Neutral Citation Number: [2016] EWHC 841 (Admin)

CO/5127/2015

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT

Date: 18 April 2016

Before:

HIS HONOUR JUDGE WAKSMAN QC

(sitting as a Judge of the High Court)

BETWEEN:

THE QUEEN

(on the application of H and others)

Claimant

and

EALING LONDON BOROUGH COUNCIL

Defendant

Stephen Broach (instructed by Hopkin Murray Beskine, Solicitors) for the Claimant

Matt Hutchings (instructed by Legal Department, Ealing London Borough Council) for the Defendant

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Hearing date: 3 March 2016

INTRODUCTION

1. This is a challenge to the introduction by the Defendant, Ealing London Borough Council ("the Council") in October 2013 of a significant amendment to its housing allocations policy. Until then, and with some immaterial exceptions, its available lettings were allocated by reference to Priority Bands A to D as described below, A being the highest. An applicant who fell within a particular band was ranked within it by date of entry.

2. As is well-known, there is a very substantial shortage of social housing. In 2014 there were over 255,000 households on council waiting lists and those in Ealing numbered 10,676. Those who apply for lettings do so because they are currently homeless or in temporary accommodation or who are existing council tenants but wish to transfer to more suitable accommodation.

3. By the change to its housing allocations policy, the Council introduced a scheme whereby 20% of all available lettings would be removed from the general pool and would be reserved for (a) "Working Households" and (b) "Model Tenants". In brief, a working household was one where the applicant or another member of the household worked for at least 24 hours per week. A model tenant was an applicant for transfer who already had a Council secure tenancy but who was seeking more appropriate accommodation and who had complied with the terms of the tenancy. I shall refer to this change as "the Scheme". The broad aims behind it are to incentivise tenants to work or return to work and to encourage good tenant behaviour. As will become apparent, policies along similar lines have been introduced in other London councils including Barnet, Bexley and Hammersmith and Fulham.

4. The position of the various Claimants in this case is set out in the evidence and is not in dispute. I take the following description from their Skeleton Argument: the First Claimant is a single mother of six children. The Second Claimant is her youngest child, now aged 4. Five of the children remain living with the First Claimant. The family are victims of domestic violence. The First Claimant has long-standing mental health problems, including depression, anxiety and severe agoraphobia, so that she is 'disabled' within the meaning of section 6 of the Equality Act 2010 ("the Act"). She cannot work at present as a result of her disabilities and caring responsibilities. She is in receipt of income support and personal independence payments which constitute a disability benefit. Her solicitor, Ms Bevington, states in her witness statement ("WS") dated 29 January 2016 that the First Claimant and her family have been moved to alternative temporary accommodation which is suitable for the family's needs and which allows her to access family support. However her primary goal remains to obtain suitable and stable long-term accommodation for her family, so she can focus on meeting her children's needs and her own health and well-being. The scarcity of four bedroom homes, coupled with the Scheme (for which she cannot qualify) is preventing her from achieving this.

5. The Third to Sixth Claimants are a family comprising two grandparents (the Third and Fourth Claimants), their daughter (the Fifth Claimant) and her infant son (the Sixth Claimant). The Third Claimant was a teacher and journalist and the Fourth Claimant was a teacher, before the family was forced to flee Iran and come to the UK in 2009. The Fifth Claimant has significant physical disabilities, having dystonic cerebral palsy. The grandparents are therefore responsible for much of the care of both their daughter and grandson. The Third Claimant has physical health problems and the Fourth Claimant has physical and mental health problems. As a result, none of the adults in the family are presently able to work. The Third, Fourth and Fifth Claimants are all disabled within the meaning of the Act. Ms Bevington confirms that the family have been provided with alternative temporary accommodation in a village outside Maidenhead. Although the layout of the property is suitable the location is not, and so a review of suitability has been requested

any event. The primary need of this family is also for settled long term accommodation so they can access appropriate services and support. As with the First Claimant's family, the Council's housing register is the only realistic route to this.

THE ISSUES

6. The Claimants challenge the lawfulness of the Scheme on the following grounds:

   (1) It indirectly discriminates against women, disabled and elderly persons within the meaning of s19 (2) of the Act and such discrimination is not justified;

   (2) It is in breach of Article 14 of the ECHR because the Scheme falls within the ambit of Article 8 and discriminates against women, children, disabled persons, the elderly and tenants who do not hold Council tenancies; all of these groups have "status" for the purpose of Article 14 and again, the discrimination is not justified;

   (3) In adopting and maintaining the Scheme, the Council was in breach of its public sector equality duty ("PSED") under s149 of the Act; and

   (4) In adopting and maintaining the Scheme, the Council is also in breach of its obligations in respect of the welfare of children imposed by s11 of the Children Act 2004.

THE BASIC FACTS

Introduction of the Scheme

7. Prior to the introduction of the Scheme, the Council's housing allocations policy operated essentially by reference to the following four priority bands, in descending order:

   (1) Band A: Emergency and Top Priority Members;

   (2) Band B: Members with an urgent need to move;

   (3) Band C: Members with an identified housing need, and

   (4) Band D: No priority status, ie all the remaining seekers of Council housing. They cannot actively bid for properties save those which are not wanted by anyone in the higher bands.

8. The Scheme's details are as follows:

   (1) 20% of lettings will be made available to applicants from working households and those Council tenants who comply with their tenancy agreement and pay their rent and Council tax;

   (2) The definition of a 'working household' is where they have been 'employed for a minimum of 24 hours a week and for 12 out of the last 18 months';

   (3) 'Model tenants' are 'existing tenants who have demonstrated that they are "model" tenants by complying with the terms of their tenancy agreement for a specified period of time'. In particular they:

      (a) Must not have rent arrears for the previous 12 months;

      (b) Must not have breached their tenancy conditions for the previous two years; and

      (c) Must not have any anti-social behaviour record.

9. Applicants who fall within the Scheme are ranked according to their existing Priority Band and the date of joining it.

