HOUSING ALLOCATIONS

Housing Law Practitioners Association

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1. This note summarises some of the principal challenges to allocation schemes that have tested the changes to allocation policies made by the Localism Act 2011 to the provisions governing allocation in England[1]. The current versions of ss 159, 160ZA, 166, 166A are annexed.

2. The objects of the changes were described in the Allocation of accommodation: guidance for local housing authorities in England ["the Guidance"] as being [2.1][2]:

   a. "To enable housing authorities to better manage their housing waiting list by giving them the power to determine which applicants do or do not qualify for an allocation of social housing.

   b. "Make it easier for existing social tenants to move by removing the constraints of Part 6 from those social tenants who apply to the housing authority for a transfer, unless they have reasonable preference.

   c. "Maintain the protection provided by the statutory reasonable preference criteria – ensuring that priority for social housing goes to those in the greatest need"

3. This was mainly given effect by removing the duty to maintain a Housing Register, by a new s.160ZA and a re-cast of the reasonable preference duty in 166A. S. 159(4A) and 4B also exempted non priority transfers from the provisions of in Part VI.

[1] For reasons of space this note does not address the position in Wales.

[2] See also the December 2013 Guidance Providing social housing for local people: Statutory guidance on social housing allocations for local authorities in England

4. S. 160ZA limited the persons to whom tenancies could be allocated to those who were eligible[3] or who were "qualifying persons". S. 160ZA(7) gave authorities a general power to decide "what classes of person are, or are not, qualifying persons". On the face of it the power is limited only by:
    a. Persons who are not eligible cannot qualify.
    b. Regulations made by the Secretary of State (s. 160ZA(8[4])).
5. The December 2013 Guidance [11-15] in particular encouraged authorities to use qualification criteria to prioritise those with a local connection to the area.

6. Challenges following the new regime have covered:
    a. The legitimacy and scope of qualification criteria.
    b. Over-rigid preference criteria.
    c. Allocations outside the statutory scheme.
    d. Misapplication of preference criteria.
    e. Discrimination under the Equality Act 2010 and under Article 14 ECHR with Article 8.

7. All of these challenges are shadowed by *R. (Ahmad) v Newham London BC* [2009] UKHL 14 where the HL set the tone for the court's approach. At [16], Baroness Hale emphasised that what is now s.166(11) "… makes it clear that, subject to the express provisions, it is for the council to decide on what principles the scheme is to be framed. At [46], Lord Neuberger of Abbotsbury said:

> "… as a general proposition, it is undesirable for the courts to get involved in questions of how priorities are accorded in housing allocation policies … it seems unlikely that the legislature can have intended that judges should

[3] The eligibility rules only apply to the person to whom the property is to be allocated. An authority is not prohibited from allocating accommodation that will be occupied by one or more people who are not eligible. Nor it is required to exclude them in determining what are the needs of the household. However, they are not required to exclude consideration of their immigration status as irrelevant – *R (Ariemuguvbe) v Islington LBC* [2010] HLR 14 [21-2].

[4] Only 2 sets of Regulations have been made: *Allocation of Housing (Qualification Criteria for Right to Move) (England) Regulations* 2015 SI 2015/967 which limits the use of qualification criteria for transfers for work related reasons and Allocation of Housing (Qualification Criteria for Armed Forces (England)(Regulations) 2012 SI No 1869 which prevent authorities from using local connection criteria to disqualify certain persons who are or have served with the armed forces or are associated with them.

> embark on the exercise of telling authorities how to decide on priorities as between applicants in need of rehousing, save in relatively rare and extreme circumstances. Housing allocation policy is a difficult exercise which requires not only social and political sensitivity and judgment, but also local expertise and knowledge."
>
> See also para 62.

8. Initially the novelty of the new regime enabled some" hard edged" challenges to be made that did not involve maters of evaluation. Equally some authorities made decisions that clearly over-reached what was reasonable to achieve the objects of the scheme and so were vulnerable to discrimination complaints. More recently the courts have moved back to a more deferential model. Most recent general attacks on schemes have failed but there has been greater success on the detail of individual decisions.

Challenges to Qualifying Criteria

Reasonable preference

Jakimaviciute v Hammersmith & Fulham LBC [2015] P.T.S.R. 822.

9. The authority had disqualified homeless applicants to whom a full housing duty had been accepted (and so who were owed a duty under 166A(3)). In practice it had the effect of excluding 87% of people accommodated under Pt VII.

10. At first instance the LA argued successfully that qualifying criteria were not governed by the reasonable preference (RP) duty because they were not part of the scheme for allocating accommodation but a separate and prior exercise. This would have had the effect of undermining the reasonable preference duty because authorities could define the RP classes out of the allocation exercise before it began.

11. The Court of Appeal held that the power to set qualification criteria was subject to the reasonable preference duty in s. 166A. It went to hold that the criteria in that

case were unlawful because they impermissibly cut down one of the specified preference groups.

12. The court was not asked to consider whether qualification criteria could never make inroads of any kind into reasonable preference groups and the CA endorsed a submission to the effect that: "It is permissible to adopt a rule excluding individual applicants by reference to factors of general application, such as lack of local connection or being in rent arrears, but it is not permissible to cut down the statutory class in the way that para 2.14(d) attempts to do".

    R (HA) v Ealing [2016] EWHC 2375 (Admin), Goss J.

13. This case took the step that *Jakimaviciute* did not. C had fled domestic violence and the authority accepted that it owed a s. 193 duty to her. Ealing operated an allocation scheme where it was a qualifying condition that applicants had to have live in the area for 5 years, except in exceptional circumstances, which were undefined.

