



Discrimination in allocation schemes

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GARDEN COURT CHAMBERS



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Equality Act 2010

Direct discrimination s.13(1):

- “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”.
- NB caveats re age (s.13(2)), disability (s.13(3)) and marriage and civil partnership (s.13(4)). Certain forms of discrimination specified re race (s.13(5)) and sex (s.13(6)).

Indirect discrimination s.19:

“(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.”



Equality Act 2010

Disability discrimination s.15

“(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

9 protected characteristics:

- Age s.5;
- Disability s.6;
- Gender reassignment s.7;
- Marriage and civil partnership s.8;
- Race s.9;
- Religion or belief s.10;
- sex s.11;
- Sexual orientation s.12;
- Pregnancy and maternity, ss17 – 18.



Equality Act 2010

Exercising public functions s.29 ie allocation of social housing under Part 6 HA 1996:

“(1) A person (a “service-provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.”

Disposal of premises: s.33

“(1) A person (A) who has the right to dispose of premises must not discriminate against another (B)—(a) as to the terms on which A offers to dispose of the premises to B;

(b) by not disposing of the premises to B;

(c) in A's treatment of B with respect to things done in relation to persons seeking premises.”



Article 14 discrimination

Article 14: “*The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*”

“*other status*”, such as:

- Being homeless: *R (RJM) v SSPW* [2008] UKHL 63, [2009] 1 AC 311, HL;
- Being a care leaver: *R (YA) v Hammersmith & Fulham LBC* [2016] EWHC 1850 (Admin), [2016] HLR 39, Admin Ct (although case didn’t turn on it);
- Being a private rented sector tenant: *R (Osman) v Harrow LBC* [2017] EWHC 274 (Admin);

What Convention rights might within the ambit of allocation issues? Article 8?

- Accepted in *R(HA) v Ealing LBC* [2015] EWHC 2375 (Admin) & other Admin Ct cases;
- Doubted in Court of Appeal in *R (H) v Ealing LBC* [2017] EWCA Civ 1127, [2018] HLR 2, and in *R (Z) v Hackney LBC* [2019] EWCA Civ 1099, [2019] HLR 44;
- SC expressed “*reservations*” about CA’s doubts in *R (Z) v Hackney LBC* [2020] UKSC 40, [2020] 1 WLR 4327.



Equality Act 2010/Art 14

When does EA/Art 14 apply?

- When drawing up the allocation scheme; and
- When making decisions on separate applications.

What type of decisions?

- Are there qualification criteria that might be discriminatory?
- Might the priority of various categories in the allocation scheme, applying reasonable preference, be discriminatory?
- Could other decisions such as the date of the application or applying sanctions be discriminatory?
- decisions relating to being offered a property.



Case-law: indirect discrimination/Art 14

R (HA) v Ealing LBC [2015] EWHC 2375 (Admin):

Facts:

- C entitled to reasonable preference as homeless, having left another borough due to domestic abuse;
- Qualification criterion of 10 years residence, which C could not fulfil.

Held:

- female victims of domestic violence were accepted to have a status falling within the grounds of discrimination prohibited by article 14 of the Convention;
- that since the article 8 right to enjoyment of a family life could in reality only be enjoyed in settled accommodation, the authority's policy had a discriminatory effect which it was required to justify;
- Indirect discrimination against women since women more likely to be subject to domestic abuse than men under s.29 EA;
- that no rational justification had been advanced for treating women fleeing from domestic violence to the authority's borough differently from other applicants for social housing, and therefore the policy was unlawful on that ground.



Case-law: indirect discrimination/Art 14

R (C) v Islington LBC [2017] EWHC 1288 (Admin), [2017] HLR 32, Admin Ct.

Facts:

- C applied to Islington from different borough fleeing domestic abuse, homelessness duty accepted;
- Challenged local lettings giving priority to residents on estates where new homes built, through points system.

Held:

- Art 14 applied, in conjunction with Art 8, as she was victim of domestic abuse and/or homeless person “other status”;
- Whilst there was different treatment, it was justified & therefore proportionate: local lettings policy was intended, and had, a beneficial effect upon provision of social housing & so fair & proportionate balance struck between severity of consequences for C & importance of aim.
- Also proportionate for purposes of s.19 EA indirect discrimination so no unlawful discrimination;
- No equality impact assessment but overall D gave “sufficiently rigorous and conscientious consideration to PSED” when introducing local lettings policy.



