to enforce? Any relevant decision of a housing authority under the Act of 1977 which an applicant for accommodation wants to challenge will be of that character. I have no doubt that the same general rule should apply to such a case. The safeguards built into the Order 53 procedure which protect from harassment public authorities on whom Parliament has imposed a duty to make public law decisions and the inherent advantages of that procedure over proceedings begun by writ or originating summons for the purposes of investigating whether such decisions are open to challenge are of no less importance in relation to this type of decision than to the type of decision your Lordships have just been considering in ***O'Reilly's*** case. I have in mind,

in particular, the need to obtain leave to apply on the basis of sworn evidence which makes frank disclosure of all relevant facts known to the applicant; the court's discretionary control of both discovery and cross-examination; the capacity of the court to act with the utmost speed when necessary; and the avoidance of the temptation for the court to substitute its own decision of fact for that of the housing authority. Undue delay in seeking a remedy on the part of an aggrieved applicant for accommodation under the Act of 1977 is perhaps not often likely to present a problem, but since this appeal, unlike ***O'Reilly's*** case, arises from proceedings commenced after the coming into operation of the Supreme Court Act 1981, it is an appropriate occasion to observe both that section 31 of that Act removes any doubt there may have been as to the *vires* of the 1977 amendment of Order 53 and also that section 31(6), by expressly recognising that delay in seeking the public law remedies obtainable by application for judicial review may be detrimental to good administration, lends added weight to the consideration that the court, in the control of its own process, is fully justified in confining litigants to the use of procedural machinery which affords protection against such detrimental delay.

Even though nullification of a public law decision can, if necessary, be achieved by declaration as an alternative to an order of certiorari, certiorari to quash remains the primary and most appropriate remedy. Now that all public law remedies are available to be sought by the unified and simplified procedure of an application for judicial review, there can be no valid reason, where the quashing of a decision is the sole remedy sought, why it should be sought otherwise than by certiorari. But an unsuccessful applicant for accommodation under the Act of 1977, confronted by an adverse decision of the housing authority as to, say, the question of his intentional homelessness, may strictly need not only an order of certiorari to quash the adverse decision but also an order of mandamus to the housing authority to determine the question afresh according to law. I have said that the court has no power to substitute its own decision for that of the housing authority. That is strictly correct, though no doubt in practice there will be cases where the court's decision will effectively determine the issue, as for instance where on undisputed primary facts the court holds that no reasonable housing authority, correctly directing itself in law, could be satisfied that the applicant became homeless intentionally. But it will be otherwise where the housing authority's decision is successfully impugned on other grounds, as for instance that the applicant was not fairly heard or that irrelevant factors have been taken into account. In such cases certiorari to quash and mandamus to re-determine will, in strictness, be the appropriate remedies and the only appropriate remedies.

It follows from these considerations that proceedings in which an unsuccessful applicant for accommodation under the Act of 1977 sets out to challenge the decision of the housing authority against him will afford another application of Lord Diplock's general rule and will amount to an abuse of the process of the court if instituted otherwise than by an application for judicial review under Order 53.

In view of some technical but significant differences in the approach to the question raised in this appeal between the law of England and the law of Scotland, which is to be considered in the next judgment of your Lordships' House to be delivered, and in order to dispel any possible doubt, I think it appropriate to emphasise that the conclusion reached in this appeal arises from the English court's inherent jurisdiction to control its own process to prevent abuse, and has nothing to do with any limitation on the jurisdiction of the county court. As Lord Diplock has observed in ***O'Reilly's*** case, the validity of a public law decision may come into question collaterally in an ordinary action. In such a case the issue would have to be decided by the High Court or the county court trying the action, as the case might be.

My Lords, I would allow this appeal, set aside the order of the learned judge and determine the preliminary issue by declaring that the respondent is not entitled to continue these proceedings or to seek any of the relief he claims otherwise than by an application for judicial review.

Lord Brightman, **M**y lords,
I also would allow this appeal for the reasons given by my noble and learned friend, Lord Bridge of Harwich.