Neutral Citation Number: [2020] EWHC 3526 (Admin)

Case No: CO/4484/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BIRMINGHAM DISTRICT REGISTRY

Date: 19/12/2020

Before :

MR DAVID LOCK QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

THE QUEEN (ON THE APPLICATION OF MRS HABIBO NUR) (1) **ZAKIYA ABDULAHI (2)**	**Claimants**
- and –	
BIRMINGHAM CITY COUNCIL	**Defendant**

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- -

ZIA NABI (instructed by **Community Law Partnership**) for the **Claimant**
JONATHAN MANNING (instructed by **Birmingham City Legal Department**) for the **Defendant**

Hearing dates: 16 and 17 December 2020

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Mr DAVID LOCK QC :

1. This is an application for judicial review brought by the First Claimant, Mrs Habibo Nur ("**Mrs Nur**"), and by the Second Claimant, Ms Zakiya Abdulahi ("**Zakiya**") against Birmingham City Council ("**the Council**") arising out of decisions which were made by the Council in relation to the allocation of rented housing to the Claimants. Unfortunately, this case is an object lesson in how a public body should not respond to public law proceedings. The Council have failed properly to engage in the proceedings, appear to have misunderstood the nature of public law proceedings and, when it finally started to engage with the issues at a very late date, completely misunderstood the duties on it as a public body. Further, when responding to the single issue on which I was able to hear argument today, counsel for the Council, Mr Manning, found himself in the near impossible position of being required to advance submissions on the construction of the Council's policy which were plainly in conflict with how his own solicitors had explained how they believe the policy operated.

2. I do not underestimate the difficulties faced by local authorities, such as the Council, in the past year. The pandemic has not only caused considerable disruption in the way that any large organisation functions but has also added additional pressures on the Council as a result of increasing numbers of people coming to the Council seeking public services as a result of the economic effects of the pandemic. Balancing all of the conflicting demands from a limited staff base, where that base has been affected by those who are off work due to Covid-19 or are working remotely, has placed considerable stresses on anyone working in local government. Those difficulties suggest that the Court should be sympathetic to a local authority which fails to respond to proceedings as promptly or as comprehensively as would be usually expected. Whilst I am mindful of the need to give an appropriate degree of latitude to any public body in the present circumstances, the approach taken by the Council in this case is far outside any legitimate area of flexibility.

3. The duty on public bodies against whom judicial review proceedings are brought is set out at paragraph 14.1.5 of the Administrative Court Guide as follows:

"Public authorities have a duty of candour and co-operation with the Court and must draw the Court's attention to relevant matters. A particular obligation falls upon both solicitors and barristers acting for public authorities to assist the Court in ensuring that these high duties are fulfilled. The Court will expect public authorities to comply with the duty of candour without being reminded of it – see R (Citizens UK) v The Secretary of State for the Home Department [2018] EWCA Civ 1812. Public authorities must provide full explanations of all facts relevant to the issues, and where necessary identify the significance of a document or fact. The public authority's duty of candour has been recognised as applicable at the permission stage and applicable to interested parties."

4. It is also important to note the observations of Lord Walker in *Belize Alliance of Conservation Non-Governmental Organisations v The Department of the Environment* [2004] UKPC 6 who said at §86:

"It is now clear that proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A respondent authority owes a duty to the court to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings."

5. In this case, the Council has failed in that duty at every point, up to and including the application which was made at the end of last week for permission to rely upon witness evidence and to file and serve Detailed Grounds of Resistance. There have been a series of lamentable failures in the conduct of this litigation on behalf of the Council and, for the reasons I will set out below, it has left both the Claimant and the Court in a near impossible position. Nonetheless, thanks to the sensible approach taken by counsel for both parties, some progress was possible with this claim today, albeit that other issues may need to be explored at a later date for reasons I will explain below. Nonetheless, I hope that the terms of this judgment will be drawn to the attention of those having responsibility for the operation of the Legal & Governance Department at Birmingham City Council so as to ensure that the Council fully understands its duties to the court when it is engaged in public law litigation.

The facts.

6. Mrs Nur lives in Birmingham with her three adult daughters, including Zakiya. She also has a son who is an adult and lives elsewhere. Zakiya was born on 10 February 1992 and is now aged 28. Zakiya suffers from cerebral palsy and has learning difficulties. She is at risk of unintentional self-neglect if she is not supported with daily living activities. Her disabilities mean that she has been assessed as needing a level access shower, access to stairs with bilateral handrails and that she would benefit from accommodation with a downstairs toilet. Zakiya is in receipt of a personal independence payment as a result of her disabilities and Mrs Nur receives a carer's allowance in respect of Zakiya. Mrs Nur is Zakiya's main carer and it is clear from the evidence that Mrs Nur is a devoted mother who provides support for Zakiya for a very large part of the time. Mrs Nur does not work because of her caring responsibilities for Zakiya and is therefore in receipt of state welfare benefits.

7. Mrs Nur and her daughters were living in private rented accommodation when they registered on the Council's Housing List in August 2011. This was not a homelessness application but was an application for them to be allocated a rented property owned either by the Council or by a Housing Association with whom the Council have partnership arrangements.

