Neutral Citation Number: [2021] EWHC 1138 (Admin)

Case No: CO/4484/2020

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

Date: 04/05/2020

Before :

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

- -

Between :

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

- -
- -

MR ZIA NABI (instructed by **Community Law Partnership**) for the **Claimant**
MR JONATHAN MANNING (instructed by the **City Solicitor, Birmingham City Council**) for the **Defendant**

Hearing dates: 20 and 21 April 2021

Approved Judgment

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

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Mr DAVID LOCK QC:

1. This is the second part of the trial arising out of the discrimination and public law challenge brought by the Claimants, Mrs Habibo Nur ("**Mrs Nur**") who is the first Claimant and her adult daughter, Zakiya Nur ("**Zakiya**") who is the Second Claimant. The Claimants bring a challenge to the operation of the Defendant's Housing Allocation policy. The first judgment is *R (Nur & Anor) v Birmingham City Council* [2020] EWHC 3526 (Admin). However, in order to ensure that this judgment can be read by itself, I shall set out some of the factual background included in the first judgment.

2. The Claimants were represented by Mr Nabi and the Council by Mr Manning. I would like to express my thanks to both counsel for the constructive and focused way in which they made submissions. Both counsel argued their cases strongly on behalf of their clients. In is inevitable in a case such as this that one or other party will be disappointed by the outcome but both clients can be confident that they were properly and professionally represented by their barristers. As will be seen from the length of this judgment, there were a large number of points argued and I have concluded that both barristers have succeeded on some of the points they argued and have failed on others. However, all points in this case were properly taken on both sides and were of great assistance to me.

The parties.

3. Mrs Nur has lived in Birmingham for many years with her Zakiya, another daughter and her son Mr Abdifatah Abdulahi ("**Abdifatah**") for many years. Abdifatah subsequently moved to live independently but continues to support his mother and sisters and has provided evidence to support this application. 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 to live in a property with 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.

4. The Defendant, Birmingham City Council ("**the Council**"), is a unitary authority and is one of the largest local authorities in England. The Council used to be the landlord for a significant proportion of housing in Birmingham but the number of properties that it has available to it to provide as social housing has significantly diminished in recent decades. At present it is common ground that far more people in Birmingham wish to live in social housing than the number of properties available to the Council to meet that need. This means that the Council have to make very difficult decisions about which categories of people should have priority over others when allocating properties from its limited stock of housing. The properties available to the Council to meet the needs of those who want social housing in the city is not restricted to properties directly owned by the Council; the Council has entered into partnership agreements with housing associations under which the housing associations allow the Council to select which applicants should be put forward for tenancies of properties that become available. For present purposes it is not necessary to distinguish between properties that are owned directly by the Council and properties that are owned by housing associations and where tenancy allocation decisions are made by the Council on behalf of a housing association.

5. The evidence in this case shows that there are a variety of different types of properties within the stock of social housing available to the Council, including houses, maisonettes and flats. Inevitably, properties which are classified as "houses" tend to have their own gardens to a much greater extent than other types of accommodation. The Council has confirmed that, within the overall demand for social housing, there is a very high demand for houses.

6. The mismatch between demand for social housing and the ability of the Council to allocate property to meet that demand is not unique to Birmingham. It appears to be a challenge that all local housing authorities have to grapple with and, as each is responsible for its own decision making, each local authority has to make decisions

about who gets access to which forms of social housing. These are highly charged decisions with political implications. As a result, I am mindful that I should give a considerable measure of respect to the choices made by the local authority because it is that body which is democratically accountable to local people for the choices that it makes. My role is limited to examining whether those choices have been made by a process which is in accordance with the law and to examine whether the final decisions are ones that are within the considerable margin of discretion allowed to a local authority under the law.

7. The Claimants have produced statistical evidence annexed to a witness statement from the Claimants' solicitor, Mr McIlvaney, which was not the subject of challenge by the Council. I accept that this evidence derived from the Office for National Statistics data demonstrates three things. First, a higher proportion of disabled people live in social housing than non-disabled people. That is an indication of the financial consequences in our society of being disabled for many people; namely that disabled people tend, on average, to have a lower income than those who are not disabled, and social housing exists to a significant extent to ensure that those who are not able to purchase their own house or rent in the private market have access to decent housing. Secondly, that disabled adults over the age of 24 are more likely to continue to live in a household with their parents than non-disabled adults of the same age. Thirdly, that disabled adults who have learning difficulties are much more likely to live with their parents than non-disabled adults. The broad effect of this evidence is that a disabled person is more likely to be living in a household without children than a non-disabled person. That evidence is far from surprising because, whilst many disabled people live wholly independently, disabled people with both physical and cognitive disabilities often require support and care in order to be able to live on a day to day basis. Families are the primary source of that care. Thus, whilst non-disabled children develop independence from their parents and move to live away, a proportion of disabled persons continue to look to their parents for care and support long into adulthood. Lifelong bonds of commitment that members of a family owe to each other mean that parents of disabled children continue to provide care and support to their children long after they have become adults in the eyes of the law.

8. No evidence was led by the Council to suggest that this evidence was incorrect but the Council did not accept that the evidence supported the case advanced by the Claimants. In the absence of any other evidence, I accept it because there is no reason to consider that the makeup of households in Birmingham is substantially different to the makeup of households throughout the rest of the UK. Accordingly, I accept that the ONS data shows that disabled persons in Birmingham were less likely to live in a household which included a child than non-disabled persons.

The duty on the Council to have a Housing Allocation Policy.

9. Section 166A(1) of the Housing Act 1996 requires every local authority to have a Housing Allocation Scheme. Section 166A(14) provides:

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

10. The broad effect of that provision was set out by Lord Justice Males in *R (Favio Ortega Flores) v Southwark LBC* [2020] EWCA Civ 1697 at §13/14 who explained the effect of the duty in section 166A(14) as follows:

> *".. Once an 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"*

The evidence of the development of the Council's Housing Allocation Policy.

11. Mr Michael Walsh, one of the Council's Head of Service, explains the background to the adoption of the Council's Allocation Scheme in a witness statement dated 4 February 2021. Mr Walsh holds a Postgraduate Diploma in Housing Studies and has been employed by the Council for 18 years, and prior to that worked for other local authorities. At the time of the development of the current Allocations Scheme in 2013 and 2014 Mr Walsh was employed as a Senior Service Manager with responsibility for housing strategy.