14. This was held to be unlawful because it disqualified people within the reasonable preference categories in 166(3). The policy did not provide for a general exclusion from the 5 year requirement of people subject to RP and the exceptional discretion did not achieve this since it was directed to individual applications in exceptional circumstances and not to general exceptions for people in preference categories.

15. The judge concluded that:

    "23 Although a residency requirement is an entirely appropriate and encouraged provision in relation to admission onto a social housing list, it must not preclude the class of people who fulfil the "reasonable preference" criteria. The defendant's policy does not provide for the giving of reasonable preference to prescribed categories of persons as required by section 166A(3) of the Act. In this respect the policy is unlawful".

16. The combined effect of these cases is seriously to limit an authority's freedom to adopt its own qualifying criteria. Since they must leave the whole of the RP

classes intact the qualifying criteria can only have effect for potential applicants outside those RP classes. This seems to apply to all such criteria, including, for example, anti-social behaviour or eviction for rent arrears. Ealing objected in HA that this was nonsensical because it would undermine the rationale for having bespoke qualify criteria at all. The response was that 4 London Boroughs did exactly that [21].

Exceptions to qualifying criteria

17. The Supplementary English Code (de 2013) recommends [p. 6] that provision is made for exceptional cases and the ombudsman has indicated that they expect this and are likely to find fault if it is not present[5]. Despite this, there is first instance authority that there can be a blanket qualifying criterion without the need for an exceptional case discretion.

18. *R (Hillsden) v Epping Forest DC* [2015] EWHC 98 (Admin) concerned a challenge to a scheme that imposed a qualification criterion that applicants had to demonstrate 3 years continuous residence in the Borough (2.5 years for those already on the list at the time of the new policy). McCloskey J held that this was not subject to any exceptions, rejecting the C's claim to the contrary [23]. He went on to hold that this blanket ban was lawful because:

> "There is nothing in the governing legislation which requires a LHA to include within its housing allocation scheme provision for the discretionary admission to the Housing Register of applicants who do not satisfy the qualifying criteria" [26, 39]

19. The claimant could not point to a statutory discretion and so there was no room for the application of the *British Oxygen* principle against fettering discretion: "the absence of a residual, or overarching, discretionary provision in the impugned Scheme is not attributable to the erection by the Council of some inflexible rule or policy relating to how it will exercise a statutory discretion" [30, 39].

[5] Full House: Council's role in allocating social housing – Focus report: learning lessons from complaints (LGO Jan 2016).

20. However, a blanket rule may still impermissibly cut down the reasonable preference categories and be unlawful for that reason (see below). A failure to have an exceptions policy may also be a failure to make reasonable adjustments or unjustifiable indirect discrimination.

21. The question whether an allocation scheme must have a residual discretion was left open in *Holley v Hillingdon LBC* 2017 HLR 24 CA [27]

Reasonable preference challenges

22. Although the cases described above limited the power of authorities to limit their lists through qualification criteria the court in *Jakimaviciute* observed that much the same outcome could be achieved through reasonable preference criteria. At [50] Lord Richards noted that the: "challenge was not to the rationality of the council's overall objective. If those falling within para 2.14(d) *[the paragraph in the scheme that prevented J from qualifying]* have a lesser need for social housing than other people within the reasonable preference classes, the council may wish to consider whether it is possible to reflect that factor in an appropriate banding structure under the scheme in place of the impermissible exclusion effected by para 2.14(d)"

23. Reasonable preference means giving those entitled to it a "reasonable head start" *Jakimaviciute* citing *R v Wolverhampton Metropolitan Borough Council, Ex p Watters* 29 HLR 931, 938. However, this does not exclude consideration of other factors and they may diminish, or even eliminate the preference (see below).

24. Moreover, this does not mean that the preference must be given "at all times and in relation to all properties. It is sufficient if such preference is given over the course of a reasonable period" – *R (Babakandi) v Westminster CC* [2011] EWHC 1756 (Admin) [22], permission refused at [2011] EWCA Civ 1397. However in *R(Alemi) v Westminster CC* [2015] EWHC 1765 (Admin) WCC operated a scheme under which applicants were eligible for the private rented sector only for 12 months and during that time they were precluded from bidding under a choice

based lettings scheme for properties in the social housing sector. Blair J held that this was impermissible as an "arbitrary" time period, unrelated to the statutory purpose of allocating accommodation in the sense of managing relative priorities. He held that the reasonable preference had to be given "for some part of the LHA's annual distribution cycle" [31] "however remote that possibility might be".

25. The judge drew support for this analysis from the examples given in s. 166A(5), which, he said permit different priority but not a scheme that "altogether remove[s] them from the potential of being allocated social housing" [29]

26. This has, in turn since been doubted in:

R (Woolfe) v Islington LBC [2016] HLR 42 Holman J

27. W lived with her mother in her one bedroom flat but had to sleep on the sofa. In 2014 she became pregnant and a s. 193 duty was accepted. She was then accommodated in the PRS.

28. The relevant provisions of the allocation scheme gave 10 points to a person who had been accepted as homeless and was in private sector accommodation and awarded 100 points for residence in the Borough. Additional points were awarded on welfare grounds in bands (40, 80 or 150). Applicants could only bid for properties if they had 120 or more points. W had 110 points (10 for the s. 193 duty + PRS and 100 for her residence).

29. W challenged the allocation of points on various grounds and succeeded on the basis that she in fact ought to have qualified for an additional 90 points under a "New Generation" scheme. This turned on the way that provision had been drafted.

30. The points of more general application were:
    a. Whether the scheme gave her a reasonable preference when the points allocated to her meant she could not bid for properties.

b. Whether the points threshold breached s. 11 Children Act 2004?