8. It is well recognised that there is a much larger number of people in Birmingham who wish to live in social housing than the number of properties available to meet that need. The high level of demand for social housing means that the Council are required to operate a Housing Allocation Scheme ("**the Allocation Scheme**") which sets out how the limited stock of social housing available to the Council will be allocated as between the large number of people who have registered for social housing.

9. The legal framework governing the allocation of housing accommodation by local authorities was common ground between counsel. Section 166A(1) of the Housing Act 1996 requires every local authority to have an Allocation Scheme. The Council have discharged that duty by adopting the Allocation Scheme. Section 166A(14) provides:

"A local housing authority in England shall not allocate housing accommodation except in accordance with their scheme"

10. As Lord Justice Males noted in *R (Favio Ortega Flores) v Southwark LBC* [2020] EWCA Civ 1697 at §13/14, the effect of the duty in section 166A(14) is that:

".. Once a Allocation Scheme is established, it must be followed….

Section 166A(14) requires a local authority to comply with the Allocation Scheme which it is established, not only when deciding which applicant should be selected or nominated for a particular property, but also when deciding where on the waiting list and applicant should be placed"

11. The Council's Allocation Scheme identifies a series of bands, depending on the housing needs of the individual. Applicants are also entitled to express preferences, although the mismatch between available stock and demand means that preferences concerning, for example, location and type of property will not always be met. The Council operates a "bedroom standard" in order to ensure that families are not placed in unsuitably small properties. The bedroom standard requires a separate bedroom for each person aged 21 or more (see paragraph 8.1 of the Allocation Scheme). When she applied, Mrs Nur lived as a household with 4 adults and therefore was required to apply for a property with 4 bedrooms. This requirement substantially reduced the number of properties she was entitled to bid for. Following pre-action correspondence, the Council subsequently agreed to allow Mrs Nur to bid for a three-bedroom property. The letter explaining this dated 12 June 2019 explains:

"This decision was made after taking into consideration the fact that Mrs Nur and her family are currently in temporary accommodation, there is a shortage of suitable 4 bedroom properties, the family has requested a 3 bedroom property, and Mrs Nur's daughter, Zakiya Abdulahi (DOB 10/2/1992) is disabled due to her Cerebral Policy and shares her bedroom with a family member, who stays with her and provides care through the night.

I can confirm that the client department has amended Mrs Nur's application and she can now start bidding on 3 bedroom properties"

12. Part of the Allocation Scheme involves allocating additional priority points to people depending on how long they have been on the waiting list. Mrs Nur had insufficient priority in the years following her initial application in 2011 to secure an offer of a property. However, her housing needs changed in late 2018 when the landlord of her private rented property sought possession of the property rented by Mrs Nur. An order for possession was made on 12 November 2018 and the Council accepted they had a homelessness duty towards the family on 22 November 2018. The family were accommodated in two rooms in a Travelodge and were then moved to 89 Jervoise Road further to an offer made by letter dated 17 April 2019. This property was not adapted to meet Zakiya's needs and was not appropriate as a long-term option for the family for the reasons set out in the Health and Housing Assessment prepared by an occupational therapist employed by the Council, Ms Tania Khan, dated 19 June 2019. Ms Khan considered that Zakiya had a "high priority" for a property which was adapted to meet Zakiya's particular needs.

13. The Council operates an online bidding system that allows applicants on the Council's waiting list to bid for properties that become available and, on occasion, allows unsuccessful applicants to understand something about why they have not secured a desired property. Mrs Nur bid for a large number of properties in 2019 and the computer printout included as an exhibit to the witness statement of Mrs Nur's solicitor shows the outcomes of these bids. A combination of the number of years Mrs Nur was on the waiting list and a relative priority as a result of Zakiya's particular needs meant that by 2019 Mrs Nur was moving towards the top of the priority list. Hence, for example, on 11 April 2019 she bid for a house at Dovehouse Road, Witton, Aston but was unsuccessful. The record states "*Bid skipped. Customer has no dependent children*". I understand that a bid would only be "skipped" under the Council's system if the person had reached the top of the priority list but, despite being No1 on the list, her bid was not accepted as a result of the operation of the Allocation Scheme.

14. Mrs Nur faced the same problem when she bid on 25 April 2019. On 13 June 2019 her bid for a property at Berkeley Road East, Birmingham was unsuccessful. The record states:

> *"Bid skipped: Property not in line with medical recommendations and/or mobility category"*

15. As I understand matters, Mrs Nur's bid for this property was rejected because the property was not adapted to meet Zakiya's particular medical needs (or possibly was not adaptable to meet those needs). Whilst this approach was commendable in seeking to ensure that the family would be housed in a property which met Zakiya's needs, it had the consequence of limiting the properties open to Mrs Nur. Accordingly, even though she was at the top of the Council's waiting list at this time, she was not permitted to bid for properties that were either not adapted or adaptable to meet her daughter's needs or had too few bedrooms. Hence, for example, Mrs Nur bid for a property at Wandle Grove, Birmingham but her bid was "skipped" on the basis that:

> *"Family size not eligible for property"*

Mrs Nur then bid for 2 further properties on 7 July 2019 but her bids were once again skipped on the basis that she had no dependent children.