12. Mr Walsh explains how the current scheme was developed as a result of a series of Policy Development Workshops and was then put out to public consultation. The scheme was developed by officers in response to the outcome of the consultation, and they then sought advice from a specialist housing barrister, although that legal advice has understandably not been disclosed. Once a policy had been developed through this process, it was subject to an Equality Impact Assessment and, once that was completed, a report was provided to members to consider the draft policy. It appears that members approved the policy in 2014 but, for reasons that have not been explained, final implementation of the policy was delayed until 2017. At that point the policy was implemented. Minor amendments were made to the policy in 2018 but, in substance, the policy now operated by the Council is the one which was developed in 2013/4 as a result of the process that I have summarised above.

13. The process that Mr Walsh describes to develop the Housing Allocation Policy in 2013/14 seems to me to be entirely appropriate because it built on the considerable experience of the Council's housing officers to attempt to devise a policy that they felt would be fair in balancing the competing interest for scarce resources, then tested the policy with the public and those who could speak on behalf of affected groups and finally went through a process of ensuring that members were asked to consider the work undertaken. The documentation produced by the Council has been subject to entirely proper forensic examination by Mr Nabi on behalf of the Claimants and he has highlighted a number of shortcomings in the process which I will look at below. However, in approaching these criticisms, it seems to me important to bear in mind the care which the Council took in developing the policy, the opportunities that others had to have their say before it was adopted and the attempts that Council took through the Equality Impact Assessment to foresee how the Policy would impact on those with protected characteristics. A local authority is not required to have a perfect policy development process in order to act lawfully. The court has to accept the realities of the pressures on local authorities and the fact that they cannot be expected to be "all seeing" about how a policy will work out in practice. A reasonable but still imperfect process may well be sufficient to meet the local authority's legal duties as long as there is some measure of continuing review of the policy so that the local authority understands how it is working out in practice.

14. The Initial Screening Stage document identified the objectives of the policy development process as follows:

> ***"Objectives:***
> *1. Enable fair access to social housing for applicants in housing need as defined by the scheme.*
> *2. Enable the best use of Birmingham City Council and partner Registered Provider stock.*
> *3. Be realistic and informed by stock availability.*
> *4. Promote sustainable communities by supporting access to employment and training, valuing community contribution and enabling mobility*
> *5. Operate within the legal and regulatory frameworks for the allocation of social housing.*
> *6. Operate a simple and understandable assessment system"*

15. I accept that those are entirely laudable objectives. The Initial Screening Stage document also said that establishment of clear, transparent and understandable criteria in relation to eligibility and qualification was intended to safeguard against discrimination and victimisation. However, it also recognised that, however well-intentioned the aims of the policy may be, there was always the chance of unintended consequences. It said:

> *"New improved data collection will be introduced during delivery of the new allocation scheme.*
>
> *Following the launch and operation of the scheme, an annual review is planned to assess achievement and operational efficiency when any inequality or inefficiency will be addressed"*

This appears to me to be an entirely appropriate way to ensure that the Council understands the effect of unintended consequences and is thus able to consider whether to make adjustments to the policy.

16. The Council prepared a full Equality Impact Assessment ("**EIA**") in relation to the proposed housing allocations policy. The EIA stated:

> *"**Medical/Disability and Welfare Needs***
>
> *The proposed scheme affords priority to those who need to be rehoused due to health problems. This is often coterminous with under occupiers suffering age related issues. Overall, medical priority is bound to benefit our older population disproportionately.*
>
> *Support for applicants with disabilities will also promote independent living; including those with mental health and learning disabilities alongside physical disability"*

17. A particular focus of the EIA was the exclusion of some groups from being able to be included on the housing register. The modelling suggested that the current register of about 27,000 households would reduce to between 15,000 and 13,000 households, thus excluding between 12,000 and 14,000 households of any prospect of securing social housing in Birmingham. Mr Nabi pointed out that the document accepts that data held by the Council meant that the Council's ability to assess the impact of this change was far better for the protected characteristics of race and age than for other protected characteristics. However, whilst that is correct, it does not appear to me to be relevant for present purposes because this challenge is not about how the policy affected those who were excluded from the policy entirely. This challenge is about how the policy operated as between those who were still on the register but who had disability as a protected characteristic. Thus, whilst I accept that the Council was rightly focused on its equality duties with regard to those who were removed from the policy, that part of the EIA does not assist for present purposes.

18. For those who were on the register, the assessment of the proposed impact of those with disabilities read as follows:

> *"The scheme makes provision for households with disabilities to be awarded reasonable preference if their current housing is unsuitable. There are also*

provisions relating to caring responsibilities which will impact upon this group. Citizens with disabilities and the organisations representing them have not raised any specific objections to the proposals"

19. As is perhaps inevitable in a policy where there were a huge number of conflicting priorities, the EIA dealt with some issues more thoroughly than others. In my judgment, the EIA cannot be criticised for not having foreseen every single problem arising from the interaction of different policy decisions. There was, for example, a particular issue about the extent to which the definition of a "household" should be restricted to "immediate family" which, in a city such as Birmingham which had the strength of many different cultures, was an understandably sensitive issue. Given all these issues, it is inevitable that relatively little focus was placed on other issues such as the proposed part of the policy to give preference to households with children when allocating houses. However, this was not ignored because the EIA noted:

"Irrespective of the household definition that is applied the scheme proposes to give priority for houses with more than 2 bedrooms to households with dependent children. This is to ensure that households with children have a greater chance of securing accommodation that is suitable for their needs – including direct access to outside space"

20. The reasons for this policy were not clearly set out in any document which is in evidence in this case. However, the reasons for this policy were explained by Mr Walsh who says:

"9. My recollection from the policy development workshops was that this was not a major point of controversy, with an acceptance that it was rational to seek to give preference to households with dependent children because of the benefits of providing children with access to outside space. In contrast, it was considered to be less desirable – albeit inevitable given the profile of our stock – to allocate flatted accommodation to households with dependent children due to issues such as parents struggling to negotiate stairs with pushchairs and lack of access to private outdoor space.