Case-law: indirect discrimination/Art 14

R (H) v Ealing LBC [2017] EWCA Civ 1127, [2018] HLR 2 CA:

Facts:

- Allocation scheme provided that 15% of allocations would be to working households (WHPS) & 5% to Model Tenants seeking transfers (MTPS);
- Cs were households where parents/carers were unable to work due to disabilities.

Held:

- Working Household Priority Scheme could be indirectly discriminatory under s.19 EA because disabled persons & elderly less likely to be in work than others, however justified because legitimate aim to encourage households into work, overall allocation scheme did provide for protected groups & banded according to greatest need, with discretion to move up bands, so no indirect discrimination;
- Link between Art 8 & Art 14 did not exist in relation to MTPS because existing tenants seeking transfers; link was made out for WHPS but any difference in treatment justified;
- No breach of PSED re MTPS; potential breach re WHPS but D showed alive to discrimination issues & not appropriate to quash WHPS.



Case-law: indirect discrimination/Art 14

R (XC) v Southwark LBC [2017] EWHC 736 (Admin) [2017] HLR 24:

Facts:

- C disabled tenant living on 3rd floor & needed transfer, unable to work, provided care to adult son who did not live with her;
- Allocation scheme provided for star for “working household” & for “community contribution”.

Held:

- Disabled people & women with childcare responsibilities less likely to be in work so star for working household potentially indirect discrimination under s.19 EA
- Legitimate aim of creating sustainable & balanced communities & encouraging residents to contribute to local community;
- Looking at scheme as whole, least intrusive measure adopted & fair balance between objectives & effect of treatment on rights of disabled people & women.



Case-law: indirect discrimination/Art 14

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

Facts:

- 10 year residency requirement, initially used as qualification criteria, subsequently removed from qualification but applied in relation to priority so placed in Band D;
- Ward:
 - 3 Irish travellers did not have 10 year residency.
- Gullu:
 - Kurdish refugee, also no 10 years residence;

Cont'd.



Case law: indirect discrimination/Art 14

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

Held:

- Allocation schemes fell within public functions at s.29 EA;
- travellers fall within “*race*” for purposes of EA
- Gullu’s nationality brought him within “*race*” so EA applied;
- Gullu’s refugee status might be “*other status*” but no need to consider Art 14;
- the issue was whether the residence requirement put non-UK nationals at a disadvantage when compared with UK nationals; plainly it did so;
- In both cases, the residency requirement amounted to discrimination and Hillingdon had put forward no justification, so discrimination under Art 14.
- See PSED below.



Case-law: direct discrimination/Art 14

R (Z) v Hackney LBC & Agudas Israel Housing Association Ltd [2020] UKSC 40, [2020] 1 WLR 4327, SC.

Facts:

- Local housing authority nominated applicants to charitable housing association but only if members of Orthodox Jewish community;
- C (not Orthodox Jewish) claimed s.13 direct discrimination.

Cont'd.



Case-law: direct discrimination/Art 14

R (Z) v Hackney LBC & Agudas Israel Housing Association Ltd cont'd..

Section 158 EA:

“(1) This section applies if a person (P) reasonably thinks that— (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or (c) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of— (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage, (b) meeting those needs, or (c) enabling or encouraging persons who share the protected characteristic to participate in that activity ...”

Section 193:

“(1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if— (a) the person acts in pursuance of a charitable instrument, and (b) the provision of the benefits is within subsection (2).

“(2) The provision of benefits is within this subsection if it is— (a) a proportionate means of achieving a legitimate aim, or (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.”



Case-law: indirect discrimination/PSED

R (Z) v Hackney LBC & Agudas Israel Housing Association Ltd cont'd..

Held:

- Range of permissible aims within meaning of ss.158 & 193 included enabling persons who shared a protected characteristic to overcome or minimise disadvantages connected with that characteristic, or to meet needs particular to persons with protected characteristics;
- Correct question was whether the association's allocation policy was a measure which was proportionate to promoting those aims by ameliorating & improving positions of members of Orthodox Jewish community & not merely to achieving equality of opportunity for others;
- Allocation policy operated as direct counter to discrimination suffered by Orthodox Jewish community in seeking to obtain housing in private sector where demand from that community far exceeded supply of suitable housing.
- Unless & until elimination of that disadvantage had been achieved, proportionate for association to operate blanket policy to allocate properties to members of Orthodox Jewish community as means of promoting that legitimate aim;
- Blanket effect of that policy did not make it disproportionate;
- In light of unmet need for social housing by Orthodox Jewish community & small impact on other groups, Divisional Court had been entitled to conclude proportionate for association to focus its attention on that community.