16. Whilst properties owned by or available to the Council through partner housing associations varied in form between houses, maisonettes, flats, properties in sheltered accommodation units and potentially others, there was no evidence before me that there was any substantial stock of properties with 3 or 4 bedrooms which was suitably adapted to meet the needs of somebody with disabilities in properties that were not described as "houses". All of the properties that Mrs Nur bid for were classified by the Council as "houses" and, on each occasion, her bid was "skipped" because Council officers understood that the Allocation Scheme required them to allocate houses to families with children in preference to all other applicants.

17. The combination of these factors, all of which were introduced for entirely appropriate reasons, meant that Mrs Nur considered that she was left in an invidious "catch-22"

position. She was only entitled to bid for properties which met her daughter's disability needs but, whenever she did so, she found that her bid was "skipped" because the property was a house and Council officers considered that they were obliged to give priority to a family with children under the age of 18 in preference to a family who had a seriously disabled daughter who needed constant care but was over the age of 18.

18. Matters came to a head when Mrs Nur bid for a property at 183 Wash Lane, South Yardley B25 8PU ("**Wash Lane**"). The Wash Lane property was a house with 3 bedrooms which had adaptions to it in order to meet the needs of somebody with disabilities, namely a level access shower and ramped/level access externally. This is shown in the classification "MOB3" set out on the particulars provided to applicants. When Mrs Nur bid for this property she was informed:

> *"You are in queue position 1"*

19. Accordingly, unless there was another rule operating within the Allocation Scheme, she could expect to be allocated this property. The bidding cycle ended on 7 July 2019 but Mrs Nur was informed that her bid was being skipped because she had no dependent children. Her solicitors sent a pre-action protocol letter asserting that this approach was unlawful on 15 July 2019. A response was provided with commendable promptness dated 16 July 2019 which explained as follows:

> *".. ".. our client's records confirm that your client placed a bid for a 4-bed adaptable property at 183 Wash Lane B25 and reached bid position 1.*
>
> *Following this, a decision was made not to allocate the property to your client. The property was allocated to a family with dependent children. This is for the following reason:*
>
> *In accordance with the Housing Allocations Allocation Scheme 2017, 8.1 states "To enable the best use of the Council and partner registered provider stock properties will be allocated to those applicants who need that size and type of property. As such, preference for houses with two or more bedrooms will be allocated to families with dependent children".*

In light of the above, any applicants with dependent children and in the same or higher band will be given preference over families that do not have dependent children.

Your client's children are all adults, and therefore she is classed as not having dependent children.

Your client continues to be eligible to bid for accommodation, including bids for flats and maisonettes"

20. The response from the Council made it clear that the reason that Council officers had made the decision to skip Mrs Nur's bid was that her daughters were over the age of 18. There are several errors in this response. First, the property was a 3 bedroomed property and not a 4 bedroom property. Secondly, the quotations relied upon by the Council related to the 2017 version of the Allocation Scheme but this had been amended when a new version of the Allocation Scheme was adopted by the Council in November 2018. The relevant part of the current Allocation Scheme reads as follows:

"The type of properties

To enable the best use of the Council and partner registered provider stock, properties will be allocated to those applicants who need that size and type of property.

As such, preference for houses with two or more bedrooms will be allocated to families with dependent children.

Sheltered housing and extra care accommodation will be allocated to older people.

Properties with adaptations will be allocated to persons with a physical or sensory disability"

21. The way in which this policy was interpreted has been consistently explained by both housing officers and by the Council's legal department. In July 2020 Mrs Nur bid for another 3 bedroomed property which was classified as "Mob3" because it had a stair lift and a level access shower. Once again, Mrs Nur's application was "skipped" because the property was a house and Council officers interpreted the policy as requiring them to offer this to a family with dependent children under the age of 18. That reasoning was explained in a letter from the Council's Legal & Governance Department dated 7 August 2020 which said:

> *"The property is a house and the Council have to make best use of its housing stock. This is reflected in the Housing Allocation Scheme that preference for houses will be allocated to families with dependent children. As the property is a house with adaptations, the bid list was checked for applicants with dependent children first. If no one was found on the bid list with dependent children, then at the time of shortlisting the bid list would have been revisited to establish a customer on the bid list who may be eligible for the property with a physical or sensory disability…..*
>
> *We confirm that the property is no longer available as it has been allocated to a family with dependent children."*

22. That explanation as to how Council officers considered the Allocation Scheme to operate appears to me to be entirely consistent with the explanation offered by the Council in their pre-action protocol response letter of 16 July 2019. Mrs Nur's solicitors sent a second pre-action protocol letter dated the same day, namely 16 July 2019, alleging that the decision not to allocate the Wash Lane property to Mrs Nur constituted a breach of the Public Sector Equality Duty ("**PSED**") imposed by section 149 of the Equality Act 2010, as well as alleging that the Council had acted in breach of the duty under section 166A of the Housing Act 1996 in failing to give reasonable preference to Mrs Nur based upon her daughter's medical and welfare needs.