10. For these reasons, the policy intention was that when houses would become available then preference would be given to households with dependent children"

21. I accept that evidence as being the best evidence available to explain the thinking of housing officers which led them to recommend that members adopt this policy. It has the limitations of being largely anecdotal as opposed to being evidence based but was a sensible approach to issues around social housing for households with children. That view was supported by the answers to a question in the public consultation about giving preference to families who have dependent children over those who do not when allocating larger properties. The consultation showed that this general approach received strong support.

22. The proposal to give preference to families with children when allocating houses made its way into paragraph 8.1 of the Final Policy which provided:

"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"

23. In the first judgment I set out the meaning of that policy. I held that, to an extent, the Council's officers had misunderstood how decision making was required to be undertaken to give effect to the Policy, and thus to ensure that the Council complied with its duty under section 166A(14) of the Housing Act 1996 not to take decisions which departed from the Policy. The key part of that decision was that the Policy provided that Properties with adaptations were required to be allocated to persons with a physical or sensory disability as opposed to a house being allocated first to a family

with children and only considered for a person with a physical or sensory disability if there were no families with children who were bidding for that property. I agreed with the Council's submissions that the use of the word "*preference*" meant that households with children would have a preferential claim if they applied for a particular type of property, but it was inherent in that wording that the policy needed to be operated in a way which enabled that "preference" to be overridden by other factors. Whilst that submission was correct, the policy did not provide any guidance to housing officers to explain how other factors could outweigh the preference they were supposed to apply to households with children, and so houses were allocated to households with children over all other bidders, regardless of any factors which suggested that those other bidders had a more pressing need for the house.

24. A report was prepared for the Council's Cabinet dated 28 July 2014 seeking approval of the Policy and Mr Walsh says that the report was approved. That envisaged the policy would be implemented from September 2015 and it asked for responsibility for the scheme to be delegated to the Strategic Director for Place and the Cabinet Member for Health and Wellbeing. The report refers to the Policy creating a "Choice Based Lettings" scheme ("**CBL**"). Mr Walsh notes that the scheme was approved but there is no information about what happened next as part of the implementation of the policy, save that it did not come into effect until it came into force on 20 April 2017.

The absence of any monitoring as to how the housing allocation scheme worked in practice.

25. Three things appear to have become clear from the evidence in this case. First, the housing allocation policy now operating in Birmingham is not exactly the same as the policy approved in 2014. I understand that it was modified in 2018. Whilst there is no evidence about the extent of any modifications, I am told that the changes were relatively minor and none are relevant for present purposes. I am told that no further equality impact assessment was carried out at that time.

26. Secondly, the promised reviews of the operation of the policy referred to in the 2014 EIA never occurred. No evidence has been put before the Court to explain why the reviews did not happen and it would not be right to speculate why the review process was never followed. However, the factual position is that the Council never reviewed

how the policy was working in practice and they did not undertake any analysis to see how the scheme was impacting on those with protected characteristics at any point after 20 April 2017 when the policy became live.

27. Thirdly, it appears that no one from the Council was made aware of the fact that the preference in the policy for allocating houses to households with children had the potential to work to the detriment of disabled persons because they were less likely to live in a household with children. No one appears to have appreciated that a policy which gave a preference to one group of households, namely households with children, reduced the opportunities for households with disabled adults from securing a property under the Council's allocation scheme.

28. It follows that the Council has been operating a scheme for the past 4 years without knowing whether, in practice, the scheme achieves the objectives which were set out when the scheme was launched or has unintended consequences which impact adversely on groups of Birmingham residents with protected characteristics. It was frankly acknowledged by Mr Manning on behalf of the Council that this made it very difficult for the Council to demonstrate that it had discharged its Public Sector Equality Duty because it simply did not have any reliable information to enable Council officers or members to know how the scheme was working and whether the scheme was, in practice, impacting adversely on any group of Birmingham residents with protected characteristics. However, thorough the EIA processes were at the point that the scheme was set up, unless there was some monitoring about how the scheme worked in practice, , the Council would not know whether the scheme was, in practice, discriminating against those with disabilities or was discriminating against any other group of persons with a protected characteristic.

29. There is no suggestion whatsoever that the Council was intentionally operating a housing allocation scheme which discriminated against, inter alia, those with disabilities or any other group of persons with protected characteristics. A lack of intentional discrimination is, however, largely irrelevant for the purposes of the Equality Act 2010 ("**the EA**"). The duties under the EA are not concerned with the intentions of decision makers but with the effects of their decisions. It is no defence to a discrimination claim for the unintentional discriminator to say that he, she or it was

unaware of the discriminatory effect of the decision making systems operated by a decision maker. The primary question in a discrimination case is whether there was unlawful discrimination, not whether anyone intended a decision making system to operate in a discriminatory manner.

CBL and the Bidding Process.

30. The Council relies on witness statement evidence from Ms Vicki Pumphrey to explain how the CBL process operates and how those on the register are able to "bid" for properties which become available to those on the register. Ms Pumphrey is the Council officer with responsibility for the shortlisting process. Ms Pumphrey explains that the initial assessment system places households in one of four Bands according to their level of Housing need. The tests which are used by the Council to assess which Band a household are placed in are set out in the Policy. There is no challenge to those tests and I assume both (a) that they are lawful and (b) that the tests were properly applied to the Claimants.

31. The CBL system then allowed anyone on the housing register to make their own choices about which properties they wanted to bid for under weekly bidding cycle, with each household limited to 2 bids. The bidding system is all online. Ms Pumphrey explains that available properties are generally advertised on a weekly cycle starting from midnight on Thursday mornings and ending the following Monday at midnight. After bidding cycles close, a shortlist of applicants who have bid for each property is downloaded from the computer system by housing officers. The purpose of the Policy is to provide a system of rules which are required to be followed by housing officers to select the successful bidder for each property from amongst those who had bid for a that property. In principle, that is an entirely appropriate way for the Council to make the difficult choices between different bidders.