31. As to reasonable preference:

32. The judge referred to *R. v Wolverhampton MBC Ex p. Watters* (1997) 29 H.L.R. 931 where W was in a RP group but excluded from the register on the basis that she had rent arrears. The Court of Appeal held there that reasonable preference did not preclude consideration of other factors and they may diminish, or even nullify the preference required to be given. As Judge LJ put it:

> "The statutory obligation … therefore requires that positive favour should be shown to applications which satisfy any of the relevant criteria. To use colloquial language they should be given a reasonable head start. Thereafter all the remaining factors fall to be considered in the balancing exercise inevitably required when each individual application is under consideration. If despite the head start the housing authority eventually decides on reasonable grounds that the application for a tenancy must be rejected this will not constitute a breach of the obligations imposed by [the section".

33. And by Dyson LJ in *R (Lin) v Barnet* [2007] HLR 440*:*

> "Compliance with [the section] does not depend on outcomes … Preference should not be confused with prospects of success. Prospects of success depend on many factors, of which the most material is the fact that the demand for accommodation greatly exceeds the supply. It is quite possible for a lawful scheme to give reasonable preference to a person within [the section] and for that person never to be allocated Part 6 housing … 28. As to whether the preference is 'reasonable', it seems to me that this is a matter for the discretion of the council … "

34. The judge noted that these cases were not directly in point because they involved countervailing factors whereas in Woolfe's case where was simply a lack of qualification on positive factors. It is doubtful whether that is a distinction with any real difference.

35. The judge also distinguished the more recent cases; *Jakmaviciute* and *HA* were about exclusion from the register and *Alemi* involved admission to the register but then an "absolute bar against bidding for 12 months no matter how strong her case".

36. The conclusion was that 10 points did give W a preference and it was not for the court to adjudicate on the reasonableness of that preference:

> "In my view, the setting of the bidding threshold is a different aspect of the overall allocation process, not itself concerned with the issue of preference or priorities. Preference has already been assessed by the awarding of points".

37. The authority were entitled to set the threshold at a level that managed the volume of applicants by limiting them to people who stood a realistic chance of being re-housed and the threshold was lawful.

38. It is not entirely clear whether this reasoning is intended to mean that only the points matter for the reasonable preference question and the bidding threshold is a matter of rationality. If so then it is questionable whether this is the right approach. Although there is no right to accommodation the threshold is still part of a scheme for allocation. Ultimately this makes no difference and in determining what is a reasonable preference the authority may take account of pressures on its stock and how to manage them. The judge's approach here may have been driven by his questionable distinction between adverse matters weighing against the applicant and other factors.

39. As to s. 11 of the 2004 Act there was no issue about whether this applied. It was also common ground that it was for the authority to adduce evidence that they had discharged their duty [47]. However, there was such evidence. It was sufficient for the authority, in consultation with social services, to address children's welfare through the availability allocation of welfare points in the scheme and specifically in relation to W when considering her case:

> "Provided the welfare of children can be sufficiently safeguarded and promoted in individual cases by the award of welfare points, there is in my view no inconsistency between the statutory duty under s.11 and the setting of a points threshold for the practical reasons already discussed".

Discrimination arguments

40. In *HA v Ealing* (above) a further strand of argument was based on discrimination under the Equality Act 2010 and the ECHR

41. Goss J readily found that a residence requirement was discriminatory against women victims of domestic violence who were more likely to have moved recently to the area (as also accepted in *R (Winder) v Sandwell MBC* [2015] PTSR 34 at para 85 – involving a residence qualification for a council tax reduction scheme). It was further accepted that being a victim of domestic violence amounted to a status for the purposes of Article 14.

42. The judge dealt with the ambit of Article 8 briefly:

> "there must be a link to another Convention article. The link here is said to be home and family life. There is no enshrined right to a physical home; the right is to the enjoyment of a family life. However, this can, in reality, only be enjoyed in settled accommodation. Accordingly, I am satisfied there is a sufficient link".

43. The only remaining issue was justification. Goss J held that none had been demonstrated for the different impact – i.e. treating victims of domestic violence differently [30].

44. For similar reasons the policy was found to discriminate indirectly in breach of ss 29 (public functions) and 19 (indirect discrimination) of the Equality Act 2010.

45. The claim also succeeded on:

    a. S. 11 of the Children Act 2004. Here the judge placed the burden of showing compliance on the authority: "there is nothing to show that the defendant made arrangements to ensure that it discharged its functions having regard to the need to safeguard and promote the welfare of children either in terms of formulating the policy or, more particularly in applying it to the individual circumstances of the claimant and her children in her case" [36].

    b. The facts since there was no evidence that the exceptionality criterion was applied 38.

H v Ealing LBC

46. A total of 20% of available properties were reserved for a working household priority scheme (WHPS) and model tenant priority scheme (MTPS). The WHPS, it was was argued discriminated against women, the elderly and the disabled who were less likely to find work. The MTPS discriminated against non-tenants who could not meet its terms. The claim was framed under s. 19 of the Equality Act 2010 (in relation to the WHPS only since the MTPS did not engage protected charecteristics), Article 14 ECHR taken together with Art 8, the public sector equality duty and s. 11 of the Children Act 2004 (HHJ Waksman QC [2016] PTSR 1546) allowed each of the claims.

47. The Court of Appeal [2018] HLR 2 allowed the Council's appeal but upheld the judge's reasoning in some important respects:

48. Firstly, the authority argued that there was not even prima facie discrimination in relation to the WHPS because although the measure taken on its own had a disadvantageous adverse impact the scheme had to be looked at overall and the disadvantaged groups fared better in respect of the 80% of properties that were not reserved for the two schemes. This "swings and roundabouts" argument was rejected and could not survive the concession that the schemes were a provision criterion or practice that had a disadvantageous impact on protected groups [59]. However, the overall scheme was relevant to justification.