23. Judicial Review proceedings were then issued on the same day to challenge both the decision of the Council in relation to the Wash Lane property and to seek declaratory

relief in relation to the Allocation Scheme. The Statement of Facts and Grounds ("**SFG**") challenge these decisions under 4 grounds namely:

i) The Council acted unlawfully in failing to allocate an adapted property to a person with physical or sensory disability in contravention of the terms of the Allocation Scheme and thus breached the duty under section 166A of the Housing Act 1996;

ii) Insofar as the Council's Allocation Scheme purported to give priority to families with dependent children under the age of 18 over those with disabilities, the Allocation Scheme was unlawful because:

a. It constituted unlawful indirect discrimination against families with household members who were disabled;
b. It breached the PSED; and
c. it failed to comply with the duty under section 29 of the Equality Act 2010 to make reasonable adjustments for persons with disabilities;

iii) The Allocation Scheme was unlawful on the grounds of unfairness; and

iv) The Allocation Scheme was irrational.

24. An application was made for interim relief to prevent the Council letting the Wash Lane property to anyone else pending Mrs Nur's application for Judicial Review. That was refused by HHJ Cooke sitting as a Judge of the High Court in a decision made on 18 July 2019 on the grounds that it was undesirable in principle for the court to interfere with the operation by the council of its housing policy in a case where the unlawfulness had not yet been established.

25. CPR 54.8 provides that any person served with the claim form who wishes to take part in the judicial review must file an Acknowledgement of Service within 21 days. Where a person served with judicial review proceedings wishes to contest the claim, that acknowledgement of service is required to set out a summary of the grounds relied

upon by that person for doing so. The Council failed to serve an Acknowledgement of Service or provide Summary Grounds to explain its position to the Court.

26. Despite the absence of any response by the Council, permission was refused by HHJ Worster, sitting as a High Court Judge, in a decision dated 16 September 2019. The essential reason given by the Judge for his decision was expressed at paragraphs (v) and (vi) as follows:

> *"(v) I assume that following the refusal of interim relief, the property has been let as D intended. In those circumstances no useful purpose is served by pursuing this claim. Considering whether or not D's policy is flawed as C suggests would be an academic exercise if (as seems probable) the rights of the family to whom this property have been let effectively prevent the Court from making the mandatory order sought.*
>
> *(vi) if I wrong in the assumption I make above, C may apply to the Court on paper for an order varying or setting aside this order"*

27. Unsurprisingly, Mrs Nur's solicitors applied to renew their application pursuant to CPR 54.12. Mrs Nur's challenge was to the lawfulness of the Allocation Scheme operated by the Council for the allocation of properties. As she had been unsuccessful in securing a tenancy of the Wash Lane property, she could only secure a property by doing so in accordance with the rules of the Allocation Scheme. If those rules were unlawful, she would have continued to face unlawful decisions being made to deny her properties. In those circumstances, in my judgment, it was incorrect to suggest that her claim had become "academic".

28. Mrs Nur's application for renewed permission came before Mr Justice Swift on 6 February 2020. It was supported by renewed grounds and a detailed Skeleton Argument.

29. Despite the fact that the Council had failed to serve an Acknowledgement of Service, the Council served a Skeleton Argument seeking permission from the Court under CPR 54.9(1)(a) to take part in the permission hearing. That Skeleton sought to defend the

lawfulness of a policy which gave preference to families with children under the age of 18 when allocating houses. It did not engage with the argument that the Council had misunderstood the effect of its own policy in allocating an adapted property to somebody who did not have disabilities.

30. Permission was granted to bring this claim on all grounds by Mr Justice Swift. The Claimant was given permission to apply to amend her grounds and the Council were required to serve Detailed Grounds and evidence 35 days from the date of any order granting the Claimant permission to amend. Amended grounds were duly served and permission was given. The amended grounds developed the case to be advanced by the Claimant but did not substantially change it. As a result of an order made by Mr Thomas Hawarth, the Council were required to serve Detailed Grounds and evidence in response to the claim within 56 days of that order, namely by 29 August 2020.

31. The Council failed to comply with the terms of that order. No Detailed Grounds or evidence were served. Meanwhile, Mrs Nur's efforts to secure appropriate housing for herself and her family continued. In September 2020, the Council agreed to make an exception to its existing policy by letting a property to Mrs Nur. In a witness statement that was subsequently prepared, an officer of the Council, Ms Vicki Pumphrey, explained at §30 that the offer of the property had been made to Mrs Nur in order to avoid costly litigation. That appears to confirm that at least one of the reasons that Mrs Nur was able to secure a property in the months immediately before this trial was that the Council made that decision in order to seek to avoid the Court being in a position to rule on the lawfulness of the Council's Allocation Scheme.

32. On 22 September 2020 the Council's Legal & Governance Department wrote to the Claimant's solicitors saying:

> *"We confirm that your client has been made a final offer of accommodation which has been accepted. In the circumstances, we consider that the Judicial Review is now academic and look forward to receiving a draft Consent Order by return"*

33. This letter indicates a fundamental misunderstanding of the differences between private and public law litigation. Public law litigation seeks a review of the legality of the decisions of a public body on the request of the person with standing. In this case, permission had been granted to review the lawfulness of the Council's Allocation Scheme and in particular to determine whether it was acting lawfully in preferring applicants with children over applicants with dependent disabled adults when allocating houses. That issue affected disabled people across Birmingham and was not limited to the personal circumstances of Mrs Nur and her family. Further, the claim was being brought on her behalf by a firm of solicitors who represented a large number of vulnerable people in the Birmingham area who were affected by the Allocation Scheme. Mrs Nur did not cease to have standing under CPR 54 as a result of this discretionary offer of accommodation. Further, she had an existing unresolved discrimination claim against the Council. I therefore consider that there was no proper basis on which the Council could have considered that this claim had become "academic" as a result of a decision by a Council officer to bypass the terms of the Allocation Scheme by making an offer of a house to Mrs Nur.