32. The Policy provided that every person was given a "registration date". That date gives a person a level of priority between others in the same band. This is set out in paragraph 6.8 of the Policy which provides that:

> *"The relevant date will be used to prioritise between applicants in the same band"*

33. Thus, at the point that Council officers are called on to make a decision between applicants for a property, all other things being equal, the property is offered to the bidder in the highest band. If there is more than one bidder in a band, the property is offered to the bidder who joined the register on the earliest date from amongst the bidders. The Policy provided for relatively few households to be assessed as having such serious and pressing needs for new accommodation that they were allocated to "Band 1". Both counsel accepted that this was a narrow band with relatively few households being able to meet the strict criteria. The policy provided that a household that was in Band 1 should take precedence over all households in Band 2. Households with significant needs could be assessed as being in Band 2, with those with needs at a lower level being placed within Band 3. Those without housing needs were in Band 4. Mrs Nur's household was assessed to be in Band 2. There is no challenge either to the assessment criteria or to the assessment carried out in the case of Mrs Nur's family.

34. In the present case, there is no evidence that any bid made by (or on behalf of) Mrs Nur was unsuccessful because the property was allocated to a household who were in Band 1. Equally, there is no evidence that a property was refused to Mrs Nur because it was allocated to a family in Band 3. Accordingly, the decision making processes operating in this case appear to be entirely concerned with a competition between bidders who were in Band 2. In those circumstances I do not need to concern myself with any element of competition for properties between bidders in different Bands.

Adapted and general needs properties.

35. Ms Pumphrey refers in her witness statement to "*adapted*" properties and "*general needs*" properties. I understand that adapted properties are those which have had some physical adaptations undertaken to the property to make them suitable for persons with disabilities. The Council has a system of assessing the needs of disabled people into three categories called "Mobility 1", "Mobility 2" and "Mobility 3". When adapted properties are advertised as part of the online system, there is a wheelchair symbol as part of the details which indicates that it is an adapted property and gives details of the extent of the adaptations. Ms Pumphrey explains at paragraph 33 of her witness statement:

"In order to make best use of the housing stock and ensure people can be easily matched; when adapted properties become available for re-letting the properties are advertised by recording the mobility level and matching the characteristics of any adaptations. Adapted properties are not necessarily wheelchair accessible – levels of adaptations vary considerably from property to property"

36. Properties that have adaptations to make them suitable for disabled persons thus appear with a clear marking to that effect in the material available to bidders. Information about an unadapted property, which is known as a "general use" property, does not contain the wheelchair symbol. No information is provided to a bidder to indicate whether a general use property, is capable of being adapted to meet the needs of any particular disabled person or not. That is perhaps not surprising because the adaptations required for people with different disabilities vary between persons with different forms of disability. Accommodation on a single floor is necessary for some disabled persons who use a wheelchair whereas multi-level accommodation can be suitable for other forms of disability. Some disabled people need adapted bathrooms or other facilities. However, all that is necessary to note for present purposes is that, from the perspective of the bidder, there was no information to indicate whether a property without adaptations was or was not capable of being adapted to meet the needs of a particular disabled person.

37. There is an issue between the parties as to whether, in practice, the way that the Council operated the policy meant that disabled persons were able to apply for properties which were not presently suitable for their needs but which had the potential to be adapted to meet their needs before any tenancy commenced. For reasons which will become clear as part of the legal analysis below, this is an important issue and I will thus have to consider the evidence on this matter in detail. However before doing so, it is necessary to describe what, in practice, happened when Mrs Nur made bids under the scheme.

Mrs Nur's bidding history.

38. Mrs Nur and her daughters were living in private rented accommodation when they registered on the Council's Housing List in August 2011. At this point she was not making a homelessness application but was asking to be allocated a rented property owned either by the Council or by a Housing Association with whom the Council have partnership arrangements.

39. 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. 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 then Mrs Nur was granted a tenancy of a house owned by the Council at 89 Jervoise Road. She received that property following a homelessness offer which was made to her made by letter dated 17 April 2019 and not as an allocation under the housing allocation policy. This property was not adapted to meet Zakiya's needs and it is common ground that it was not appropriate as a long-term accommodation 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.

40. Thus, by April 2019 Mrs Nur was living with her 3 adult children in a house which was not adapted to meet Zakiya's particular needs. Under the Council's "bedroom standard", Mrs Nur was thus assessed as requiring a 4 bedroomed house and thus could not bid for a smaller property. On 12 April 2019 Mrs Nur's solicitors wrote to the Council to explain that Mrs Nur shared a bedroom with Zakiya and accordingly the family only needed a 3 bedroomed property and thus should be permitted to bid for such a property. The background to this letter was that there is a particular shortage of 4 bedroomed properties available to bidders as part of the stock which was available to the Council and thus Mrs Nur would substantially increase her chance of being able to secure a property if she were able to bid for both 3 and 4 bedroomed properties. The Council responded by a letter dated 12 June 2019 which confirmed that the Council had made the required changes and thus Mrs Nur was able to bid for a 3 bedroomed property.

41. Mrs Nur then bid for a series of 3 bedroomed properties which were advertised as being suitable for a person with a Mobility 2 level of disability but was unsuccessful with every bid. It is not necessary for present purposes to go through every application that

she made, but it is common ground that Mrs Nur only bid for properties which were advertised as being appropriate for a disabled person with Mobility 2 disability needs.

42. The evidence shows that no adapted property came up during the period of about 18 months when she was bidding which was not a house. There is no evidence to explain why the only adapted properties which came up as part of the bidding cycle were houses. It is also unclear whether anyone at the Council realised that the only adapted properties which became available were houses as opposed to any other types of properties.

43. As I mentioned above, all of Mrs Nur's bids were unsuccessful. However, they were unsuccessful for a variety of different reasons. First, there were a series of occasions when she was not in "*bid position 1*" and so the property was allocated to someone who was in a higher position. The evidence suggests that this bid failed because the successful bidder had been on the register for even longer than Mrs Nur. That was, for example, the position in relation to a property in Beales Street, Birmingham B6 on 2 May 2019 when Mrs Nur was in bid position 11 and the property was allocated to someone with a higher bid position. Mrs Nur makes no complaint about those decisions.