10. Proposals to introduce the Scheme, or something like it, first arose in the context of the Council's Allocations Policy Review of 2012. In the paper produced for the Council's Overview and Security Committee meeting of 21 June 2012, the increased freedoms on the part of local authorities introduced by the Localism Act 2011 were noted. Consideration was given to using them by giving a degree of priority to working households and to see how allocation policy could reward working households and encourage non-working households to work. A percentage of vacancies could be set aside to that end. Ways might also be explored to recognise applicants who demonstrated a positive community contribution along with households who stick to their tenancy agreements. In the consultation process undertaken between January and April 2012, several respondents commented that people with a disability or ill-health, carers and the elderly might not be able to work or to make a community contribution and that might disadvantage them.

11. At its next meeting on 12 July 2012 the committee made recommendations to Cabinet for consideration at its meeting on 25 July as follows:-20% of lettings would be made available to applicants from working households and model tenants as was eventually set out in the Scheme. By that time what had been described as a full impact assessment report and entitled "2011-2012 Full Equalities Analysis" had been written. This was also submitted to Cabinet. The Scheme would be operated and monitored for 12 months "to identify any unintended consequences and ensure that no particular equalities group is disadvantaged". The proposal also included giving priority to other categories of applicant who made a positive contribution to the community or completed training or did voluntary work. But the decision of the committee at that stage and its recommendation, was to undertake the particular Scheme in relation to working households and model tenants only.

12. The Full Equalities Analysis referred to 149 of the Act and the PSED thereby imposed and then referred to the main proposals which included details of the Scheme. In paragraph 2 it stated as follows:

> "the scheme proposes criteria to enable people to register on the Housing Register and be prioritised for social housing based on their individual circumstances and housing need consequently those registering for housing are likely to be the most economically disadvantaged and therefore contain an over-representation of households in the protected groups including the elderly, families with children, single-parent families, those with disabilities and households from ethnic minorities."

13. The Scheme was examined in relation to those with the protected characteristic of age. It said (relating to the policy as a whole) that preference was given to older people and there were proposals to increase mobility in sheltered housing. Preference was also given to families with children.

14. As to disability, the effect was said to be positive: "data on the housing register is not broken down against traditional definitions of disability as the main criteria is housing need. This automatically ensures that those with a disability or medical condition or long-term limiting illness will be given an appropriate level of housing if they are not suitably housed at the point of application."

15. In relation to the characteristic of sex the effect was said to be neutral. "Data on gender is not available. Gender alone would not have any bearing on the ability to access social housing."

16. At paragraph 5 is the analysis of the information shown and whether there was evidence of lawful/unlawful discrimination. It said "it identifies that for most equalities strands the proposed changes to the allocations policy will have no impact on applicants.… There is no evidence of lawful or unlawful discrimination." Finally it was decided that the policy was to be reviewed after 12 months of operation to assess the impact.

17. At its meeting on 25 July, Cabinet duly approved the recommendations for the piloting of the Scheme and following a review to see if there had been any "unintended negative impacts", the matter would come back to Cabinet. The Scheme was published in August 2012.

18. There were some delays in introducing the pilot of the Scheme but this then took place over a six month period only between April and September 2013. In the report of the review steering group prepared for a meeting on 25 September 2013, it said this:

> "Under the policy applicants only qualify if the work is for a minimum of 16 hours each week and where they have been employed for a minimum of 12 months. The new policy also recognised households who comply with their tenancy agreement and pay their rent and council tax. It was agreed that 20% of lettings would be made available to applicants who fall within these definitions.
>
> There were some delays as systems were set in place to ensure that all eligible working applicants were identified and live on the system and of the 299 Council lets made between April and September 2013, 61 properties (20%). were advertised for working or play by the rules priority groups. Of the 33 for working households, only 14 went to the target group. Offers for working households were aimed at the estates where there are high proportions of benefit dependent households to develop more sustainable communities but working households have been reluctant to bid for these properties and have told us that they are looking for better quality accommodation. Of the 28 for play by the rules offers, 26 went to the intended group.
>
> Overall there has been no change in the overall equalities profile for households allocated properties so the new policy changes do not appear to have had a negative impact on any particular equalities group. The lets for 2010/2011 and 2012/2013 as set out below for comparative purposes."

19. The figures referred to in the last sentence were not in fact set out in that document or at least the copy of the document produced to the Court. The Council has not been able to find or produce the figures referred to. So it has not been possible to test the assertion made in the last paragraph. Moreover, its accuracy must be open to doubt since by September 2013 the only comparator was the relatively short trial period in which not all the lettings offered under the Scheme were even taken up.

20. Following that report the Council then introduced the Scheme "proper" as it were in October 2013.

21. The WS of Susan Parsonage dated 22 February 2016 and filed shortly before the hearing explains that, as the Council's Director of Safer Communities and Housing, she has recently reviewed the Scheme and decided that it should continue for the time being. A further and fuller review will then take place which will involve the carrying out of "a full EIA in respect of the percent priority groups." Following consultations any necessary changes to the allocations policy will be made with the hope that any new allocations policy would be in place by April 2017.

The Figures

22. The Council has provided the following information. It is relevant to various of the claims but it is convenient to set it all out in one place here.

23. For the year ended 30 September 2012 i.e. before the introduction of the Scheme there were a total of 971 lettings. Of these 131 were applicants, or members of the applicants household, who were disabled, according to the Council's definition of disabled for these purposes. This represented 13.5% of the total lettings. The percentage of applications made by disabled applicants (or households containing a disabled person) were 7.8% of the total number of

applications. But measured as a proportion of applications by disabled households (776) the disabled households which succeeded constituted 16.9%.

24. For the year ended 30 September 2015 i.e. after the Scheme had been introduced, the total number of lettings was 845 of which 90 went to disabled households. This equates to 10.6% of the total number of lettings. Disabled households constituted 7.2% of all applications.

25. Moreover at least on a projected basis for that year, the total targeted supply to be reserved for the Scheme was 175 lettings. But the lettings were not equal across the different types of accommodation. In particular out of a total available stock of 113 three-bedroomed houses 44, i.e. 39%, went to the Scheme and were thus removed from the general pool.