49. On justification the authority argued that the correct approach (under the EA 2010 and the Convention) was the 4 stage approach to justification set out in *Bank Mellat v HM Treasury (No.2) [2013] UKSC 38; [2014] A.C. 700* at 74:

> "(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the

measure will contribute to its achievement, the former outweighs the latter. … In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure"

75. In relation to the third of these criteria, Dickson CJ made clear in R. v Edwards Books and Art Ltd [1986] 2 S.C.R. 713 at 781–782 that the limitation of the protected right must be one that 'it was reasonable for the legislature to impose', and that the courts were 'not called on to substitute judicial opinions for legislative ones as to the place at which to draw a precise line'. This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (Illinois State Board of Elections v Socialist Workers Party (1979) 440 U.S. 173 , 188–189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. …".

50. It was further argued that since this was a policy decision on economic and social matters the test for review ought to be whether the measure was "manifestly without reasonable foundation". The court did not engage with this but other cases – see below - have held that this is <u>not</u> the correct test.

51. The CA held that the judge had not been entitled to find justification based on the fact that other authorities had acted differently in operating a "safety valve" by way of discretion or other type of community contribution. Their polices were radically different [82]. Critically, they applied to the whole of their housing stock whereas the WHPS only applied to 15% in Ealing. Banding throughout the WHPS and the remaining stock gave priority to women led households, to disabled people and those needing sheltered housing.

52. The judge also went too far in requiring Ealing to show, by evidence, that the policy actually did encourage movement into work [84]. That was an "unacceptable incursion by the court into the practical running of a housing allocation scheme such as the WHPS". In addition, on the issue of justification the council <u>was</u> able to point to the rest of the allocation policy which assisted the protected groups.

53. As to Convention discrimination, all members of the court overturned the judge's reasoning, broadly for the same reasons as under s. 19 [106-8].

54. However, the court made highly restrictive comments about whether the facts fell within the ambit of Article 8, as they have to do to found a claim under Article 14.

55. Etherton MR referred to previous cases that suggested a need for a "personal interest close to the core of the right" to be involved [93] citing *Clift v SSHD* [2007] 1 AC 484 [13].

56. He held that the MTPS, which concerned the transfer of a secure tenant who is already housed, was not within the ambit Article 8 at all. His reasoning appears to be that this was neither a means of keeping families together and so a "modality" of respect for family life (see *Morris v Westminster CC* [2005] EWCA Civ 1184), nor a case involving eligibility of a family unit "for assistance in finding accommodation when they were threatened with homelessness" – *Bah v United Kingdom* 54 EHRR 21.

57. He held that the WHPS was within the ambit of Article 8 since it involved a move from precarious accommodation and "in accordance with the principle in *Bah* , since local authorities are bound to provide the homeless in priority need with accommodation, and homelessness is related to the enjoyment of family life, then they must do so in a non-discriminatory way"

58. This is not a satisfactory means of distinguishing between the two schemes because it does not compare like with like. When assessing the MTPS the judge looked at the people who benefitted from the scheme but when looking at the WHPS he focussed on those who were excluded by it. The latter approach ought to have applied in both cases. The question is whether the "facts" (see e.g. *Michalak v LB Wandsworth* [2003] 1 WLR 617 para 20) fall within the ambit of right in question here they were that non-tenants in priority groups were in both cases being excluded from a section of the stock that they needed to access to have

a secure home – which Etherton MR appears to have accepted was within the scope of family life.

59. The other two members of the court were stricter still.

60. Davis LJ agreed that the MTPS was not within the ambit of Art 8 but would also not be minded to accept that WHPS was within the ambit either since "I do not, as at present advised, accept that there is, for these purposes, a "right" to settled or permanent accommodation protected by or within the reach of art.8.

61. Underhill LJ was also minded not to accept that the WHPS was within the ambit of Article 8. He disputed the proposition (accepted at first instance and in *HA v Ealing*) that "the enjoyment of settled accommodation is said to fall within art.8 because family life cannot be enjoyed without it". He accepted that this was so for rights "intended to take a family out of precarious accommodation" such as Part VII but he did not accept that this extended to accommodation provided in discharge of the Part VII duty or other accommodation occupied by applicants under Part VI who, he claimed, are not moving to settled from "precarious" accommodation.

62. If this is the basis for Underhill LJ's reservations then it does little to recognise the adverse impact on family life, health, dignity and children's development of unsatisfactory and unsettled (in the broad sense) accommodation[6]. It is well established that the private life aspect of Article 8 is a broad term not susceptible to exhaustive definition and that it covers a right to personal development, and the right to establish and develop relationships with other human beings and the outside world – *Pretty v United Kingdom* 35 EHRR 1 @61. Benefits that are intended to promote private and family life, by affecting way it is arranged are within the ambit of Article 8 – *Petrovic v Austria* (2001) 33 EHRR 14 *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016. Against this background allocation

[6] See, among many studies on the topic:
https://england.shelter.org.uk/__data/assets/pdf_file/0016/39202/Chance_of_a_Lifetime.pdf ;
https://england.shelter.org.uk/__data/assets/pdf_file/0010/726166/People_living_in_bad_housing.pdf

schemes can be described as a way in which the state, through housing authorities, shows respect for the values caught by Art 8. This is reinforced by the UNCRC Arts 26 and 27 which recognise duties to "provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing" in order to secure "a standard of living adequate for the child's physical, mental, spiritual, moral and social development". Likewise the UNCRPD refers to a duty to make reasonable adjustments and to the "equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right" (Art 19)

63. Although there is no right to a home under Art 8 this engages the principle recently affirmed in a different context by the Court of Appeal in *Smith v* Lancashire Teaching Hospitals NHS Foundation Trust [2018] PIQR P5 @55[7].