NB ECtHR has declared application inadmissible (16 June 2022).



Case-law: indirect discrimination/Art 14

R (Nur) v Birmingham City Council No 2 [2021] EWHC 1138 (Admin), [2021] HLR 41, Admin Ct:

Facts:

- Claimants were mother and disabled adult daughter, living in council accommodation & needing to move to adapted property (so reasonable preference under S.166A(3)(d));
- Policy was that families with dependent children given priority for houses, which was interpreted as meaning any household without dependent children was “*skipped*”;
- All adapted properties which came up during her 18 months of bidding were houses; she would not have been accepted for non-adapted properties.

cont’d



Case-law: indirect discrimination/Art 14

R (Nur) v Birmingham City Council No 2 [2021] EWHC 1138 (Admin), [2021] HLR 41, Admin Ct, cont'd

- Comparator is family without disabled member:
 - C at a disadvantage in not being able to bid for non-adapted properties;
 - At a further disadvantage being in practice not being accepted for houses.
- Whilst the priority for families with dependent children was legitimate aim, question was proportionality;
- Practice of treating absence of dependent children as decisive factor disproportionate and therefore s.19 indirect discrimination;
- Council was therefore under a duty to make reasonable adjustments to meet the needs of disabled applicants & took no such steps
- “ *the Council ought to have appreciated that its policy of giving preference to households with children was likely to be adversely impacting on disabled households throughout the city*”;

Cont'd



Case-law: indirect discrimination/Art 14

R (Nur) v Birmingham City Council No 2 [2021] EWHC 1138 (Admin), [2021] HLR 41, Admin Ct, cont'd:

- Decision relating to allocation application was public function and so fell within s29 rather than s.33: significance of that is no need for notice if falling under s.29 (Pt 3 EA);
- Claim for damages adjourned.
- See *R (Nur) v Birmingham City Council (No 1)* [2020] EWHC 3526 (Admin), [2021] HLR 23, Admin Ct on PSED.



PSED: s.149 Equality Act 2010

“(1) A public authority must, in the exercise of its functions, have due regard to the need to—(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it...

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.”

NB does not apply to marriage and civil partnership protected characteristic.



Case-law: PSED

Principles well established from *R (Bracking) v SSWP* [2013] EWCA Civ 1345 [26]

“(1) ...equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements...

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice...

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a “rearguard action”, following a concluded decision...

Cont’d



Case-law PSED

R(Bracking) v SSWP [2013] EWCA Civ 1345 [26] cont'd

(5) These and other points were ...as follows: i) The public authority decision maker must be aware of the duty to have “due regard” to the relevant matters; ii) The duty must be fulfilled before and at the time when a particular policy is being considered; iii) The duty must be “exercised in substance, with rigour, and with an open mind”. It is not a question of “ticking boxes”; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument; iv) The duty is non-delegable; and v) Is a continuing one. It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) “[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.” ...

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be “rigorous in both enquiring and reporting to them.



Case-law PSED

R (Bracking) v SSWP [2013] EWCA Civ 1345 [26] cont'd

8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* ...*(i)* ...I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, ...it is for the decision maker to decide how much weight should be given to the various factors informing the decision. The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."



Case-law PSED

R (Bracking) v SSWP [2013] EWCA Civ 1345 [26] cont'd

(ii) At paragraphs [89-90] “[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]): ‘...the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons’ disabilities in the context of the particular function under consideration.’ [90] I respectfully agree.....”



Case-law: PSED

R (Ward) v Hillingdon LBC, R (Gullu) v Hillingdon LBC [2019] EWCA Civ 692, [2019] HLR 30, CA:

- The public sector equality duty does not require a policy maker to assess the potential indirect discrimination of every conceivable group that shares a protected characteristic; if a policy maker has given adequate thought to deciding which particular groups ought to be considered, the fact that a particular protected group has not been considered does not necessarily mean that there has been a breach of the public sector equality duty...in 2013, there was no reason for the authority to have considered the position of non-UK nationals or refugees; by the time of the equality impact assessment in 2016, however, the claimant had commenced proceedings; at that stage the authority should have considered the position of non-UK nationals and, in failing to do so, the authority had breached the public sector equality duty [72] – [74].