26. There may be some discrepancy over the figures since the Council also said at an earlier stage that the total actual allocation was 759 and not 845 but I ignore this for present purposes because neither side suggested that a planned removal from the general pool of 44 out 113 of those houses was materially wrong.

27. Annex D3 to the grounds of defence uses, again, the figure of 845 but puts the allocation under the Scheme in respect of working households at 241 in total. Of those, it is said that 15 lettings went to applicants in Band D. Using these figures women made up 54% of the applicants and 55% of those who obtained lettings. Of the total of 5780 applicants who were women, 467 i.e. 8% succeeded.

28. Those with medical conditions which gave them some priority amounted to 3.2% of all applicants but 5.5% of those awarded a letting. Measured as a percentage of the number of applications by disabled households (777) the successful disabled households (90) were 12%. For elderly applicants who were seeking sheltered accommodation (143) the successful applicants (90) were 41%.

29. The average success rate for this period on the basis that there were 10,687 applicants for 845 lettings, was 8%.

30. For the calendar year 2015 the total number of lettings was 574. There are no figures overall for the proportion of successful applicants made up of disabled households so as to make a direct comparison with the years ended 30 September 2012 or 2015. However 114 of those lettings were made available under the Scheme of which 90 went to working households and 24 to model tenants. Of the lettings to working households, 21 (i.e. 23%) went to disabled households i.e. households where a member had a medical priority or an assessed mobility level or a medical and assessed mobility level. Of the 24 lettings to model tenants, 14 (i.e. 58%) went to disabled households as defined above. I should add that in the briefing paper produced by the allocations review steering group for the housing portfolio and discussed at the meeting on 25 September 2013, reference was made to the figures for the initial trial period of April to September 2013.

GROUND 1: INDIRECT DISCRIMINATION UNDER THE ACT

Introduction

31. In order to challenge a measure as discriminatory under the Act it must first affect someone with protected characteristics. These include age disability and sex. Children are not included in relation to potential discrimination by service providers or persons exercising public functions. Because there is no real evidence of any discriminatory effect upon the disabled, the elderly or women caused by the model tenants element of the Scheme, ground one is concerned with the working household element only.

32. H (the First Claimant), as noted above, is the carer for the Second Claimant and is also registered as disabled. She is currently in Band B. As for the A household the Third and Fourth Claimants are 64-65 years old and may be classed as older persons. The Third Fourth and Fifth Claimants are all disabled. The Fifth Claimant is a single mother though having assistance from her parents. The Sixth Claimant is a child, like the Second Claimant. The A household is currently in Band C.

33. The effect of the Scheme is that an applicant within it but who would otherwise be in Band D (where there is effectively no chance of obtaining a property from the general pool) may well obtain one in the reserved 20% and may do so ahead of someone in Bands A – C in the general pool. This "trumping effect" has occurred 18 times in the last 12 months.

Discriminatory effect

34. Section 19 of the Act provides as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

35. It is accepted that the Council is a "person" for the purposes of section 19 (1) because it provides a service, namely housing. The next question is therefore to identify the provision, criterion or practice in question. In argument the Council conceded (inevitably in my view) that the provision in question here was the working household element of the Scheme.

36. That provision applies equally to young and old, men and women, the disabled and the able-bodied. But the Claimants contend that the Scheme puts women, the disabled and the elderly at a disadvantage because they are much less likely to be able to satisfy the qualifying criterion of working 24 hours per week. This is because the disabled and elderly are at a disadvantaged position in the job market, as are women particularly in relation to full-time work because of the time needed to care for their children. It is accepted that it is not now necessary to make good the claimed disadvantage by reference to statistical evidence (see *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15); but in any event the Claimants, by way of example, point to the general statistical information contained in the documents referred to in paragraphs 14-16 of the WS of Rebekah Carrier dated 21 October 2015. This appears to be accepted in paragraph 29 of the grounds of the defence and was not itself challenged in written or oral submissions. If that is correct, then on the face of it, H and A and others in similar positions will be put at a disadvantage in relation to the allocation of lettings under the Scheme because they are unlikely to qualify for that housing stock which has been taken out of general circulation as it were; so they face the prospect of being "trumped" by others who are in working households even though their own priority band might be lower. The real prospect of disadvantage is also accepted in paragraph 20-21 of the WS of Ms Parsonage.

37. However, the Council argues that there is no real evidence of such disadvantage in relation to such groups. Its principal argument here is that it is incorrect to view the Scheme in isolation when considering its effect. Due account must be taken of the other 80% of housing stock in respect of which single parent carers who are women, the disabled and the elderly are likely in practice to be given higher priority banding than others who do not form part of

such groups. Therefore, in effect, this cancels out or should be taken to cancel out any negative effects of the Scheme which after all only concerns 20% of the stock.

38. The Claimants deny that this is the right approach and argue that the discriminatory effects must be considered in relation to the provision in question and only that provision. The effect of other aspects of the policy is relevant, if at all, only at the stage of justification.

39. There are two relevant authorities here. The first is *SG v Secretary of State of Work and Pensions* [2015] 1 WLR 1469, a decision of the Supreme Court. This was an Article 14 case brought in relation to the benefit cap introduced by statutory instrument in 2012. The essential allegation of discrimination concerned single women parents but a residual argument concerned women who were victims of domestic violence. It was argued that the cap discriminated against them because they would need, when staying in temporary accommodation to pay two lots of rent and so would be at a particular disadvantage as a result of the amount of the increased benefits provided.

40. At paragraph 62 Lord Reed first observed that such a problem was inherently of a temporary nature. Moreover it was mitigated by another measure which was specifically intended to counteract the effect of the cap on groups such as these. This was the decision to provide additional discretionary payments for those who needed additional funding, like women fleeing domestic violence, and such payments would not count for the purpose of computing the total amount of benefit in respect of the cap. There was at that stage no suggestion that the discretionary payments would not have their intended effect. Accordingly it could not be said that the cap *per se* caused there to be a disparate effect upon that particular group.

41. This case does not assist the Council here because it was concerned with a specific measure designed to ameliorate the effect of the provision in question. No such measure was introduced in relation to the Scheme here.