44. However, where Mrs Nur was in "*bid position 1*", there were a series of occasions when her bid was unsuccessful for other reasons. These bids were described as being "*skipped*". Mr Nabi has submitted that the rules about skipping are not contained within the policy and thus the Council acted in breach of its duty under section 166A(14) by operating a system which resulted in Mrs Nur's bids being skipped. I do not accept that submission. I accept that the Council cannot have a "*unpublished administrative practice*" which departs from the terms of the criteria set out in the scheme: see *R (Faarah) v London Borough of Southwark* [2008] EWCA Civ 807 at §41. However, any policy will inevitably leave areas where housing officers have to operate decision making systems which are consistent with the terms of the policy or exercise discretions given to the Council under the policy. As Sedley LJ said in the same case:

"Both Southwark and other authorities with similar schemes have a duty to make sure that their schemes are compliant with their statutory obligations and are not subverted by inconsistent administrative practices"

45. Where bids remain in the bidding system, a property will be allocated to the person in the highest band who has been on the register for the longest period of time. However, if housing officers consider that there are factors which mean that the property should be allocated to someone else by operating the rules of the scheme, then the system needs a way of ensuring that happens because, if that were not to happen, the property would be allocated to the wrong person. The Council's practice was that bids were "skipped" if housing officers identified a reason why a property should not be allocated to the person in the highest band who has been on the register for the longest period of time. Hence, for example, if there is competition for a house, the Council's policy is that households with children should be afforded priority over those without children. In practice, that was interpreted by Council officers to mean that bids from all households not containing children were "skipped" until the first household was reached which included a child. Assuming that the rule about giving preference to households with children is lawful, I do not accept Mr Nabi's submissions on this point. It seems to me that the skipping of bids in such circumstances is an "administrative practice" which is consistent with the terms of the policy, and thus operating the policy by skipping bids in this manner is not unlawful. That conclusion is consistent with the decision reached by Mr Ockelton who was sitting as a Deputy High Court Judge in *R (Van Boolen) v Barking and Dagenham LBC* [2009] EWHC 2196 (Admin) helpfully cited to me by Mr Manning. I agree with the approach taken by Mr Ockelton to the issues as set out in that case.

46. I thus accept Mr Manning's submission that the Council will not act unlawfully by skipping bids if it is appropriate to do so to give effect to the decision making scheme set out in the policy. The Council will, however, act unlawfully if a bid is skipped to give effect to a decision making process which conflicts with the policy. Thus, the issue in this part of the case is not the skipping of the bids *per se* but the reason why that decision was taken in an individual case and whether a decision to skip one of Mrs Nur's bids was consistent with the terms of the policy.

The lack of documents about how and why decisions were made by Council officers.

47. One of the difficulties in assessing this part of the evidence is that Council have disclosed no documents beyond the policy itself. There are thus no documents which explain the approach that Council officers were required to take when making decisions under the policy.

48. That lack of documentation appears to me to be unfortunate in the context of a large housing authority which was operating a complex system involving the allocation of a large number of properties on a weekly basis. The Council failed properly to engage with these proceedings when they were first commenced. In my first judgment, I criticised the Council's failure to engage with these proceedings. However, despite those procedural breaches, I was not prepared to prevent the Council from taking a full part in the proceedings because it seemed to me that the issues in this case were important to a range of different groups of people in Birmingham and thus it would be unsatisfactory to make judicial findings on the lawfulness of the Council's policy without giving the Council a further opportunity to take a full part in the case. I thus made directions in an order dated 17 December 2020 which sought to ensure that the Council properly discharged its duties to both the Claimant and the court as a public body whose decisions were subject to challenge in a judicial review action.

49. Given the Council's failure to comply with previous directions, I was anxious to ensure that the Council complied properly with its duty of candour by disclosing any documents held by the Council which were relevant to the case. I therefore made the following direction at paragraph 6(b) of the order:

> *"The Defendant do provide disclosure to the Claimants of any relevant documents in its possession custody or control where disclosure is required to satisfy its duty of candour by 4pm on 1 February 2021 by providing a copy of each such document to the Claimant"*

50. The Council served Detailed Grounds of Resistance and two witness statements in response to that order. The witness statements exhibited a series of documents concerning the decision making processes followed by the Council leading up to the 2014 report to cabinet. However, no documents were disclosed by the Council which explained how Council officers were required or expected to operate the CBL system other than the policy itself. If the Council had any documents which set out the

decision making processes that Council officers were expected to follow in making decisions on the CBL system, those should have been disclosed to the Claimant's solicitors in compliance with paragraph 6(b) of the directions order. As no documents were disclosed, I have to assume that there are no documents beyond the policy itself which explain to Housing Officers how the CBL system should be operated. There are, for example, no memos giving instructions about how to deal with adapted properties, applications for Disabled Facilities Grants and no procedural manual explaining the general approach required to be taken by officers of the Council in operating this housing allocation system.

51. I accept that it is possible that these documents exist but no one in the Council's Housing Department or Legal Department appreciated that they would be useful to the Court in understanding how the Council's Housing Allocation system operated in practice. There have been no applications by the Claimants for specific disclosure and no applications were made for any Council officer to be cross-examined. I do not unduly criticise the Claimants for not having made any such applications because the duty to make disclosure lay on the Council and, as set out below, in part the details of the Council's response to this claim only became clear during the trial. Nonetheless, the absence of documents from the Council explaining how the system was required to operate in practice has left the court in a difficult position, particularly where there is conflicting evidence about how the system worked in practice.

Why were Mrs Nur's bids skipped?

52. A large number of bids were unsuccessful because Mrs Nur was bidding for a house and her bid was skipped because her household did not contain any dependent children (by which the Council means a person under the age of 18). Hence, for example, Mrs Nur bid for a house on 11 April 2019 at Dovehouse Pool Road, Witton Aston, which was recorded as being skipped for the following reason:

> *"Bid skipped: Customer has no dependant children"*

53. That entry suggests that a decision was made by a Council officer to "skip" Mrs Nur's bid solely on the grounds that she did not have any dependent children, not because one of the other bidders had both a need for an adapted property and had one or more

children within their household. A similar entry appears for a number of other properties.