Case-law: PSED

R (Nur) v Birmingham City Council (No 1) [2020] EWHC 3526 (Admin), [2021] HLR 23, Admin Ct:

“Any proper examination of the compliance by a public body with the PSED duty must demonstrate how the potentially discriminatory effects of policy decisions have been considered by effective decision makers at a public body.” [45]

“where a specific decision had been made by the Council to give preference to one group of Birmingham residents, namely families with children, and where that decision had the effect of substantially reducing the opportunities available to another group of Birmingham residents with protected characteristics, namely families with a disabled adult, the PSED requires the Council to have recognised this potentially discriminatory effect of its policy and to have specifically reached the decision that one group of residents should be preferred over another group. The PSED requires that conscious focus on the equality impacts of a policy. If a policy has a discriminatory effect, this should have been drawn to the attention of decision makers so that can understand the impact of the decision on people with a range of protected characteristics. Accordingly, evidence by a single council officer as to why she believes that the Council may have operated this approach is, in my judgment, inadequate to form an evidential basis to demonstrate compliance with the PSED” [49]

Guidance

Allocation of Accommodation Code of Guidance (DLUHC) last updated 1 June 2022 at <https://www.gov.uk/guidance/allocation-of-accommodation-guidance-for-local-authorities>, para 3.29.

Providing Social Housing for Local People Code of Guidance (MHCLG 2014) at <https://www.gov.uk/government/publications/providing-social-housing-for-local-people>, para 16.

Guidance for Social Housing Providers (EHRC February 2019) at <https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-social-housing-providers>:

“in schemes for managing applications for housing, social housing providers will need to avoid unjustified discrimination (which may be contrary to Article 14) and procedural unfairness (which may be contrary to Article 6). In particular, rules which unjustifiably discriminate between housing applicants on grounds such as marital status, age, gender, disability or nationality may amount to unlawful discrimination under domestic equality legislation and also breach the Convention Rights protected by the HRA.”



Useful materials

Allocation scheme;

Equality impact assessment & any other reports when adopting or amending the scheme;

Client's file;

FoI requests on lettings, characteristics of successful applicants, waiting times etc.



Thank you

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Recent developments in the law of housing allocation

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22 June 2022



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Allocation of social housing: the legal framework



Legal framework

- Housing Act (HA) 1996, Part VI
- Statutory guidance
 - Allocation of Accommodation: Guidance for Local Housing Authorities in England (2012)
 - Providing Social Housing for Local People: Statutory Guidance on Social Housing Allocations for Local Authorities in England (2013)
 - Right to Move: Statutory Guidance on Social Housing Allocations for Local Housing Authorities in England (2015)
 - Improving access to social housing for victims of domestic abuse (2018)
 - Improving access to social housing for members of the Armed Forces (2020)



What is an ‘allocation’?

- 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 them, or
 - (c) nominate a person to be an assured tenant of housing accommodation held by a private registered provider of social housing or a registered social landlord.

(S159(2) HA 1996)

- An allocation will not occur in the case of certain tenancy transfers/grants, including:
 - Vesting by succession or devolution on death of tenant
 - Assignment by way of mutual exchange or to potential successor
 - Transfer of tenancy under certain family law court orders
 - Transfer of secure tenancy initiated by landlord
 - Grant of tenancy to family intervention tenant
 - Grant of tenancy to displaced person pursuant to Land Compensation Act 1973 or Housing Act 1985
 - Tenant-initiated transfer where tenant does not qualify for reasonable preference.

(Ss159 and 160 HA 1996, Allocation of Housing (England) Regulations 2002, Allocation of Housing (England) (Amendment) (Family Intervention Tenancies) Regulations 2008)



Eligibility and qualification

- **Eligibility**

- An LHA shall not allocate housing accommodation to a person from abroad who is ineligible (or to two or more persons jointly if any of them is ineligible): s160ZA(1) HA 1996.
- This does not affect the eligibility of a person falling within s159(4B): s160ZA(5) HA 1996.
- Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006

- **Qualification**

- A person may be allocated housing accommodation if that person is a qualifying person (or if one of two or more person who apply jointly is a qualifying person): s160ZA(6) HA 1996.
- LHAs may set qualifying criteria, subject to the eligibility rules and any regulations: s160ZA(7) HA 1996.
- Certain classes cannot be disqualified on grounds of local connection – see Allocation of Housing (Qualification Criteria for Armed Forces) (England) Regulations 2012/1869 and Allocation of Housing (Qualification Criteria for Right to Move) (England) Regulations 2015/967: s160ZA(7) and (8).