34. The Claimant's solicitors prepared bundles for the hearing and served a Skeleton Argument. Last week, when this case was allocated to me, I made enquiries as to whether the Council were intending to continue to defend the proceedings given that no Acknowledgement of Service had been served and no evidence had been provided.

35. On Friday 11 December the Council made an application to serve Detailed Grounds of Resistance and to serve evidence. There are 3 things about this application which are noteworthy. First, it contained no explanation as to why the Council had acted in breach of the terms of the orders made by this Court requiring it to file Detailed Grounds of Resistance and evidence on earlier dates, and contained no apology for failing to do so. Secondly, this application continued to advance the misconceived submission that the allocation of a property to Mrs Nur had rendered this claim academic. Thirdly, it suggested that the Council did not need to seek "relief from sanctions" in accordance with the principles set out in *Mitchell v News Group Newspapers Ltd* [2013] EWHC 2355 and *Denton v TH White Ltd* [2014] 4 Costs LR 752. That submission was made in the light of a decision by Mr Clive Sheldon QC, sitting as a Deputy Judge of the Court in *R (XY) v London Borough of Haringey* [2019]

EWHC 2276 (Admin). The Council thus sought permission to file Detailed Grounds of Resistance a few days before trial and to rely upon evidence in the witness statement of Ms Pumphrey which sought to explain the Council's perspective, without giving the Claimant any real opportunity to be able to respond to that evidence.

36. In my judgment, this application was singularly ill judged. Judicial review proceedings are proceedings to which the rules under Part 8 CPR apply, as modified by CPR 54: see CPR 54.1(e). CPR 54.9 provides:

> *"(1) Where a person served with the claim form has failed to file an acknowledgment of service in accordance with rule 54.8, he –*
>
> *(a) may not take part in a hearing to decide whether permission should be given unless the court allows him to do so; but*
> *(b) provided he complies with rule 54.14 or any other direction of the court regarding the filing and service of –*
> *(i) detailed grounds for contesting the claim or supporting it on additional grounds; and*
> *(ii) any written evidence,*
> *may take part in the hearing of the judicial review*
>
> *(2) Where that person takes part in the hearing of the judicial review, the court may take his failure to file an acknowledgment of service into account when deciding what order to make about costs.*
>
> *(3) Rule 8.4 does not apply"*

37. Rule 54.9 defines the conditions which must be met by a party which fails to file an Acknowledgement of Service but nonetheless wishes to "take part" in a judicial review hearing. Rule 54.9(1)(a) refers to the position at a permission hearing and rule 54.1(b) refers to the position at a "*hearing of the judicial review".* Accordingly, a party which fails to file an Acknowledgement of Service is still entitled to take part in a final judicial review hearing provided that that party complies with directions made by the Court concerning the filing of Detailed Grounds and evidence. There is no express

power given to the Court to allow a party to "take part" in a judicial review hearing where that party acts in breach of either CPR 54.14 or in breach of the terms of a court order requiring it to file Detailed Grounds and evidence. I accept that the Court's general management powers under CPR 3.1 would allow the Court to permit a party to appear by counsel in a judicial review notwithstanding that that party had failed to comply with the terms of CPR 54.9. Nonetheless, the absence of any express power to do so in CPR 54.9 suggest to me that the Court should be cautious before doing so.

38. In *R (XY) v Haringey LBC* the Deputy Judge was faced with a situation where a local authority had filed an Acknowledgement of Service setting out its response to the judicial review challenge but had failed to file Detailed Grounds or evidence within the 35 days provided for within CPR 54.14 following the grant of permission. Rule 54.14 is not concerned with the right of a party to "take part" in judicial review proceedings but is concerned with the right of a party who has established a right to take part by serving an Acknowledgement of Service but also wishes to set out a case to contest (or support) the claim. It seems to me that CPR 54.9 involves the first stage of a party's involvement in a judicial review case, namely setting the conditions which have to be satisfied in order to permit a party to "take part" in the case. Once a party has established the right to take part in the case, CPR 54.14 comes into play because it defines the terms upon which a party which is taking part can either contest the claimant or can advance other grounds supporting it. Accordingly, CPR 54.14 only becomes relevant to a party which has the right to take part in a case by complying with CPR 54.9. That position appeared to have been recognised by the Deputy Judge in *XY* at §42 because he looked at the interaction of CPR 54.9 and CPR 54.14 and said:

> *"The CPR therefore recognises that there are specific consequences for the failure to an acknowledgement of service"*

39. Accordingly, in my judgment, the Council was simply incorrect to suggest that it was entitled to rely upon CPR 54.14 to file late Detailed Grounds and evidence without having, at any stage, either filed an Acknowledgement of Service or having complied with the terms of the directions order concerning the filing of detailed grounds and evidence.