42. The second case is the earlier decision of the Divisional Court in *Hurley v Secretary of State for Business Innovation and Skills* [2012] EWHC 201. This involved an Article 14 challenge to the raising of University tuition fees from £6000 to £9000. It was alleged that this was discrimination against those from socially disadvantaged backgrounds who were now less able to take up university places. The Defendant denied that there was any disproportionate effect on such a group because of the availability of loans, high levels of maintenance support, scholarships and the obligation of universities to encourage the participation of that group in higher education. Overall it was said that there was no evidence that in the round, such a change would disparately affect the group in terms of taking up university places.

43. At paragraph 51 of the judgment Elias LJ accepted that it was necessary to look at the policies in the round and not simply at the increase in fees. A steep increase in fees taken by itself may well have a disproportionate effect. But any such effect was mitigated by the existence of the loans. And that, accompanied by the other measures specifically directed to increased access the poorer students meant that it was not "sufficiently clear that as a group they will be disadvantaged under the new scheme". Indeed both sides had marshalled arguments about the impact. It was all too uncertain at that stage and so he could not be satisfied that disparate impact had been proved. Lest he was wrong about that he went on to consider the question of justification in any event.

44. While it is undoubtedly correct to say that the Court in *Hurley* did not confine itself to the impact of the provision in question in isolation as it were, the facts were very different from the instant case.

45. First, the availability of loans obviously applied whether the fees were £6000 or £9000 so this was important, albeit that there was more money to pay back. Second, this was all about the likely effect on applications for university places which was simply not clear when set

against the background of other measures designed to increase such access. In our case the position is quite different. It is true, by way of example, that disabled people may often be eligible for bands C or B because of their medical condition, but the reason for that priority is because their needs are perceived to be greater than able-bodied people in the first place. But that does not mean that where a significant proportion of housing stock (20% and more for certain types of house) is taken out of circulation in circumstances where they are less likely than others to be eligible, that discriminatory effect can be ignored.

46. Of course if the Council had introduced a "safety valve" measure in the form of an exceptionality provision, for example, so as to admit to the working household group some people who simply could not work even if they wanted to, to address this potential problem, that might be different. But it did not do so.

47. Mr Hutchings also argued that if it was correct to look at the Scheme in isolation from other parts of the allocation policy, it would mean that unless each and every part of the policy was itself equality-neutral, they could all be struck down as discriminatory. This is in my judgment a *reductio ad absurdum*. If one part of the policy gives priority to people with a certain level of medical need it would obviously discriminate against those without such need-but that goes nowhere because the latter are not protected group. Nor could it result in indirect discrimination against such a group. And so on.

48. A variant on this was to argue that if the Scheme had always been in the allocations policy from the start as it were, the Claimants could have no claim. So why, it is asked, should it be different if the Scheme is a recent amendment? But in my judgment the premise is false. The effect of the Scheme will be the same in either event and it would therefore be open to challenge whenever it was introduced. The fact that here the Scheme is a recent amendment simply makes the position more stark and makes it easier to obtain evidence about the position of the protected groups either with or without the Scheme.

49. Of course, if, on the evidence, it is clear that in reality disabled people have not been adversely effected by the Scheme at all (or only in a *de minimis* sense) when looking at the housing allocation overall that is a different matter. But that depends on the figures, to which I now turn.

50. It has already been noted in paragraph 36 above that the basic position is that H and A and others who are disabled or women or elderly are likely in general to be disadvantaged. The only question therefore is whether the figures available here show that this will not be the case for the Scheme.

51. In my judgment the figures do not show that. It is true that the September 2013 report asserted that the introduction of the Scheme had not shown any disadvantage but as already noted the figures relied upon were not produced, the pilot was for a short period and not all the earmarked lettings were taken up.

52. As against that, disabled applicants made up 13.5% of those who obtained lettings in 2012 but only 10.6% of the successful applicants for 2015 with the percentage of the total applicants being made up by the disabled being similar in each case i.e. 7.8% and 7.2%. That suggests that there must have been some disadvantageous effect. At the very least the difference calls for explanation and there has not been any.

53. The only other relevant figures are those for the calendar year 2015 which show that of the working households who obtained lettings, 23% contained a disabled person. That could either be because the working member was also disabled or because the household had one working member and one disabled member. What the figures cannot show is what the position would have been in relation to lettings as a whole in the absence of the Scheme.

54. I also consider that there is force in the submission made by the Claimants that the Council's definition of disabled persons adopted for the purpose of the figures is not sufficiently comprehensive. The Council uses the categories of medical priority and assessed mobility levels to capture this group. But this is not the same for example, as the definition of disability under section 6 of the Act which will include people with mental health problems, autism or learning disabilities who may also be unable to work full-time. Equally the elderly group is defined by the Council for these purposes by reference to those who are seeking or living in sheltered accommodation. Yet elderly people outside of this group may also be unable to work full-time.

55. All this is in the context of where there is no equal division of lettings placed into the 20% group. I refer again to the 39% of three bedroomed houses. For the disabled or the elderly living with family, this may be a significant size of letting. In the case of H, for example, a three bedroomed house is necessary. In the case of A, a four bedroomed house is required although they could just about make do with three bedrooms.

56. The Council has focused upon the fact that in the year ended 30 September 2015 only 15 lettings were allocated to working households within band D, this being the paradigm example of where such households would "trump" households with a higher priority band but who were not within the Scheme. It is said that 15 lettings amounts to a very small proportion of the Scheme lettings and of the total lettings figure of 845, an even smaller percentage – less than 2%. I see that but (a) there is the possibility for working households in band C to trump those non—working households in Bands A and B (and the same for those in Band B) and (b) in the light of the other figures already mentioned, it simply cannot be said that overall, the effect of the Scheme upon the protected groups is only at worst *de minimis*. If there is any relevance to these proportions, it will be on the question of justification (see below).

57. Accordingly, for all those reasons I consider that the Scheme does indirectly discriminate against the protected groups being the disabled, the elderly and women.