Allocation schemes (1)

- Local housing authorities must have a scheme: s166A(1) HA 1996.
- Scheme must set out how authority will determine priorities and what procedure will be followed: s166A(1) HA 1996.
- Scheme must give reasonable preference to categories of people set out at s166A(3) HA 1996:
 - Homeless as defined by Part VII HA 1996.
 - People owed certain homelessness duties.
 - People occupying insanitary, overcrowded, or unsatisfactory housing.
 - People who need to move on medical or welfare grounds.
 - People who need to move to particular locality to avoid hardship.



Allocation schemes (2)

- Scheme may give additional preference to person who has reasonable preference and has urgent housing needs: s166A(3) HA 1996.
- Scheme must give additional preference to person who has reasonable preference, has urgent housing needs, and is a veteran/disabled member/widow or widower of armed forces: s166A (3) HA 1996.
- Scheme may set out how priorities amongst people entitled to reasonable preference will be determined: s166(5) HA 1996.



Rights of notification

- S160ZA(9) HA 1996: local housing authorities must notify applicant of:
 - Any decision that applicant is not eligible.
 - Any decision that applicant does not qualify.
- S166A(9): local housing authorities must ensure that their scheme gives applicant right to be notified of/request information about:
 - General information about how application is likely to be treated and whether housing is likely to become available.
 - Any decision about the facts of their case.
 - Any review decision about the facts of their case.
 - Any review decision about ineligibility.
 - Any review decision about qualification.



Rights of review

- S166A(9): local housing authorities must ensure that their scheme gives applicant right to request review of:
 - Any decision about the facts of their case.
 - Any decision that applicant is ineligible.
 - Any decision that applicant does not qualify.



Bringing an allocation case

- Obtain a copy of the LHA's allocation scheme – usually but on website but if not, can request under s168(2) HA 1996.
- First question is whether client's application has been decided in accordance with the scheme.
- If not, may be challengeable.
- If it has, next question is whether that part of the scheme is itself lawful.
- If not, may be challengeable.



Reasonable preference and qualifying criteria



On the one hand...

S166A HA 1996:

(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 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).



On the other...

S160ZA HA 1996:

- (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 person are, or are not, qualifying persons.
- (8) The Secretary of State may be regulations-
- (a) prescribe classes of persons who are, or are not, to be treated as qualifying persons by local housing authorities in England,
 - (b) prescribe criteria that may not be used by local housing authorities in England in deciding what classes of persons are not qualifying persons.



Limits on the power to disqualify

- Starting point is that LHAs are free to set their own qualifying criteria.
- Two express restrictions:
 - Cannot allocate to person who is ineligible: s160ZA(1) and (6) HA 1996.
 - Power is subject to any regulations made by the Secretary of State: s160ZA(7) and (8). Regulations have provided that certain classes cannot be disqualified on grounds of local connection – Allocation of Housing (Qualification Criteria for Armed Forces) (England) Regulations 2012/1869 and Allocation of Housing (Qualification Criteria for Right to Move) (England) Regulations 2015/967.
- In addition:
 - Cannot infringe other legal requirements eg Equality Act 2010.
 - LHA should retain discretion: *Hillingdon LBC v Holley* [2016] EWCA Civ 1052.



Can LHAs disqualify persons entitled to a reasonable preference?

Local decisions: a fairer future for social housing: Consultation (November 2010):

- Para 4.10: *“We want to provide local authorities with the power to decide who should qualify to be considered for social housing, while retaining a role for government in determining which groups should have priority for social housing through the statutory reasonable preference requirements.”*
- Para 4.11: *“It is important that those who are vulnerable and in housing need do not lose out under these changes and that they continue to be in the frame for social housing...We believe that the statutory duty on local authorities to frame their allocation scheme to give ‘reasonable preference’ to certain groups, together with local authorities’ wider equalities duties, should serve to ensure that local authorities put in place allocation schemes which are fair and that those who are vulnerable and in housing need are properly protected.”*



Can LHAs disqualify persons entitled to a reasonable preference?

Allocation of accommodation: guidance for local authorities (June 2012):

- *Para 3.26: "In framing their qualification criteria, authorities will need to have regard to their duties under the equalities legislation, as well as the requirement in section 166A(3) to give overall priority for an allocation to people in the reasonable preference categories."*
- *Para 3.27: "Housing authorities should avoid setting criteria which disqualify groups of people whose members are likely to be accorded reasonable preference for social housing, for example on medical or welfare grounds. However, authorities may wish to adopt criteria which would disqualify individuals who satisfy the reasonable preference requirements. This could be the case, for example, if applicants are disqualified on a ground of antisocial behaviour."*



Can LHAs disqualify persons entitled to a reasonable preference?