40. Secondly, this application was incorrect in the sense that it suggested that Mrs Nur's claim was academic because she had been allocated a property. The Council was facing an application which challenged the lawfulness of the Allocation Scheme. Permission had been given for that challenge and the fact that an exception had been made in favour of an individual who was seeking accommodation did not prevent the Court ruling on that challenge. It cannot be right that public bodies can avoid legitimate examination of the lawfulness of their decision-making processes by making an exception in the case of an individual affected by that process, and then argue that the challenge to the decision-making process, which was previously applied to that individual Claimant and continues to be applied to others in like circumstances, should not proceed because it is rendered "academic" by a decision of the public body to benefit an individual claimant outside the terms of the challenged decision-making process.

41. Thirdly, the evidence that the Council was proposing to rely upon to seek to respond to this challenge entirely failed to engage with the duty of candour resting on every public body against whom judicial review proceedings are brought. Paragraph 3 of the Allocation Scheme provided as follows:

> *"The Council's Allocation Scheme takes into account the Allocation of Accommodation Code of Guidance for Housing Authorities 2012 and the 2013 guidance: Providing social housing for local people, which replaced all previous statutory guidance on social housing allocations. The Allocation Scheme is drafted and framed to ensure that it is compatible with the Council's equality duties including the Equality Act 2010 and has been subject to an equalities analysis"*

42. The Council sought permission to rely upon a witness statement from Ms Vicki Pumphrey, a Senior Service Manager in the Neighbourhoods Directorate of the Council. This witness statement did not disclose any of the documents which explained the decision-making process undertaken by the Council leading up to the decision to adopt the Allocation Scheme in November 2018. Notwithstanding the fact that the challenge was based on an alleged breach of the PSED, the evidence did not disclose

the equalities analysis prepared by the Council in advance of the adoption of the Allocation Scheme.

43. The evidence explained that the Council's approach was to give priority for houses to families with children under the age of 18 over households with no children under the age of 18. The evidence did not explain whether a situation ever arose where there were no families with children on the relevant waiting list who would have been accorded priority over a family with a disabled adult. Accordingly, it was impossible to tell whether the factual situation set out by the Council in its letter of 7 August 2020 was ever likely to arise in practice or had ever arisen in practice.

44. Further, the witness statement provided no evidence to explain what proportion of 3 and 4 bedroomed properties were "houses" and what proportion were other types of property. It was thus impossible from this evidence to tell whether the *de facto* rule which gave priority to families with children for houses affected 50% of the available housing, 75% of the available housing or all of the available housing.

45. This evidence provided no justification to meet the apparent "catch 22" situation faced by Mrs Nur in that her perspective every property she bid for was either deemed to be unsuitable because it was too small, unsuitable because it was not adapted or adaptable to meet her daughter's disabilities or was removed from her because it was a "house". It was unclear from this evidence whether there were any properties Mrs Nur could have bid for successfully and, if so, what proportion of available properties would have been open to her.

46. Ms Pumphrey sought to advance a rationale at paragraph 10 of her witness statement concerning the reasons why the Council gave priority to families with children over families with disabled adults. However this evidence was not the evidence of the person who made the decision to adopt the policy and Ms Pumphrey did not refer to any document indicating any form of reasoning which had led decision-makers at the Council to adopt this policy. 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. This evidence has not been led by the Council.

47. The importance of evidence from decision makers in a PSED case was emphasised by HHJ Mackie QC sitting as a High Court Judge in *R (Chavda) v London Borough of Harrow* [2007] EWHC 3064 (Admin) (2007) 11 CCLR 187. The Judge said of duties under the Disability Discrimination Act 1995 which were in a like form:

> *"These are important duties nonetheless including the need to promote equality of opportunity and to take account of disabilities even where that involves treating the disabled more favourably than others. There is no evidence that this legal duty and its implications were drawn to the attention of the decision-takers who should have been informed not just of the disabled as an issue but of the particular obligations which the law imposes. It was not enough to refer obliquely in the attached summary to ' potential conflict with the DDA ' – this would not give a busy councillor any idea of the serious duties imposed upon the Council by the Act.*
>
> *…*
>
> *It is important that Councillors should be aware of the special duties the Council owes to the disabled before they take decision. It is not enough to accept that the Council has a good disability record and assume that somehow the message would have got across. An important reason why the laws of discrimination have moved from derision to acceptance to respect over the last three decades has been the recognition of the importance not only of respecting rights but also of doing so visibly and clearly by recording the fact"*

48. That approach was also emphasised in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) where the Court of Appeal explained that:

> *"… the "due regard" duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind"*

49. Accordingly, 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. Further, the duty of candour requires the Council to make proper disclosure so that the decision-making process which led up to the adoption of a policy which had these effects can be examined by both the Claimant and the Court.

50. Given the completely inadequate approach that the Council had taken to the preparation of its evidence, I declined to give permission to allow the Council to file and serve Detailed Grounds out of time and to rely upon Ms Pumphrey's witness statement as evidence to attempt to respond to the discrimination case faced by the Council.