> "if the State has brought into existence a positive measure which, even though not required by art.8, is a modality of the exercise of the rights guaranteed by art.8 , the State will be in breach of art.14 if the measure has more than a tenuous connection with the core values protected by art.8 and is discriminatory and not justified. It is not necessary that the measure has any adverse impact on the complainant in a positive modality case other than the fact that the complainant is not entitled to the benefit of the positive measure in question".

R (Osman) v LB Harrow [2017] EWHC 274 (Admin) (Robin Purchas QC)

64. O was in the private rented sector and seriously overcrowded – 2 adults and 4 children in a single bedroom flat. She had been in band A but this was then moved to band C when the council altered its policy to remove overcrowded homes (by 2 or more bedrooms) from band A on the basis that this encouraged people to stay in overcrowded properties when they could improve their housing circumstances by moving within the PRS [29]. This was based on an assessment by the council's officers. The judge recorded that there was no contrary evidence [66] and he rejected an argument that there had been insufficient research or analysis [72]. The

[7] Concerning discrimination in bereavement awards which were not available to the survivor of a cohabiting couple.

change did not affect those in social housing on the basis that they did not realistically have the option of giving up their secure tenancy and moving to the PRS.

65. The challenge was on the basis of Article 14 taken together with Article 8 (which it was accepted was engaged) and on the ground that the scheme discriminated between social sector tenants (transfer cases) and others (homeseekers). The judge rejected arguments that the council had misdirected itself in favouring council tenants because of a mistaken view of its contractual duty to avoid overcrowding or because to failed to have regard to the option of mutual exchange (so that council tenants could move without giving up their security).

66. The judge gave "considerable weight" to the council's own evaluation [64] of the position. Although the two groups were comparable the council was entitled to take into account the differences and the willingness or realism about moving [66]. It was a legitimate aim to reduce the perverse incentive that had been identified and to make the best use of scarce resources. Homeseekers continued to have some preference and the reduction in preference was proportionate and justified [73].

R (YA) v Hammersmith and Fulham LBC [2016] HLR 650 Peter Marquand

67. YA was a care leaver who had a number of serious convictions when still a child and were "spent" under the Rehabilitation of Offenders Act 1974. The LA decided he was not qualified under an "unacceptable behaviour" provision in its scheme. They refused to exercise a discretion in his favour.

68. YA succeeded under the 1974 Act. The Defendant argued that the exclusion was not because of the conviction but because of the underlying behaviour. That failed because it was not possible to separate the two. s. 4 of the 1974 Act also provides that the person "must treated for all purposes in law as a person who has not committed … the offence". The object is to prevent spent past offending from coming to light and this would be undermined if the underlying behaviour could

be referred to because the offence would then be obvious. In any case the authority defined the exclusion in YA's case by reference to the offences and did not rely on any other bad behaviour.

69. A discrimination clam failed. It was accepted that the case was within the ambit of Article 8 because of the "the link between the process, private life and the need for settled accommodation for vulnerable individuals" [62]. Moreover being a care leaver was a status and there was prima facie discrimination since they were more likely to have convictions. However, the measure was justified given the need to consider the rights and interests of the whole community and the fact that the position of individual care leavers could be addressed through the exercise of discretion to include so allowing consideration of special circumstances and avoiding a blanket application of the section [85].

***R (XC) v Southwark LBC* [2017] HLR 380, Garnham J**

70. XC applied for a transfer on medical grounds and so was in a RP category. The authority operated a "starring" system that gave additional priority to working households and those who performed voluntary work. These provisions could be waived in exceptional circumstances. C challenged this part of the scheme on the basis that it discriminated against the disabled and women who were less able to undertake paid or voluntary work. The claim was framed as indirect discrimination under the Equality Act 2010.

71. Garnham J followed HHJ Waksman in *HA* (on which he has been upheld by the Court of Appeal see above) in rejecting a submission that it deciding whether there was any difference in treatment the scheme as a whole should be considered. On the facts it is notable that there was not a significant disparity between the proportions of men and women doing qualifying voluntary work (27% vs 26%). But the scheme gave no priority for voluntary caring responsibilities, which the judge accepted were more likely to be undertaken by women [77].

72. As to the justification the judge did not agree that the test was "manifestly without reasonable foundation" as this was not comparable to regulations adopted by parliament [81]. The correct test was that adopted in *Aster Communities v Akerman-Livingstone* [2015] A.C. 1399 and in Bank Mellat v HM Treasury (No.2) [2014] A.C. 700 (see above).

73. The main issue here was on questions 3 and 4 (least intrusive measure and fair balance). The judge pointed out that a reasonable preference scheme does, by its nature, discriminate since a preference to one will necessarily mean a detriment to another [90-2]. The LA was entitled to favour those in work and who volunteer and this was consistent with the Guidance [97]. The key considerations were:

    a. The classes intended to benefit would be unduly broadened if they included all those who gave some voluntary care or who could not work because of disability. The scheme was the least intrusive possible and which struck the right balance. [98, 99].

    b. The scheme provided for a discretion in exceptional circumstances and so mitigated any unfairness through this "safety valve" [100]. In this respect the case was different from *H v LB Ealing*.