54. However, not having dependent children was not the only reason that Mrs Nur found that her bids were skipped. On 13 June 2019 Mrs Nur's bid for a house at Berkeley Road, East Birmingham was "skipped". The following reason was recorded on the computer system:

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

On the same day Mrs Nur's bid for a property at Broadyates Road, Birmingham was skipped for the same reason. On 15 December 2020 Abdifatah swore a statement to explain the support he had given to his mother in her housing bids. He refers at paragraph 11 to Mrs Nur's bids being skipped because she did not have dependent children. He then said:

> *"On four more occasions the reason provided was that properties were not in line with medical recommendations/mobility requirements. I understand that this means that the council considered a property to be insufficiently adapted to meet my sister's medical needs"*

55. He explained at paragraph 13:

> *"I confirm that, to the best of my recollection, I only ever placed bids on properties that appeared from the property description to meet my sister's needs i.e. adapted properties. There appeared to be no point in placing bids on properties that did not cater for her needs because firstly this would not be sensible, and secondly, I knew that the council would decline the bids on the basis that the properties were not in line with Zakiya's medical recommendations/mobility requirements. I can also confirm that I only ever bid on my mother's behalf for houses. This was only because I cannot ever recall an occasion where it was possible to bid for other property types such as Flats or maisonettes that were described as adapted. I presume that the reason for this is that property types, with adaptations, are few and far between because they are likely to present difficulties in terms of access to many groups of disabled persons"*

56. Accordingly, the position as it was understood by Mrs Nur's son was that bids for an unadapted property would have been wasted bids because they would have been

automatically declined because the property was not considered to be suitable for a disabled person who had an assessed need for an adapted property. It is entirely understandable that this is how a lay person would have approached this matter. The rules of the scheme were operated in a fairly rigid way, as was shown by the steps that Mrs Nur had to take, through her solicitors, in order to secure the right to bid for a 3 bedroomed property when the number of adults in her family would normally have led to her being assessed as needing a 4 bedroomed property. There is nothing in the policy which explains that bidders who need an adapted property to meet the needs of a disabled person are entitled to bid for an unadapted property, with the idea that adaptations can then be carried out to the property once the property has been allocated to the prospective tenant. I also bear in mind that the only information which is made available to bidders about properties is the information about the property on the bidding website. Properties are either marked as being adapted for disabled persons or as being general use properties, namely those without adaptations. Bidders will not have visited the property at the time that a bid is placed and there is no information provided to prospective bidders to assist them to understand whether a property is or is not capable of being adapted.

57. The relevant paragraph of the policy (paragraph 8.1) explains that, to make best use of the stock "*properties will be allocated to those who need the size and type of property*". The use of the word "type" gives a strong steer that a bidder should not waste their limited number of available bids in bidding for a property which is not suitable for them because it has not been adapted to meet the needs of a disabled member of their household. It is clear that this is how Mrs Nur's son understood the Council's system worked and thus, in practice he was limited to being able to make bids on behalf of his mother for adapted properties which were suitable for a disabled person with Mobility 2 needs.

What was the Council's response to the case that a household with a disabled person could not bid for an unadapted property?

58. Paragraph 43 of the Claimant's grounds avers:

> *"By operation of the allocations policy, the First Claimant is prevented from bidding for non-adapted properties. This means that there is a much smaller pool*

of properties in respect of which she is permitted to bid/deemed to be eligible for"

That case was repeated at §88 of the Claimants' Skeleton.

59. The Council's Detailed Grounds of Resistance has sections which explain the Council's approach to "*Unadapted Houses*" (paragraphs 24 and 25) and "*Adapted properties*" (paragraphs 26 to 31). The essential case advanced by the Council in these paragraphs is that there was no evidence that Mrs Nur needed a house and thus it was not discriminatory to prevent her from bidding for a type of property for which she did not have any objectively proven need. That pleading was, in my judgment, responding to a case which the Claimants had not made and it failed to respond to the case being made by the Claimants. That case included a specific allegation that the allocations policy meant that (a) a household with a disabled person could not bid for a property that was not adapted to meet the needs of a person with disabilities, (b) all adapted properties were houses and (c) hence there were no adapted properties that the First Claimant could bid for.

60. Thus, the Council's Detailed Grounds of Resistance did not respond to the specific point raised in paragraph 43 of the Claimant's Grounds namely that the operation of the allocations policy meant that she was prevented from bidding for any suitable property. That issue was first addressed in the Claimant's Skeleton Argument which was served late on the day before the final hearing. It said at paragraph 7:

"As has been explained, there were numerous properties with the correct number of bedrooms which the Claimants could have but did not bid for, which would have led to them being housed sooner"

61. That passage does not specifically engage with the case that a disabled person could only, in practice, bid for adapted properties but it perhaps implied that the Council took issue with the case that a disabled person was limited to bidding for properties that were, at that point, suitable to meet that person's disabilities.

62. In contrast to the pleaded position, the evidence filed on behalf of the Council did suggest that there was no bar on a household with a disabled person from bidding for a

property which had not been adapted to meet that person's needs. The relevant evidence was given in response to a witness statement dated 11 December 2020 from Ms Pumphrey which was served by the Council shortly before the last hearing. That witness statement said at paragraph 2:

> *"I wish to point out that the Claimant is able to bid from both general needs housing as well as adapted properties therefore she is not limited in her choice of accommodation. Had the Defendant only permitted her to bid from available adapted properties then she would have been limited in her bidding choice but that is not the case as we permit all applicants with mobility needs to bid on all types of properties so that their choice is not limited"*

63. Thus, the position taken by the Council in their evidence is that bidders who had a disabled person in their household had an unqualified right to bid for and be considered for <u>any</u> property, regardless as to whether it was adapted or not. As will be seen below, that evidence was later qualified to deal with the evidential problem that some of Mrs Nur's bids had been skipped for the stated reason that she had bid for a property that council officers decided was not suitable for her household.

64. I did not give permission to the Council to rely on that evidence at the previous hearing because, at that stage, the Council had not served an Acknowledgment of Service and had no right to take part in the hearing. However, the Council subsequently served Detailed Grounds (albeit late) and I now grant permission for the Council to rely on all the evidence it has served. I also grant permission for the Council to rely on a further witness statement which was served during the course of the hearing, to which I will refer below. The paragraph set out above was repeated at paragraph 30 of Ms Pumphrey's witness statement of 4 February 2021. Ms Pumphrey has worked for the Council for 30 years and is responsible for the operation of the Council's allocation scheme.