51. In those circumstances, the Claimant's counsel Mr Nabi urged me to proceed with the hearing and to make findings concerning the discriminatory effect of the Council's policy. He referred me to the decision of HHJ Walden-Smith (sitting as a Judge of the High Court) in *R (AT) v Secretary of State for the Home Department* [2017] EWHC 3210 which considered the appropriate approach in a case where a public body has entirely failed to engage with judicial review proceedings prior to the date of the trial. The Judge referred to the observations of Mr Michael Fordham QC, now Mr Justice Fordham, in *R (Ademiluyi) c SSHD* [2017] EWHC 935 (Admin) who said:

> *"It may well be that a judicial review court is likely in most cases to feel that it is in an invidious position and to be extremely reluctant to decide public law issues, knowingly shutting out assistance that could be provided by the executive. Apart from anything else, that undermines the court's ability to get to the right answer. On the other hand, it cannot be the case that the Secretary of State can hold a gun*

to the head of the court, so far as default with the rules is concerned, knowing that there can be no sanction which goes to the way in which the legal merits of the case are resolved by the court"

52. It seems to me that this properly describes the position in which the Council's conduct has left the court in this particular case. In *AT* the Court declined a very late application by the Secretary of State to serve Detailed Grounds and evidence in order to support its claim concerning the lawfulness of immigration decisions taken in respect of the Claimant. The Court also awarded costs against the Secretary of State on an indemnity basis.

53. If this case was solely concerned with a decision-making process which affected an individual, I would have had no hesitation in following the course laid down in *AT*. However, the Allocation Scheme affects the rights of a large number of different groups of individuals in Birmingham, many of whom have protected characteristics. Any decision by this Court concerning the discriminatory effects of the Allocation Scheme will thus have consequences for children, disabled people and potentially other groups with protected characteristics. The issues raised by the Claimant are important, as the Council has belatedly recognised. Accordingly, because it is important for the court to be informed of a proper factual basis before making decisions which have the potential to affect different groups of vulnerable individuals, I declined to proceed with the discrimination claims in this case notwithstanding the Court's total disapproval of the way in which the Council has conducted this case. Accordingly, I propose to make Directions for the future conduct of this matter so as to bring the discrimination claims back before the Court at the earliest practicable opportunity. I will hear counsel concerning the terms of those directions.

Ground 1.

54. Ground 1 of the Claimant's case does not concern discrimination. The Claimant's case is that the Council acted unlawfully in misunderstanding the effect of its own policy. As that is a discrete issue of law, it seemed to me that there was no reason why that issue should not be determined on submissions and based on the evidence which the Claimant had provided. I therefore gave permission for Mr Manning, counsel for the

Council, to take part in the determination of this issue and to advance any construction submissions or submissions relating to the evidence that the Council wish to make.

55. Mr Nabi's case on behalf of the Claimant was straightforward. He submitted, in reliance on *Tesco Stores Limited v Dundee City Council* [2012] PTSR 983, that the true meaning of the Council's policy was a matter for the Court, based on a proper construction of the words used in the policy, and not a matter for decision by council officers. He next submitted that the true meaning of paragraph 8.2 of the Allocation Scheme involved recognising the correct interplay between the second, third and fourth paragraphs of this paragraph, within the overall policy objective identified in the first paragraph of enabling the Council to make best use of the sizes and types of property available to it. Thirdly, having identified that as an objective, he suggested that the second paragraph provided that there would be a "preference" given to families with dependent children when a decision was made about the allocation of the house but that the Council had committed itself in unconditional terms to allocating specific types of properties to specific groups in the third and fourth paragraphs. Mr Nabi submitted that the specifically identified groups to whom specific properties "will be allocated" were as follows:

    a. In respect of properties that were classified as "sheltered housing and extra care accommodation", the Council had committed itself to the fact that these properties will be allocated to older people; and

    b. In respect of properties that were classified as being "properties with adaptations", the Council had committed itself to the fact that these properties will be allocated to persons with a physical or sensory disability.

56. Mr Nabi then submitted that the Council had misunderstood the effect of its own policy because, instead of allocating properties with adaptations to those with a physical or sensory disability, these were preferentially allocated to families with children. Accordingly, so Mr Nabi submitted, the Council had acted unlawfully because it failed to comply with its duty under section 166A(14) of the Housing Act 1996 it Allocation Scheme.

57. In response, Mr Manning on behalf of the Council, accepted that the meaning of the policy was a matter for the Court and not a matter for the interpretation of council officers. However, he had two primary submissions. First, he submitted that the first paragraph should only be taken as giving families with children a measure of preference but that this should not be interpreted as meaning that houses were always allocated to families with children in preference to families with disabled adults. Secondly, he submitted that Council officers had correctly interpreted the policy by treating the provisions in the second paragraph as having primary effect, and that the provisions in the third and fourth paragraphs should be read as subsidiary provisions which only applied subject to the provisions of the second paragraph. When pressed, he agreed that he was inviting the Court to read in the words "*subject to the second paragraph above*" in front of the third and fourth paragraphs. Thus, he submitted that the correct interpretation of the policy would mean that a house with 2 or more bedrooms which was also part of sheltered housing or extra care accommodation should be subject to the "preference provision" relating to properties being offered to a family with children should be applied to such a property before it was offered to an older person.