R v Wolverhampton MBC ex p Watters (1997) 29 HLR 931

- CA held that it was lawful for a claimant to be refused admission onto the LHA's waiting list because she was in rent arrears.
- Claimant was entitled to reasonable but not absolute preference, which “*envisages that other factors may weigh against and so diminish and even nullify the preference*”: 936.



Can LHAs disqualify persons entitled to a reasonable preference?

R (Jakimaviciute) v Hammersmith and Fulham LBC [2014] EWCA Civ 1438

- Scheme disqualified applicants who had been provided with suitable accommodation under Part 7.
- Headnote: *“An authority’s duty under s.166A(3) of the Housing Act 1996, to frame their allocation scheme so as to secure that reasonable preference is given to certain classes of people is a fundamental requirement which applies to the arrangements for allocation as a whole, including the setting of any qualification criteria under s.160ZA(7).”*
- §31: *“The reasonable preference duty applies on its face to the framing of the scheme as a whole and so as to require the giving of reasonable preference to all those specified, not just to those who are qualifying persons. There is no sensible reason why it should be read as applying only at a stage where the qualification criteria have operated to exclude certain applicants from registration under the scheme. Thus, on the natural interpretation of the statutory provisions the setting of the qualification criteria is subject to the reasonable preference duty.”*
- However at §45: *“It is permissible to adopt a rule excluding individual applicants by reference to factors of general application, such as the lack of local connection or being in rent arrears, but it is not permissible to cut down the statutory class in the way that [this scheme] attempts to do.”*



Can LHAs disqualify persons entitled to a reasonable preference?

R (Alemi) v Westminster City Council [2015] EWHC 1765 (Admin)

- LHA's scheme, which prevented an applicant owed the main housing duty from bidding for 12 months, was unlawful.
- §32: *“This amended Scheme carves out a whole sub-group which is altogether excluded from the potential of being allocated social housing for 12 months. They have no preference. Part VI of the Act does not permit the removal of a whole sub-group from a group which section 166A(3) requires be given reasonable preference in the allocation of social housing, when that sub-group is not defined by reference to differentiating features related to the allocation of social housing, but applies a simple time bar to all who otherwise qualify.”*



Can LHAs disqualify persons entitled to a reasonable preference?

R (HA) v Ealing LBC [2015] EWHC 2375 (Admin)

- LHA's application process automatically rejected claimant, who was entitled to a reasonable preference, because she did not have a local connection.
- §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.”*



Can LHAs disqualify persons entitled to a reasonable preference?

R (Woolfe) v Islington LBC [2016] EWHC 1907 (Admin)

- LHA's scheme, which prevented applicants with fewer than 120 points from bidding, was lawful.
- Claimant (who had 110 points) had been given 10 points for her homelessness and had therefore been given reasonable preference.
- Bidding threshold was not concerned with preference but was a means of managing the bidding process.



Can LHAs disqualify persons entitled to a reasonable preference?

R (Ward) v Hillingdon LBC [2019] EWCA Civ 692

- §6: *“All eligible persons included in the ‘reasonable preference’ groups must be treated as qualifying for inclusion in the allocation policy.”*



Can LHAs disqualify persons entitled to a reasonable preference?

R (Montero) v Lewisham LBC [2021] EWHC 1359 (Admin)

- Claimant, who was entitled to a reasonable preference, was rejected because she did not meet qualifying criterion (local connection).
- Judge held that qualifying criterion was lawful:
 - *Jakimaviciute* had drawn a distinction between “*attempting to thwart the statutory scheme by redefining it*” and “*adopting a rule excluding individual applicants by reference to factors of general application*”.
 - The criterion in *Jakiamviciute* “*fundamentally undercut the statutory purpose*” of giving reasonable preference to homeless persons but the use of a criterion based on residence was not “*fundamentally at odds with the gist or purpose*” of the reasonable preference provisions.
 - Local connection had legitimate relevance to housing allocation and the Social Housing for Local People Code encourages LHAs to adopt such a criterion.
 - If such a criterion couldn’t be applied to people with a reasonable preference, there would be little scope for the practical operation of such a requirement.
 - Code guidance about avoiding disqualifying people who were likely to be accorded reasonable preference was likely aimed at discouraging criteria which would have a disproportionate effect on such persons.
 - Claimant’s argument was inconsistent with *Watters*.
 - *HA* was incorrect.