Justification

58. The statutory form of justification is put at section 19 (2) of the Act as being "a proportionate means of achieving a legitimate aim" and the burden is on the defendant. It is common ground that proportionality should be determined in accordance with the cumulative four-stage test set out by Lord Reed in paragraph 74 of his judgment in *Bank Mellat v HM Treasury* [2013] UKSC 39, namely: (1) is there a sufficiently important objective (i.e. legitimate aim), (2) is the measure rationally connected to that objective (3) is it the least intrusive measure which could be used without unacceptably compromising the objective and (4) in adopting the measure has the defendant struck a fair balance between the importance of securing the objective and its particular effects on the claimant's rights.

59. An important part of the factual context for justification here consists of the policies adopted by the Barnet, Bexley and Hammersmith and Fulham local authorities as follows:

    (1) Barnet's policy, adopted in February 2015, operates by giving an increased priority band placing for those who have made a defined contribution to the community. A threshold criterion is that the household must have a current positive residence history (whether tenants of Barnet or not) which includes their being no breaches of the tenancy, no outstanding housing-related debts of more than £100, no unspent convictions and no involvement in antisocial behaviour. Then they can seek priority if they are in a working household or where voluntary work of 64 hours per month has been done or are in training or education or are ex-Armed Forces or carers. In addition there is a discretion to include within this group older or disabled people who cannot do either paid or voluntary work;

(2) Hammersmith and Fulham give increased priority on a similar basis to that offered by Barnet using almost identical wording;

(3) Bexley's policy as from 2013 allows into a higher band than otherwise those who have made a community contribution by working, taking education or training or doing voluntary work or who provide full-time care to a disabled child or elderly person and to a disabled person whose disability prevents them from participating in work related activity.

60. I consider the question of justification against that background.

61. First it is not in dispute that the Council has a legitimate aim in encouraging tenants to work and to be well-behaved in relation to their tenancy. The Scheme is obviously a rational means of achieving that aim.

62. However I am not satisfied that it is the least intrusive way of doing so. For the minority of those out of work who cannot work because of a disability or age or caring responsibilities, there is no reason why the Council could not have introduced some sort of "safety valve" for those groups, whether by an exceptional discretion and/or qualification by reference to some other community contribution.

63. The Council says however that there is no reasonably acceptable alternative for the following reasons:

(1) First, to allow in other criteria (e.g. other forms of community contribution) whether across the board or for those who cannot work, would "dilute" the (permitted) aim of encouraging tenants back to work. Indeed it may even discourage such tenants because they are now competing in the Scheme with other tenants who do not have to work. I do not accept this. There is no evidence that this would be the case and indeed at the moment, there is no evidence that this encouragement of working households has actually led to increased employment among tenants who did not previously work. But in any event, I cannot see why some provision to enable those households who cannot work to demonstrate some other contribution will discourage the others.

(2) It is then said that other forms of community contribution will be difficult to measure. But the other local authorities referred to have adopted such criteria without it seems any real difficulty. Nor is there any basis for suggesting that the incentivising message will be less clear or blurred, because of particular provision aimed those who cannot work.

64. The Council placed reliance on the decision of the Supreme Court in *Ahmad v Newham LBC* [2009] PTSR 632. However, that was a case where the challenge to the allocation policy was not under the Act but on the basis of a judicial review with regard to the overarching duty under section 167 of the Housing Act 1996 to give reasonable preference in any allocations policy to those with urgent housing needs. In upholding the new policy, the Supreme Court noted that it was undesirable for the Courts to get involved in questions of how priorities should be determined within a particular housing policy where there was no breach of section 167. Quite so, but that does not absolve a local authority from the need to show justification when the policy in question indirectly discriminates under the Act.

65. Equally, I agree with the proposition set out in paragraph 75 of the judgment of Lord Reed in *Bank Mellat* that in connection with the "least intrusive measure" the Courts are not called upon to substitute judicial opinions for legislative ones as to where to draw the precise line. However, first, this was aimed at legislatures and not local authorities. Secondly, and in any event, in this case it is not a matter of creative judicial "tinkering" on the part of the Court by conceiving of a policy less intrusive in theory than the policy in question. There is a solid

body of evidence from three other local authorities who have adopted broadly similar policies that they can be designed in such a way as to cater, at least to some extent, for the needs of the protected groups. Indeed, it is noteworthy that general community contribution of which being in work was only an example, was this Council's own starting point and the limitation to working households and model tenants seems to have been as much to keep the original pilot limited as for any other reason. And any technical misgiving as to how such broader criteria could properly be operated is counteracted by the policies adopted by the other councils.

66. I quite accept that once a local authority adopts some form of mitigation measure in respect of the disadvantage which may be suffered by protected groups, there will be very much more reluctance on the part of the Court to become involved and indeed (as with *SG*) it may be unable to be satisfied that there was then any indirect discrimination at all. But that is not, presently, this case.

67. I also accept that as matters stand, it is not clear how severely the protected groups are disadvantaged by the Scheme. It is said that if the disadvantage is relatively small then it is easier to justify the Scheme. I see that but since, as I have already found, it is clearly not the least intrusive way of achieving the aim, that does not really help. It would have been of more assistance if it was the least intrusive measure and then the last step would be for the Council to show a fair balance. In any event, since the actual benefits of the aim of encouraging tenants back to work are not known in any empirical sense and in my view, there is a clear disadvantage to the protected groups, it is very hard to say that a fair balance has been struck.

68. For all those reasons, I conclude that the working households element of the Scheme amount to unlawful indirect discrimination under the Act. That finding alone will require the Council to amend the Scheme so as to be compliant (if it chooses to continue it at all) but since the other grounds have been fully argued and thus far there has been no consideration of the model tenant element of the Scheme, I discuss these also, though somewhat more briefly.

GROUND 2: DISCRIMINATION UNDER ARTICLE 14

69. Article 14 provides as follows:

> "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex race, colour, language… birth, or other status."

70. It is common ground that for there to be a breach of Article 14 the following needs to be shown:

    (1) there is a relevant status group said to be discriminated against;

    (2) that discrimination must occur in the context of its enjoyment (or non-enjoyment) of one of the substantive rights conferred by other Articles within whose scope the provision in question can be said to operate;

    (3) there must be disparate treatment leading to disadvantage in respect of the status group.