Discussion.

58. On this issue I prefer the submissions of Mr Nabi for the following reasons. Firstly, the words of the policy draw a distinction between the second paragraph which (a) only applies to houses and not other types of properties and (b) provides that a "preference" for such houses being allocated to families with children. In contrast, the third and fourth paragraphs do not draw any distinction between the different types of property but instead identify a particular characteristic of the property which makes it suitable for a specific group of persons. The wording then provides that this particular type of property "will" be allocated to a defined type of person, namely a person for whom that particular type of property is suitable. There is clearly a difference between a property allocation decision where <u>preference</u> will be given to a category of persons and a property allocation decision which is governed by a rule under which a particular type of property <u>will</u> be allocated to a defined category of persons.

59. Secondly, it would be nonsensical to interpret the policy in a way that gave preference to allocating house within sheltered housing to a family with children when such a

development is specifically intended to benefit older persons. That approach would not serve the interests of either the existing older people within that development and may well not be appropriate for a family with young children. It seems to me inherently unlikely that this was the intended consequence of the policy.

60. Thirdly, the Council has a duty to make reasonable adjustments in the discharge of its public functions in relation to persons with disabilities. Where a property of any type has been specifically adapted to meet the needs of disabled people, it seems to be that it would be an entirely appropriate reasonable adjustment to provide that that property was to be allocated to a person with disabilities. Accordingly, the construction advanced by Mr Nabi would appear to be entirely consistent with the Council's duties towards disabled persons whereas the construction advance by the Council would cut across that duty.

61. Fourthly, I see no need or justification for reading additional words into the policy to make some paragraphs subservient to other paragraphs. If the drafter of the policy had intended one part of this policy to take precedence over another part, it would have been straightforward to say so. However, the use of the words "preference" and "will be allocated" points in the opposite direction. I therefore accept Mr Nabi's submission that the Council acted in breach of its own Allocation Scheme by skipping Mrs Nur from the Wash Lane property, which was a disabled adapted property, because she had no children in her family unit.

62. I accept the submission from the Council that the true construction of the policy is to give families with children a "head start" in being considered for a house. Without making any findings as to whether it is lawful or not to give families with children head start over families with disabled adults, it seems to me that Mr Manning is correct to say that this was the intention of those who drafted the policy. Accordingly, he is correct to say that council officers should have treated the fact that a family had a child within their family as a weighting factor within any property allocation decision, but should not have treated that factor as being decisive.

63. However, that correct submission leads to two additional problems for the Council. First, it is clear from the evidence that the Allocation Scheme policy has not been operated by council officers in the way it was described to me by Mr Manning. It has

been operated so that the absence of children in a family is treated as a decisive matter for any allocation decision, resulting in a bid being skipped. That was the effect of the decision made by the Council in relation to the Wash Lane property and was also the explanation of the approach taken by council officers in the letter from the Council's Legal & Governance Department dated 7 August 2020 referred to above. Accordingly, inasmuch as council officers were treating the presence of children as mandating them to allocate a house to a family with children over other applicants who did not have children, in my judgment the Council was acting unlawfully in departing from the terms of the Allocation Scheme. The Allocation Scheme required a measure of preference to be given to families with children, not the operation of a rule which mandated families with children to be given priority over everybody else when it came to allocating a house. To that extent, I also accept that the Council were acting unlawfully in the way in which the policy was applied to Mrs Nur.

64. That leads to the second problem for the Council in lawfully implementing the policy. There is nothing in the Allocation Scheme which explains what level of weighting should be allocated to families with children in comparison to other applicants, so as to give effect to the idea of a "head start" and the weighting to be applied to other factors, so that those other factors can outweigh the initial advantage of a family having one or more children. The Allocation Scheme is required to operate in accordance with some measure of transparency and predictability so that all applicants know they are being treated fairly. A bright line rule which said that all houses would always be allocated to families with children in preference to all other applicants would create that transparency and predictability (albeit that may be discriminatory against other applicants with protected characteristics). However, that is not the policy the Council decided to adopt. In order to be transparent and to allow the policy to be operated with any degree of consistency by officers of the Council, a policy which gave a "head start" to one particular group of applicants, namely those with children, also has to explain what other factors should taken into account when the final decision is made. Someone who is given a head start in a race does not necessarily win the race because they could be overtaken by someone who started further back but runs faster. In the same way, the policy must explain how someone without a head start can prevail over someone who had a head start. I can understand why, in the absence of any defined set of additional factors that Council officers were required to take into account when operating the

Allocation Scheme rules meant that the "preference" which was given to families with children turned into an effective automatic decision in favour of any family with children in preference to any family without children. That was wrong for the reasons set out above but a transparent and workable policy needs to explain to decision makers what other factors should be taken into account and which, on the facts of an individual case, may outweigh the initial advantage given to a family with children.

65. I therefore uphold this challenge under ground 1 and will make an appropriate order containing declarations that the Council has misunderstood the terms of its own Allocation Scheme and has acted unlawfully in the implementation of the Allocation Scheme.