Some (tentative) conclusions

- LHAs cannot disqualify classes of people by reference to the criterion which entitles them to a reasonable preference. That cannot be circumvented by suspending such applicants for an arbitrary period.
- As to other qualification criteria excluding reasonable preference applicants:
 - We have two conflicting first-instance decisions.
 - The most recent (and more comprehensive) holds that such criteria are lawful provided that they do not fundamentally undercut the statutory purpose.
 - There is *obiter* from the CA that applicants entitled to a reasonable preference cannot be disqualified.
 - *Montero* held that there was *obiter* from the CA stating that such persons could be disqualified by reference to factors of general application (query whether this was a recital of the argument?).



Applicants in overcrowded accommodation



Overcrowded housing

- LHAs must give reasonable preference within their allocation schemes to “*people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions*”: s166A(3)(c).
- Part 6 HA 1996 does not define “*overcrowded*” housing.
- LHAs may therefore adopt their own definition, which could be:
 - Statutory definition in ss324-326 HS 1985: contravention of the “*room standard*” or the “*space standard*”.
 - Secretary of State’s bedroom standard, i.e. a separate bedroom to each couple, adult aged 21 or over, same sex paid aged between 10-20, and pair under 10.
 - Local Housing Allowance size criteria.
 - Their own formulation. However, the LGSCO has said that LHAs cannot adopt a less generous definition than that given in HA 1985: *Complaint against Wirral MBC*, 16 018 674, 20 June 2018.



R (Osman) v Harrow LBC [2017] EWHC 274 (Admin)

- LHA's scheme gave Band A priority to severely overcrowded households in the social housing sector but Band C priority to such households in the PRS.
- Rationale was that Band A priority had incentivised households in the PRS to stay in their accommodation in the hope of receiving an allocation rather than move within the PRS.
- Challenge failed:
 - Measure was in pursuit of a legitimate aim (removal of incentive for households in PRS to stay in overcrowded accommodation) and was proportionate.
 - Measure did not contravene requirement to give reasonable preference: preference given to claimant's group was reasonable.



R (Flores) v Southwark LBC [2020] EWCA Civ 1697

- LHA's scheme gave Band 1 priority overcrowded applicants as defined by Part 10 HA 1985 but only if they had not "*caused this statutory overcrowding by a deliberate act*".
- Claimant moved into one-bed flat (which was all he could afford) with partner and 2 children in 2014. Flat became statutorily overcrowded as children grew older.
-
- LHA decided that claimant had caused his overcrowding by moving into flat when it was inevitable it would become statutorily overcrowded as children aged.



R (Flores) v Southwark LBC [2020] EWCA Civ 1697

- CA held this decision was unlawful:
 - “*Deliberate*” did not necessarily involve culpability.
 - However, “*it is artificial on the undisputed facts to regard the cause of the overcrowding as the appellant’s decision, some five years before his application to the council to be placed on the housing register, to take a tenancy of his existing accommodation*” (§44).
 - The flat had been the best the claimant could afford and was reasonable for him to occupy at the time: “*One might ask, what else was he to do?*” (§44).
 - He did not take it with the thought of improving his position on the register.
 - The cause of the overcrowding was the children growing older.
 - LHA’s decision “*exceeds the bounds of any flexibility which may be accorded to it in the implementation of its Scheme*” (§45) and “*leads to some odd, or even perverse, consequences*” (§49).



R (Roman) v Southwark LBC [2022] EWHC 1232 (Admin)

- Claimant and family were living in one room in a flat but were evicted. Claimant looked for accommodation but could only find a 1-bed flat, which the family moved into.
- Accommodation was statutorily overcrowded from the outset.
- LHA decided that claimant had caused the overcrowding by a deliberate act:
 - It wasn't reasonable for the family to have moved into the accommodation.
 - Claimant have given up accommodation in Spain and Ecuador.
 - Claimant hadn't taken steps to secure suitable accommodation.
 - Claimant hadn't taken steps to resolve situation once moved in.