    R (C) v Islington LBC [2017] HLR 32 Baker J

74. This was a further challenge to aspects of the allocation scheme in issue in *Woolfe*. C was a homeless applicant in PRS Part VII accommodation who was awarded 110 points, below the 120 needed for bidding. She initially argued that she ought to have an additional 40 welfare points but also challenged a "local lettings policy" under which if new homes were constructed on existing estates, the authority gave priority to residents on those estates. This challenge was on the basis that it indirectly discriminated against women victims of domestic violence and it had been adopted in breach of the PSED (s. 149 Equality Act 2010) and s. 11 Children Act 2004.

75. The D's evidence showed that some direct offers had been made to applicants with fewer than 120 points but more than 100 points.

76. Baker J held that:

77. There was no error in not awarding C an additional 40 points. The welfare scheme referred to a need for "settled" accommodation but in context that did not mean Part VI accommodation and could be satisfied by Part VII accommodation. The D was entitled to conclude that C was in housing that was suitable and settled.

78. The scheme was unlawful as regards the way it dealt with direct offers. It referred to such offers but implicitly stated that they too were only available to those with 120 points or more. In fact they were made to those with more than 100 points. This was significant since 37% of homeless applicants were made direct offers yet this feature it could not be ascertained from the written scheme. This was a breach of s. 166A(1) of the 1996 Act and also a breach of the common law which requires decisions to be made in accordance with published policies [*R (Lumba) v SSHD* UKSC 12].

79. The local lettings policy was lawful and not unjustifiably discriminatory. It was accepted that the claim was within the ambit of Article 8 and that being a victim of domestic violence was a status and that such victims were likely to be women so that the status of sex was relevant.

80. What was in issue was:

81. Whether the beneficiaries of the local lettings policy were in a sufficiently analogous situation. C succeeded on this. While there were differences they were not "so obviously relevant to prevent the claimant and the beneficiaries from being in analogous situations. On the contrary, they are all individuals who are seeking to be allocated social housing under the 2015 scheme" [74].

82. Whether the difference in treatment was justified.

83. For these purposes the court could have regard to the whole scheme as part of the context [76-7].

84. The *Bank Mellat* approach was the right one [78]. The approach to the 4th question (fair balance) was not "manifestly without reasonable foundation" but:

> "I consider that it is a matter for the court to determine the question of proportionality on the basis submitted by the claimant; albeit, as the policy also concerns the allocation of finite resources, namely social housing, by a body that not only has considerable expertise and experience in these matters, but has been entrusted with this task by Parliament, significant weight should be accorded to the defendant's decision".

85. Notwithstanding this conclusion the judge cited and applied the restrictive approach in *Ahmad v Newham LBC* [2009] UKHL 14 [91-2]

86. The policy was justified for a number of reasons:

a. It was not a total bar to homeless applicants being granted a tenancy of a new property.

b. There was no evidence that it led to such applicants being excluded from more desirable properties.

c. While the D recognised that the policy might lead to applicants with a lower priority moving to a new property they would vacate the old one – which would be available for letting.

d. The policy therefore contributed to "churn" enabling moves to suitable housing.

e. The policy was being monitored. In the year to May 2016 89 had been let in this way out of 1172, 76% being let to women.

f. The policy contributed to stable communities.

87. The challenges under s. 149 EA 2010 and s. 11 Children Act 2004 were also rejected on the facts.

Children Act 1989/2004

R (J & L) v Hillingdon LBC [2017] EWHC 3411 (Admin) Nicklin J

88. J was a single mother of L, an 8 year old with severe disabilities, learning difficulties and uncontrolled epilepsy. Her accommodation was in disrepair, not adapted and in an unsafe location as it was next to an industrial car park and busy road.

89. The case illustrates the relationship between duties under the s. 17 Children Act 1989 and s. 11 Children Act 2004 2004 duties and allocations. J's Part VI application was rejected on the basis that no medical or housing need had been identified. By then there was a lengthy Children and Families (C & F) assessment that identified a number of risks and while they did not think that the case was so urgent as to require action outside the normal bidding process the risk was only tolerable in the short term.

90. The judge made various criticisms of the C & F assessment (in particular that it failed to adopt an integrated approach to managing risk and that it failed to address how review meeting L's needs). However, and for present purposes, the significant point is that the C & F assessment formed the basis for a strong criticism of the allocations decision [66,7] which failed to address it. That led to a linked failure actively to promote the welfare of L within the allocation process [67, 69] as required by s. 11 of the Children Act 2004 [see 44-7 for a useful summary of the current state of the law on this].

91. This was further considered at [75] where the judge addressed a complaint that the argument amounted to making social services into another kind of housing authority. The judge explained the relationship as follows:

a. in the C&F Assessment, the social worker did not consider that the housing need was so acute that it required s.17(6) assistance and the issue of housing need would be considered by the housing department of the Defendant (see paragraph 58 above);

b. the Decision Letter (the principal decision under challenge) refused housing under Part VI of the Housing Act; and

c. in light of the that negative decision, there remained unaddressed risks to L arising from his housing situation identified in the C&F Assessment that the Defendant should have reconsidered under its s.17 duty and the Working Together Guidance. It did not do so.

92. This did not necessarily mean that housing would then be provided under s. 17(6) as the risks might then be managed in different ways.

93. The judge also considered that s. 11 (it was not necessary finally to decide the point) may have a role to play in interpreting the allocation scheme so that the "other urgent welfare reasons" category should be interpreted so as to be consistent with it.

MARTIN WESGATE QC 12 Mar 2018

Housing Act 1996 c. 52

Part VI ALLOCATION OF HOUSING ACCOMMODATION

Introductory

This version in force from: **January 15, 2012** to **present**

(version 5 of 5)

159.— Allocation of housing accommodation.