71. I deal with each of these questions in turn.

Status Group

72. It is not in issue that non-Council tenants can constitute a status group for the purpose of Article 14 as do women, the elderly the disabled and, here, children. In the case of the latter, the Claimants also allege breach of Article 3 of the UN Convention on the Rights of the Child ("Article 3"). This requires all administrative authorities in all their actions, to have as a primary consideration the best interests of the child.

Application of Article 8

73. It is trite law that for another Article to be engaged in the sense that the provision in question is about it or within the scope of the rights conferred by it, it is not necessary to show that the creation or operation of the provision amounts to an interference with that other right. Otherwise there would be no need to appeal to Article 14 since a direct breach could be shown.

74. In that regard I adopt the recent formulation of the test as set out in paragraph 17 of the junction of Lord Wilson in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 where he said the provision must be "linked, or (as it is usually described) within the scope or ambit of…" another Article. Article 8 did not require the state to grant a particular right, but if it introduced a scheme which did, then it had to be administered without discrimination on any of the identified grounds.

75. The Claimants say that the Scheme falls within the scope or ambit of Article 8 which provides that everyone has the right to respect "for his private and family life, is home and his correspondence."

76. Initially the Council accepted that the Scheme here was within the ambit of Article 8 - see paragraph 5 of the detailed grounds of defence. However, it has now withdrawn that concession and the Claimants are content to argue the point.

77. The Claimants' argument is that the linkage between the Scheme and Article 8 is established by the following:

    (1) the Scheme is concerned with the obtaining of stable permanent accommodation and so links to the right to a home;

    (2) it also impacts upon private life because the absence of such accommodation can affect a person's physical and psychological integrity and has clearly done so in respect of these particular Claimants;

(3) finally, while the provision of accommodation may not always be vital for family life it can certainly be said directly to advance it.

78. Indeed, in paragraph 18 of her WS Ms Parsonage accepts that access to suitable long-term accommodation is particularly important for children and so accepts a link to family life and probably private life as well.

79. That the Council's housing allocation policy was within Article 8 was the conclusion also of Goss J in *HA v Ealing LBC* [2016] PTSR 16. This was another case concerned with its housing allocation policy where a different element, the requirement for five years permanent residency was found to be unlawful on Article 14 grounds. The Council did not appeal that decision. At paragraph 29 Goss J said that family life could only be enjoyed in a settled home for the purpose of finding that Article 8 was engaged. The reasoning was brief given that he had already found the Council's policy unlawful on an earlier ground, but nonetheless I should follow that decision unless it was clearly wrong.

80. Mr Hutchings submits that it was. He relies first upon the case of *M v SSWP* [2006] 2 AC 91 where the issue was the payment of child support and where such payment was in effect more favourable towards heterosexual as opposed to homosexual couples. The Supreme Court held that the policy was not within the "ambit" of Article 8 because the adverse impact concerned not the applicant and her family being for these purposes her children and their father, but rather her relationship with her new partner. The claim failed because the Strasbourg jurisprudence did not recognise family life within Article 8 as capable of being constituted by a same-sex couple. I see all of that but it is not directly relevant to this case. In so far as *M* also makes clear that there must be more than a merely tenuous link to Article 8, I accept that.

81. I then turn to consider *Morris v Westminster City Council* [2005] EWCA Civ 1184. The claimant here alleged a breach of Article 14 because under the local authority's housing policy, her otherwise entitlement to housing on the basis of prior need because of her young daughter was removed due to her immigration status as a non-British citizen. It was said that this provision and the disparate treatment caused was well within the ambit of Article 8. Sedley LJ at paragraph 23 accepted that social welfare legislation of which the Housing Act 1996 was a part was not necessarily within the ambit of Article 8. But the relevant provision there concerned the grant (or not) of priority in secure accommodation for the claimant and her daughter. Since such a provision had as its main purpose the preserving of the family unit, it was within the ambit of Article 8.

82. I accept that *Morris* is in some ways a stronger case than this one because of the emphasis of the provision directly on the parent and child i.e. a family unit. However this does not mean that any other aspect of housing legislation or policy cannot be within the ambit of Article 8 and *Morris* does not suggest this. And as a matter of principle, where this housing policy allows priority on the basis, among other things, of vulnerable families where stable permanent accommodation is a real imperative, it seems to me that in principle, a provision which changes that balance can well be said to be within the ambit of family life under Article 8. The fact that the temporary accommodation enjoyed by the families of H and A at the moment are (just about) suitable does not mean that the obtaining of permanent suitable accommodation will not directly promote the enjoyment of family life.

83. Moreover, one needs also to refer to the ECJ case of *Bah* (2012) 54 EHRR 773. Here again, and because of certain provisions in the Housing Act 1996, the priority status which would normally have been attributed to the claimant because of her young child was not available since her son had been granted leave to remain only on the basis that he would not have recourse to public funds. The Court held that the legislation in question obviously affected the home and family life of the appellant and her son since it affected their eligibility for

assistance in finding accommodation when they were homeless. So it was within the ambit of Article 8

84. Once more, I accept that the legislation in question was directly concerned with eligibility based on the fact of parent and child in the context of homelessness but this does not mean that other legislation or provision relating to allocation of housing is necessarily out with the ambit of Article 8. In practice, while the Scheme is only directly concerned with the status of one person i.e. the person who works or who is a model tenant, its requirements can be satisfied (or not satisfied) by "households" which will usually or at least often connote family. Certainly it cannot be denied that the Scheme here has an impact upon the family life of H and A.

85. Finally, if it is suggested that Goss J was saying that family life can only be enjoyed in settled accommodation in the sense of never being enjoyed otherwise I doubt that is what he really meant in this short passage. But in any event the link between settled accommodation and family life and the ability of the family directly to advance or preserve it is obvious in my view. In all the circumstances, I see no reason not to follow *HA* in this respect.