R (Roman) v Southwark LBC [2022] EWHC 1232 (Admin)

- Claim for judicial review was allowed on two grounds:
 - LHA’s interpretation of “*deliberate act*” was wrong. Correct interpretation was “*that an act is only deliberate if the applicant intended to do it, in the sense that they had a real choice between two or more viable options and voluntarily elected to do the act*”: §89.
 - LHA’s reasoning was irrational:
 - C’s decision to leave Spain and Ecuador were not the proximate cause of his overcrowding and he had sound reasons for leaving.
 - Decision that it was unreasonable for C to arrange for wife and children to join him in London without first finding suitable accommodation was irrational – C’s wife couldn’t find work in Ecuador and family wanted to be reunited.
 - Conclusion that C could have chosen to move into more suitable accommodation failed to have regard to undisputed evidence that C did search for other accommodation without success.
 - Reliance on C’s failure to look for suitable accommodation after moving was illogical as that wasn’t cause of overcrowding.



R (Roman) v Southwark LBC [2022] EWHC 1232 (Admin)

- Two other grounds were dismissed:
 - LHA was not required to publish guidance which assisted officers in applying the scheme. Guidance was not inconsistent with scheme but provided non-exhaustive of types of conduct that may amount to deliberate act.
 - Argument that decision breached Articles 8 and 14 fell away in light of decision under other grounds.



Are private registered providers public bodies?



R (Weaver) v LQHT [2009] EWCA Civ 587

- LQHT’s function of allocating and managing housing was of a public nature.
- Relevant factors included:
 - LQHT relied significantly on public finance.
 - LQHT operated in very close harmony with the LHA in the allocation of social housing and assisted the LHA to achieve its statutory duties and objectives.
 - In providing subsidised housing, LQHT was providing a public services
 - LQHT was acting in the public interest and had charitable objectives.
 - LQHT was subject to “*intrusive*” regulation which was designed at least in part to ensure that the objectives of government policy were achieved.
- LQHT was therefore amenable to judicial review and a public authority for the purposes of s6(3) HRA 1998.



Post-Weaver

- Private registered provider exercising public functions:
 - *R (McIntyre) v Gentoo Group Ltd* [2010] EWHC 5 (Admin): decision not to allow mutual exchange.
 - *R (Carney) v Bolton at Home Ltd* [2012] EWHC 2553 (Admin): decision not to allocate property in a particular locality.
 - *Turley's application for judicial review* [2013] NIQB 89: decision to prioritise transfer applicants for allocations.
 - *R (Podkowka) v Women's Pioneer Housing Association* [2014] EWCA Civ 208: refusal to transfer applicant.
 - *R (Aslamie) v LQHT* [2016] EWHC 2396 (Admin): refusal to permit mutual exchange.
 - *Poplar HARCA v Information Commissioner* [2019] 2WLUK 498, FTT: provision of social housing was a service of public interest.
 - *R (Z) v Hackney LBC* [2020] UKSC 40: AIHA accepted was amenable to judicial review (but denied being a public authority for the purposes of s6(3) HRA 1998.
- Cf. *R (Macleod) v Peabody Trust Governors* [2016] EWHC 737 (Admin): Peabody was not exercising a public function in refusing to approve a mutual exchange.



R (TRX) v Network Homes Ltd [2022] EWHC 456 (Admin)

- D refused C’s application for a management transfer to alternative accommodation under its Allocations and Lettings Policy.
- D accepted that as registered provider of social housing it may be treated as public body but asserted that it was acting as a private landlord in the management of its stock and internal transfers because:
 - Any move would take place after the tenant bid or applied to the LHA;
 - The Policy “*envisages only a limited internal management transfer scheme, in exceptional circumstances, with no direct offers of emergency accommodation and no empty properties available for allocation*” (§27);
 - C’s application was for emergency housing and D had no homelessness powers.



R (TRX) v Network Homes Ltd [2022] EWHC 456 (Admin)

- Court held that decision and policy were amenable to judicial review and in making the decision D was exercising a public function for the purposes of the HRA 1998 and s29 EA 2010:
 - The policy emphasised D’s priority to work in partnership with LHAs to meet local need.
 - D provided over 20,000 homes across the South East. The vast majority of its stock was social housing. It had received an allocation of over £122m to deliver 1,000 new affordable homes in partnership with the GLA. It had numerous nomination agreements with LHAs.
 - There was no material distinction between this case and *Weaver*.
 - D accepted that the provision of social housing to C was a public law function and it “cannot sensibly be said that the consideration, and refusal, of a transfer under the Policy is other than part and parcel of determining the allocation of that housing”: §36.
 - The transfer constituted an “allocation” under the Policy.



Thank you

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