65. Mr Pumphrey gave evidence about Mrs Nur's bidding history and explained the reasons she suggests that her bids were unsuccessful. She said at paragraph 25:

> *"The way in which these rules have been applied in the Claimants' case is as follows. The Claimants' applications have only been skipped in relation either to*
>
> *(a) general needs houses that have not been adapted and where another*

bidder in the same of a higher band also had one or more dependent children; or

(b) adapted properties where another bidder (or a member of their household) was in the same or a higher priority band as the Claimants and where they also had a disability need for the adapted property as well as one or more dependent children"

66. Mr Nabi invites me to treat this evidence with caution as he submits that it is not wholly correct because it does not deal with the fact that Mrs Nur bid for a number of properties which housing officers considered did not have adaptations which made it suitable for Zakiya and found that her bids were skipped for that reason. Hence, the bid was not skipped because the house was allocated to another household that had both a disabled person and a child but because Mrs Nur bid for an unsuitable property. Hence, argues Mr Nabi, Ms Pumphrey's evidence is wrong about the reasons given for Mrs Nur's bids being skipped and thus she must be wrong about whether it was the Council's practice was to allow a person with a disabled person in their household to bid for a property which did not meet that person's needs.

67. I recognise that a judicial review court should be slow to refuse to accept evidence filed by the public body unless it can be demonstrated that the evidence is plainly wrong. If there is any real doubt about the proper interpretation of a state of affairs, the case should be assessed on the basis that the public body's evidence is accepted. The principles were summarised by Nicola Davies LJ in *R (Safeer & Ors) v Secretary of State for the Home Department* [2018] EWCA Civ 2518 ("***Safeer**")* who said as follows:

"16. The respondent relies upon the documents, paragraph 13 and 14 above and upon the approach to be followed by the court in judicial review proceedings where there is a dispute upon the evidence. In R (McVey and Others) v Secretary of State for Health [2010] EWHC 437 (Admin) at [35] Silber J stated:

"In my view, the proper approach to disputed evidence is that:-

i) The basic rule is that where there is a dispute on evidence in a judicial review application, then in the absence of cross-examination, the facts in the defendants' evidence must be assumed to be correct;

ii) An exception to this rule arises where the documents show that the defendant's evidence cannot be correct; and that

iii) The proper course for a claimant who wishes to challenge the correctness of an important aspect of the defendant's evidence relating to a factual matter on which the judge will have to make a critical factual finding is to apply to cross-examine the maker of the witness statement on which the defendant relies."

17. The basic rule reflects the approach of Lane LJ (as he then was) in R v Board of Visitors of Hull Prison ex p St Germaine No. 2 [1979] 1 WLR 1401 at 1410:

> *"Since we have had to decide this matter on affidavit evidence without the benefit of cross-examination, we are obliged to take the facts where they are in issue as they are deposed to on behalf of the Board"*

18. Stanley Benton J (as he then was) in S v Airedale NHS Trust [2002] All ER (D) 79 at [18-19] stated:

> *"18. It is a convention of our litigation that at a trial in general the evidence of a witness is accepted unless he is cross-examined and thus given the opportunity to rebut the allegations made against him. There may be an exception where there is undisputed objective evidence inconsistent with that of the witness that cannot sensibly be explained away (in other words, the witness's testimony is manifestly wrong), but that is not the present case. The general rule applies as much in judicial review proceedings as in other litigation although in judicial review proceedings it is relatively unusual for there to be a conflict of testimony and even more unusual for there to be cross-examination of witnesses.*
>
> *19. … I think I should adhere to the general rule except where the contemporaneous documents dictate that a witness statement must be incorrect."*

19. The basic rule is clear, namely that where there is a dispute on the evidence in a judicial review application then in the absence of cross-examination the facts in the defendant's evidence must be assumed to be correct. The appellant relies on the exception to the rule identified in R (McVey and Others) at (ii), namely that the documents must show that the defendant's evidence cannot be correct. Mr Sharma on behalf of the appellant realistically accepts that the test identified at (ii) is a high one but contends that there can be adjustment to this test as was envisaged by Lord Scott in Dougherty v Birmingham City Council [2008] 3 WLR 636. He stated that judicial review procedure should be adjusted to enable issues of fact to be resolved with which Lord Mance agreed at [138] stating:

> *"...I agree with the observations ... of ... Lord Scott, about the possibility of adjusting judicial review procedure in appropriate circumstances to cover any necessary factual investigation and determination."*

68. No application was made to cross-examine Ms Pumphrey and I am thus obliged to accept the Council's evidence unless I conclude that it "*cannot be correct*". However, if there is material to suggest that the evidence from a public official cannot be correct, the court is entitled to reach the conclusion that other evidence should be preferred: see for example how Lord Dyson approached a similar issue in *R (Fisher) v North Derbyshire Health Authority* [1997] EWHC Admin 675 at §64.

69. In assessing whether this part of Ms Pumprhrey's evidence "cannot be correct", it is right to note that Mrs Nur's son explains in a witness statement that his mother's bids had been skipped on four occasions because properties were not in line with medical recommendations/mobility requirements. If Ms Pumphrey was correct in her evidence about the Council's practices, bidding for a property which was not in line with medical recommendations/mobility requirements could not lead to a bid being skipped for that reason. That raises the question as to <u>why</u> those bids were skipped. Unfortunately, Ms Pumphrey gave no explanation for the reasons shown on the Council's computer system for skipping of those bids. I thus consider that, in assessing whether I accept Mr Nabi's case, it is necessary to look carefully at the whole of the evidence.

70. As I understand matters, the computer printouts which are in evidence only relate to a number of bids made on behalf of Mrs Nur. There were many other bids which are not in evidence but the evidence shows examples of the bids Mrs Nur made across the relevant period. The computer printouts show that her bid was "skipped" on 2 occasions because the house was not in line with medical recommendations/mobility requirements. In my judgment, Ms Pumphrey was wrong to have said in her witness statement that Mrs Nur's bids were only skipped for the 2 reasons set out above. There is clear evidence that other bids were "skipped" because a Council officer made the decision that a property was not in accordance with medical recommendations/ mobility requirements and thus Mrs Nur should not be permitted to bid for that property.