86. I should mention two additional matters. The first is Guidance for Social Housing Providers published by the Equality and Human Rights Commission in March 2011. This suggests at page 13 that if a social housing provider decides to adopt an eligibility rule for social housing it may be in breach of Article 14 and the example given is where joint tenancies are only available to married and not to unmarried couples unless in a civil partnership or other pairs of applicant. The example is actually taken from *Rodriguez v Gibraltar* [2009] UKPC 52 a decision of the Privy Council in relation to Gibraltar legislation similar to the ECHR although the link to the equivalent of Article 8 was there conceded. This guidance is not binding of course but it is a pointer in the direction of seeing social housing as capable of falling within the ambit of Article 8.

87. The second is the Practical Guide on Admissibility Criteria for claims brought to the European Court of Human Rights, published in 2015. This quote extensively from the case law but the context is the making of direct claims in respect of, for example Article 8, so it is not directly in point. I accept that in the context of a claim that there has been interference with the home (itself to be defined broadly) this must to a material extent be already occupied. And the Commission Guidance makes the same point at page 11. But we are not concerned here with a direct claim based on interference. Again, Article 8 gives no positive right to a "home", certainly not as against a local authority but I do not see that if its housing allocation policy does provides a settled home for households, it must be outwith the ambit of Article 8 for the purpose of an Article 14 claim.

88. Whether for the purposes of Article 14 the policy in question is linked to or within the ambit of another Article is in my judgment a question of fact and degree in each case. Here I have no doubt that Article 8 is engaged in the required sense. I therefore turn to the question of disparate treatment.

Disparate Treatment

89. In relation to working households, I consider that there is discrimination in the operation of the Scheme as related to disabled and elderly people and women for the same reasons as set out in relation to the Act.

90. In addition, however, there is disparate treatment of non-Council tenants because they cannot be model tenants by definition. Indeed this discrimination is direct for that reason.

91. In relation to children as a status group, the Council denied that there was any disparate treatment of them due to the Scheme. That is because the discrimination, if any, was in truth against their mothers as their carers, and hence against women and not children.

92. To some extent this does not matter since the part of the Scheme in question here is the working household element and that has been found to discriminate against the disabled and the elderly and women in any event. Nonetheless I consider that children or more accurately, children of single-parent carers, should be regarded as a relevant status group (see paragraph 49 (a) of the Claimants written Reply). I also accept that the Article 14 point is given extra force by Article 3 and that there has been a breach of that provision by reason of the Scheme- again in respect of children of single-parent carers.

93. Insofar as is relevant therefore, I consider that the Scheme has had the effect of disparate treatment of children of single-parent carers, as well as the other status groups.

Justification

94. In the context of a breach of Article 14, a question arises as to the correct level of review, in terms of proportionality, of the policy in question. The Council says that here the question is whether the policy is "manifestly without reasonable foundation", in proportionality terms. The Claimants argue for the usual, more demanding, test.

95. I refer first to the decision of the Supreme Court in *Tigere v SSBIS* [2015] v SSBIS [2015] 1 WLR 82. The Claimant here was ineligible to receive a student loan because of her immigration status. She had not been lawfully resident for three years nor was she "settled" here. She claimed a breach of Article 14 operating within the ambit of Article 2, First Protocol. In her judgment, Baroness Hale referred to the "manifestly without reasonable foundation" test in the context of the task of reviewing a governmental decision concerned with political, economic or social strategy where a wide margin of appreciation was allowed. Education, however, was rather different. Baroness Hale did not adopt that test in that context but nonetheless said that, being concerned with the allocation of finite resources, the Court must treat the decisions of the Secretary of State with "appropriate respect". She then applied the usual four-stage test and found that the settlement but not the lawful residence criterion was incompatible with the claimant's human rights. Lord Hughes agreed with that result but made no comment about the "manifestly without reasonable justification" test. Lord Kerr agreed with Baroness Hale but gave no separate judgment.

96. In their dissenting judgment Lord Sumption and Lord Reed disavowed any attempt to employ a more exacting standard than the "manifestly without reasonable foundation" test- stating that the latter was well established in the context of Article 14 and Article 8. Therefore they considered that both criteria adopted by the Secretary of state were justified.

97. In my view, the test adopted by the majority in *Tigere* was something more exacting than "manifestly without reasonable foundation" while recognising a margin of appreciation where the acts of Member States were concerned.

98. In *Bah* the ECJ stated in paragraph 37 of its judgment that it would "generally respect the legislators' choice unless it was manifestly without reasonable foundation". That, of course, was in the context of national legislation.

99. When it comes to acts of local authorities, as in this case, I do not think that the "manifestly without reasonable foundation" test is sufficient although of course due regard must be paid to the choices facing the Council when distributing scarce resources like housing.

100. But whichever test is the right one, I do not consider that the Council has justified the Scheme here. This is essentially for all the reasons given in relation to indirect discrimination under the Act. And in relation to the model tenants provision, if the aim is to encourage good behaviour and reward that by increased priority, it does not follow automatically that this should be applied to Council tenants only. As a matter of principle, the other Councils referred to above operated the additional priority to non-Council tenants. That also answers the only other real point made by the Council here, namely that it would be impossible to

check on the conduct of any tenants other than Council tenants because the former would not be under the direct control and knowledge of the Council. But as the other Councils policies show, it is possible to devise a set of reasonably robust criteria which must be satisfied by all tenants.

101. I appreciate, as Mr Hutchings points out, that the model tenant element of the Scheme is narrow and specific because it deals only with transfers and not new lettings to those who may simply be in temporary accommodation. I also appreciate that with any transfer, the property left behind will go into the general pool so the overall amount of housing stock is not reduced. But I do not accept these as answers to the challenge. The point remains that there is a class of well-behaved tenant outside this group who cannot take advantage of the Scheme and who are otherwise equally in need of better accommodation. And secondly, while other housing stock becomes available, almost by definition, it is likely to be significantly worse or smaller or less appropriate than that transferred to the moving tenants.