(1) A local housing authority shall comply with the provisions of this Part in allocating housing accommodation.

(2) For the purposes of this Part a local housing authority allocate housing accommodation when they—

(a) select a person to be a secure or introductory tenant of housing accommodation held by them,

(b) nominate a person to be a secure or introductory tenant of housing accommodation held by another person, or

(c) nominate a person to be an assured tenant of housing accommodation held by [a private registered provider of social housing or] [1]

a registered social landlord.

(3) The reference in subsection (2)(a) to selecting a person to be a secure tenant includes deciding to exercise any power to notify an existing tenant or licensee that his tenancy or licence is to be a secure tenancy.

(4) The references in subsection (2)(b) and (c) to nominating a person include nominating a person in pursuance of any arrangements (whether legally enforceable or not) to require that housing accommodation, or a specified amount of housing accommodation, is made available to a person or one of a number of persons nominated by the authority.

[(4A) Subject to subsection (4B), the provisions of this Part do not apply to an allocation of housing accommodation by a local housing authority in England to a person who is already—

(a) a secure or introductory tenant, or

(b) an assured tenant of housing accommodation held by a private registered provider of social housing or a registered social landlord.

(4B) The provisions of this Part apply to an allocation of housing accommodation by a local housing authority in England to a person who falls within subsection (4A)(a) or (b) if—

(a) the allocation involves a transfer of housing accommodation for that person,

(b) the application for the transfer is made by that person, and

(c) the authority is satisfied that the person is to be given reasonable preference under section 166A(3).

[(5) The provisions of this Part do not apply to an allocation of housing accommodation [by a local housing authority in Wales] [4]

to a person who is already a secure or introductory tenant unless the allocation involves a transfer of housing accommodation for that person and is made on his application.

(7) Subject to the provisions of this Part, a local housing authority may allocate housing accommodation in such manner as they consider appropriate.

[**160ZA Allocation only to eligible and qualifying persons: England**

(1) A local housing authority in England shall not allocate housing accommodation—

(a) to a person from abroad who is ineligible for an allocation of housing accommodation by virtue of subsection (2) or (4), or

(b) to two or more persons jointly if any of them is a person mentioned in paragraph (a).

(2) A person subject to immigration control within the meaning of the Asylum and Immigration Act 1996 is ineligible for an allocation of housing accommodation by a local housing authority in England unless he is of a class prescribed by regulations made by the Secretary of State.

(3) No person who is excluded from entitlement to [universal credit or] [2]

housing benefit by section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) shall be included in any class prescribed under subsection (2).

(4) The Secretary of State may by regulations prescribe other classes of persons from abroad who are ineligible to be allocated housing accommodation by local housing authorities in England.

(5) Nothing in subsection (2) or (4) affects the eligibility of a person who falls within section 159(4B).

(6) Except as provided by subsection (1), a person may be allocated housing accommodation by a local housing authority in England (whether on his application or otherwise) if that person—

(a) is a qualifying person within the meaning of subsection (7), or

(b) is one of two or more persons who apply for accommodation jointly, and one or more of the other persons is a qualifying person within the meaning of subsection (7).

(7) Subject to subsections (2) and (4) and any regulations under subsection (8), a local housing authority may decide what classes of persons are, or are not, qualifying persons.

(8) The Secretary of State may by regulations—

(a) prescribe classes of persons who are, or are not, to be treated as qualifying persons by local housing authorities in England, and

(b) prescribe criteria that may not be used by local housing authorities in England in deciding what classes of persons are not qualifying persons.

(9) If a local housing authority in England decide that an applicant for housing accommodation—

(a) is ineligible for an allocation by them by virtue of subsection (2) or (4), or

(b) is not a qualifying person,

they shall notify the applicant of their decision and the grounds for it.

(10) That notice shall be given in writing and, if not received by the applicant, shall be treated as having been given if it is made available at the authority's office for a reasonable period for collection by him or on his behalf.

(11) A person who is not being treated as a qualifying person may (if he considers that he should be treated as a qualifying person) make a fresh application to the authority for an allocation of housing accommodation by them.

[**166 Applications for housing accommodation**

(1) A local housing authority shall secure that—

(a) advice and information is available free of charge to persons in their district about the right to make an application for an allocation of housing accommodation; and

(b) any necessary assistance in making such an application is available free of charge to persons in their district who are likely to have difficulty in doing so without assistance.

[(1A) A local housing authority in England shall secure that an applicant for an allocation of housing accommodation is informed that he has the rights mentioned in section 166A(9).

(2) A local housing authority [in Wales] [3]

shall secure that an applicant for an allocation of housing accommodation is informed that he has the rights mentioned in section 167(4A).

(3) Every application made to a local housing authority for an allocation of housing accommodation shall (if made in accordance with the procedural requirements of the authority's allocation scheme) be considered by the authority.

(4) The fact that a person is an applicant for an allocation of housing accommodation shall not be divulged (without his consent) to any other member of the public.

(5) In this Part *"district"* in relation to a local housing authority has the same meaning as in the Housing Act 1985 (c. 68).[...] [4]

[**166A Allocation in accordance with allocation scheme: England**

(1) Every local housing authority in England must have a scheme (their "allocation scheme") for determining priorities, and as to the procedure to be followed, in allocating housing accommodation.

For this purpose *"procedure"* includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken.

(2) The scheme must include a statement of the authority's policy on offering people who are to be allocated housing accommodation—

(a) a choice of housing accommodation; or

(b) the opportunity to express preferences about the housing accommodation to be allocated to them.