102. Mr Hutchings submits that the Court should be wary of intruding upon areas of allocation of scarce resources like housing and where there may be more than one way of achieving a legitimate aim. I agree that the mere fact of different approaches taken by other councils, does not mean that without more, the Council is bound to follow them. But the point here is a simple evidential one and goes to the critical question of the least intrusive method and fair balance. On this question it would be absurd if the Court did not have real regard to how other councils in more or less the same situation as Ealing have tackled the allocation challenges facing them where they have the same broad aims of incentivising tenants.

103. In my view, it cannot be said that as against the aim of encouraging tenants to work and incentivising good tenant behaviour, the Scheme is the least intrusive method without unacceptable results or that a fair balance has been achieved.

104. Accordingly, the Article 14 challenge succeeds as a whole.

GROUND 3: BREACH OF THE PSED

105. Section 149 (1) (a) of the Act provides that in exercising its functions, a public authority must have due regard to the need to eliminate discrimination and advance equality of opportunity between those who share a protected characteristic and those who do not. Section 149 (3) provides that having due regard to the need to advance equality of opportunity involves having due regard in particular to the need to remove or minimise disadvantages suffered by the relevant protected group.

106. According to the Court of Appeal in *Bracking v SSWP* [2013] EWCA Civ 1345, this imposes a heavy burden on public authorities in discharging the PSED and they must ensure that there is evidence available to demonstrate the discharge of this duty. There needs to be a "conscious approach" and the duty must be exercised "in substance, with vigour and an open mind"; there needs to be a structured attempt to focus on the details of the equality issues. See paragraph 61 of the judgment of McCombe LJ.

107. The relevant functions here are, in my view, the setting up of the Scheme and maintaining and applying it thereafter. Although an Equalities Analysis was appended to the report following the pilot in late September 2013, the Court now needs to take account of the fact that the Council through Ms Parsonage has reviewed the policy and determined that it should continue at least for the time being.

108. To some extent, the "due regard" challenge is bound up with the discrimination challenge. If the approach of the Council in its PSED was simply to look at the overall allocation policy

as a whole as opposed to looking at the possible discriminatory effect of the Scheme itself, then, for all the reasons given above, it will have been concentrating on the wrong matters. That would inevitably flaw the "due regard" process. In my judgment, that has clearly occurred here to a considerable extent.

109. As for the original Equalities Analysis, first there was no proper consideration of how the Scheme might affect the protected groups, which is surprising in the light of the earlier references to the risk of disadvantage in the 2012 documents. Its overall impact in relation to disabilities was said to be positive but it is not explained how. Also the Equalities Analysis says that gender alone is not relevant to access to social housing but it plainly it is, as far as the Scheme itself is concerned because of the likelihood that women who are carers will not be able to qualify.

110. The Cabinet minutes on the reasons for adopting the Scheme simply describe the nature of the allocations policy overall - they do not refer to the PSED. The October 2013 paper which says that there has been no adverse impact from the pilot is not impressive. It wrongly states the minimum work requirement as 16 hours when it is 24 hours, the sample itself is over a six-month period only and it was without a full take-up under the Scheme. Finally the figures said to justify the conclusion were not produced.

111. It is true that Ms Parsonage says that she has had training in the PSED but that is no substitute for explaining what she actually did in order to ensure that the Council complied with it. This is all the more surprising given that in paragraph 24 of her WS, she says that the position of some households within the groups of women, the elderly and disabled, would undoubtedly be better if the working households priority did not exist, that the allocations policy would do more to advance equality of opportunity and that the working households priority fails to do this. She did go on to say in paragraph 28 that to remove the discriminatory effect "altogether" would seriously compromise the achievement of the aim of encouraging tenants to work; but that does not follow at all if a more nuanced approach was taken, as suggested above.

112. What is missing in my judgment is any real enquiry into and consideration of the potential discriminatory effects of the working households element of the Scheme in particular.

113. Moreover, the need for this is highlighted by the comparative figures for disabled applicants as between 2010 and 2015, noted in paragraphs 23, 24 and 52 above. That does not seem to have been taken into account at all.

114. Accordingly I conclude that the Council is in breach of its PSED.

GROUND 4: SECTION 11 CHILDREN ACT 2004

115. Section 11 (2) of the Children Act 2004 is imposes an obligation on the Council to ensure that in discharging its functions, regard must be had to the need to safeguard and promote the welfare of children.

116. Not all children may be adversely affected by the Scheme but those with single-parent carers who cannot work, will be.

117. Here, there appears to have been no actual consideration of the interests of children in this context. All Ms Parsonage says now is that she is aware of the section 11 duty but that is obviously insufficient. The lack of any real consideration is all the more surprising in the light of her comments in paragraph 18 of her WS.

118. Accordingly, I find that there is a breach of this duty as well.

RELIEF

119. Following the handing down of judgment I will consider the question of what particular relief is appropriate.

120. However, at this stage I should address the question of delay in so far as this is advanced in connection with the "due regard" challenges. It is said by the Council that the delay is such as to disentitle the Claimants from any relief at all. As to this, first, even if this is correct, it will not really help the Council because the Claimants succeed on Grounds 1 and 2. Second, in relation to Grounds 3 and 4, I would not accept that any delay on the part of the Claimants means that I should exercise my discretion to refuse any relief. It is correct that the claim form was only issued on 22 October 2015, some two years after the Scheme was formally introduced. But on the other hand, the Court is now invited to consider the position in the light of the very recent review by Ms Parsonage and the decision by the Council to continue the Scheme. Also there is no real prejudice. The Council asserts that those who can and have fulfilled the working household and model tenant criteria have adjusted their long-term behaviour in reliance upon the priority conferred by the Scheme. But for those still "in the queue" under the Scheme as it were, it does not mean the end of it. I have already indicated how it might be maintained on a more nuanced basis. If that gives rise to somewhat more competition under the Scheme then so be it. In any event, the only change in behaviour that can be relied upon (and there is no data to back it up) is that tenants have now gone or gone back to work and other tenants have or are now becoming good tenants. It is very hard to see how such a change in behaviour can be said to be to their prejudice.

121. I am most grateful to both Counsel for the excellence of their written and oral submissions. All consequential matters will be dealt with upon the handing-down of this judgment.