(3) As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to—

(a) people who are homeless (within the meaning of Part 7);

(b) people who are owed a duty by any local housing authority under section 190(2), 193(2) or 195(2) (or under section 65(2) or 68(2) of the Housing Act 1985) or who are occupying accommodation secured by any such authority under section 192(3);

(c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions;

(d) people who need to move on medical or welfare grounds (including any grounds relating to a disability); and

(e) people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others).

The scheme may also be framed so as to give additional preference to particular descriptions of [people within one or more of paragraphs (a) to (e)] [2]

(being descriptions of people with urgent housing needs).

[The scheme must be framed so as to give additional preference to a person with urgent housing needs who falls within one or more of paragraphs (a) to (e) and who –

(i) is serving in the regular forces and is suffering from a serious injury, illness or disability which is attributable (wholly or partly) to the person's service,

(ii) formerly served in the regular forces,

(iii) has recently ceased, or will cease to be entitled, to reside in accommodation provided by the Ministry of Defence following the death of that person's spouse or civil partner who has served in the regular forces and whose death was attributable (wholly or partly) to that service, or

(iv) is serving or has served in the reserve forces and is suffering from a serious injury, illness or disability which is attributable (wholly or partly) to the person's service.

For this purpose *"the regular forces"* and *"the reserve forces"* have the meanings given by section 374 of the Armed Forces Act 2006.

(4) People are to be disregarded for the purposes of subsection (3) if they would not have fallen within paragraph (a) or (b) of that subsection without the local housing authority having had regard to a restricted person (within the meaning of Part 7).

(5) The scheme may contain provision for determining priorities in allocating housing accommodation to people within subsection (3); and the factors which the scheme may allow to be taken into account include:

(a) the financial resources available to a person to meet his housing costs;

(b) any behaviour of a person (or of a member of his household) which affects his suitability to be a tenant;

(c) any local connection (within the meaning of section 199) which exists between a person and the authority's district.

(6) Subject to subsection (3), the scheme may contain provision about the allocation of particular housing accommodation—

(a) to a person who makes a specific application for that accommodation;

(b) to persons of a particular description (whether or not they are within subsection (3)).

(7) The Secretary of State may by regulations—

(a) specify further descriptions of people to whom preference is to be given as mentioned in subsection (3), or

(b) amend or repeal any part of subsection (3).

(8) The Secretary of State may by regulations specify factors which a local housing authority in England must not take into account in allocating housing accommodation.

(9) The scheme must be framed so as to secure that an applicant for an allocation of housing accommodation—

(a) has the right to request such general information as will enable him to assess—

(i) how his application is likely to be treated under the scheme (including in particular whether he is likely to be regarded as a member of a group of people who are to be given preference by virtue of subsection (3)); and

(ii) whether housing accommodation appropriate to his needs is likely to be made available to him and, if so, how long it is likely to be before such accommodation becomes available for allocation to him;

(b) has the right to request the authority to inform him of any decision about the facts of his case which is likely to be, or has been, taken into account in considering whether to allocate housing accommodation to him; and

(c) has the right to request a review of a decision mentioned in paragraph (b), or in section 160ZA(9), and to be informed of the decision on the review and the grounds for it.

(10) As regards the procedure to be followed, the scheme must be framed in accordance with such principles as the Secretary of State may prescribe by regulations.

(11) Subject to the above provisions, and to any regulations made under them, the authority may decide on what principles the scheme is to be framed.

(12) A local housing authority in England must, in preparing or modifying their allocation scheme, have regard to—

(a) their current homelessness strategy under section 1 of the Homelessness Act 2002,

(b) their current tenancy strategy under section 150 of the Localism Act 2011, and

(c) in the case of an authority that is a London borough council, the London housing strategy.

(13) Before adopting an allocation scheme, or making an alteration to their scheme reflecting a major change of policy, a local housing authority in England must—

(a) send a copy of the draft scheme, or proposed alteration, to every private registered provider of social housing and registered social landlord with which they have nomination arrangements (see section 159(4)), and

(b) afford those persons a reasonable opportunity to comment on the proposals.

(14) A local housing authority in England shall not allocate housing accommodation except in accordance with their allocation scheme.

Children Act 2004 c. 31

11 Arrangements to safeguard and promote welfare

(1) This section applies to each of the following–

(a) a [local authority] [1]

in England;

(b) a district council which is not such an authority;

(ba) the National Health Service Commissioning Board;

(bb) a clinical commissioning group;

(d) a Special Health Authority, so far as exercising functions in relation to England, designated by order made by the Secretary of State for the purposes of this section;

(f) an NHS trust all or most of whose hospitals, establishments and facilities are situated in England;

(g) an NHS foundation trust;

(h) the [local policing body] [6]

and chief officer of police for a police area in England;

(i) the British Transport Police Authority, so far as exercising functions in relation to England;

[(ia) the National Crime Agency;

(j) a local probation board for an area in England;

(ja) the Secretary of State in relation to his functions under sections 2 and 3 of the Offender Management Act 2007, so far as they are exercisable in relation to England;

(k) a youth offending team for an area in England;

(l) the governor of a prison or secure training centre in England (or, in the case of a contracted out prison or secure training centre, its director);

(la) the principal of a secure college in England;

(m) any person to the extent that he is providing services [in pursuance of section 74 of the Education and Skills Act 2008] [10]

(2) Each person and body to whom this section applies must make arrangements for ensuring that–

(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and

(b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.

(3) In the case of a [local authority] [1]

in England, the reference in subsection (2) to functions of the authority does not include functions to which section 175 of the Education Act 2002 (c. 32) applies.

(4) Each person and body to whom this section applies must in discharging their duty under this section have regard to any guidance given to them for the purpose by the Secretary of State.