71. Mrs Pumphrey also sought to explain how the Council's decision making process operated in other respects. Her evidence was as follows:

> *"44. For general need houses with 2 or more bedrooms, allocation officers will consider applicants who have expressed an interest in the highest band award first. Preference is given to families with dependent children. If, for example, there are no applicants with a band 1 award and dependent children, the applicant with the earliest relevant date with a band 1 and no dependent children will be offered the property. If there are no other applicants with a band 1, the same process will be followed and applicants with a band 2 award will be shortlisted.*
>
> *For adapted properties advertised, a similar shortlist process to the above is applied, however applicants with a mobility category are prioritised and the shortlist exhausted before general need applicants requiring no adaptations are considered"*

72. Ms Pumphrey's evidence on this point appears to me to be problematic because it is not consistent with the way in which the Council has explained its decision making at earlier points in this case. The Council's correspondence shows that it did not say its system operated so that, in the case of an adapted property, a selection was made between applicants with a need for a disabled property above other applicants who had no need for a property with adaptations for a disabled person. When the question was first raised in correspondence about why Mrs Nur's bid for the house at 183 Wash Lane was skipped, a letter was sent by the Council's Legal and Governance Department which said as follows:

> *"You request an explanation as to why your client was not offered the property at 183 Wash Lane, B25 8PU despite reaching bid position number 1 at the end of the bidding cycle.*
>
> *Our client confirms that Ms Nur's application for social housing received a Band 2 Disability - Disability, Homeless Priority, and an additional Band 3 for overcrowding. She is eligible for a 4-bed adaptable property. Your client lives with her 3 adult daughters.*
>
> *Further, 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 Scheme 2017, 8.1 states "To enable the best use of the Council and partners registered provider of 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 but do not have dependent children.

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

73. This letter says that preference would be given to "*any applicants with dependent children*". There is no reference in this letter to Mrs Nur's bid being skipped because there were other families seeking the property who had dependent children and a person in the household who was disabled. I have been invited by Mr Manning to read this letter as if it contained that qualification. I regret that I am simply unable to do that because it is, in my judgment, entirely clear that the sole reason given by the Council as to why Mrs Nur's bid was skipped was that she had no dependent children. The fact that, in a competition between families with children, the property may have subsequently been allocated to a family who had both dependent children and a member of the household who was disabled does not appear to me to have any relevance to the question as to why Mrs Nur's bid was skipped. I am not prepared to read this letter as suggesting that her bid was unsuccessful because there was another bidder whose household contained both a disabled person and a dependent child.

74. That reasoning is supported by two further factors. First, in July 2020 there was an exchange of letters in connection with another property, namely a house at 60 Solihull Lane, Birmingham, B28 9LU. This was a 3 bedroomed house, 2 living rooms which is classified as Mob3 having a stair lift with a level access shower, and therefore would have been suitable for Mrs Nur. Once again, her bid was skipped. The decision making

process was challenged by her solicitors and the Council responded by way of letter dated 7 August 2020. The letter explained as follows:

> *"The records show that contact was made with your client and details taken from her on 20 July 2020. Mrs Nur contacted the Home Option public phone line, verification was made via her son and he enquired if they had been shortlisted for the above property and was advised to wait for the bidding cycle to close.*
>
> *On 24 July 2020 the property was shortlisted and Mrs Nur's bid for the above property was skipped. The reason given is that she has no dependent children. On 27 July 2020 Mrs Nur and her son contacted The Home Option Team to chase the outcome of their bid and they were informed that they were skipped because she had no dependent children.*
>
> *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. Therefore, Mrs Nur was shortlisted in line with the Council's Housing Allocation Scheme at page 39 which states:….*
>
> *[the relevant part of the Policy is then set out]*
>
> *We trust the above clarifies the reason why your client and many other applicants were skipped for the above property. The Council has scarce housing and must make best use of its council stock when allocating properties. We confirm that the property is no longer available as it has been allocated to a family with dependent children."*

75. That letter could not be clearer that the Council, at that stage, interpreted its policy to provide that a house which has been adapted to meet the needs of disabled person would be offered to a family with dependent children before any consideration was given to offering the property to a person with a physical or sensory disability.

76. Lastly, I am mindful of the fact that the Council must have given instructions to their counsel when he made the submission which I recorded at paragraph 57 of my previous judgment. For completeness, the submissions were as follows:

> *"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"*

77. That submission suggested that Council officers were right to have treated all families with dependent children as having precedence over disabled households when decisions had to be made about who should be allocated an adapted house.

78. In those circumstances, Ms Pumphrey's evidence cannot be correct that, at the material time, wherever an adapted house came up for consideration, decisions were made by Council officers that applicants with a need for a property with the relevant mobility category were prioritised over families with children, and that a shortlist of such persons was exhausted before general need applicants requiring no adaptations were considered, including by implication families with children. This may be how the Council <u>now</u> operates its decision making processes following my judgment in December 2020. It may even be how Ms Pumphrey thought the system ought to have operated at all times, but it plainly was not how the system operated when Mrs Nur was making the relevant applications.

79. It therefore seems to me that the evidence demonstrates conclusively that, at least prior to December 2020, the practice of the Council was to skip any bid for an adapted house by a household which did not contain a dependent child in favour of household with children. It may well be that, when a decision fell to be made amongst those bidders whose bids had not been skipped, preference was given to bidders who had both a dependent child and a disabled member of their family. However, the precise way in

which Council officers made these important decisions is unclear because there is no procedural manual which explains to either the Council officers or to prospective bidders how such decisions should be made.

80. That leads back to the dispute of fact as to whether it was reasonably open to households containing a disabled person to bid for an unadapted house. It seems clear that Mrs Nur, acting through her son, thought that the scheme rules prevented this. Abdifatah gave further details to explain his understanding in a witness statement dated 25 February 2021 where he said:

> *"13. In the past I have bid for properties that were not described as adapted but such bids were not successful and from experience I learned that bids for properties that were not adapted would be unsuccessful. In fact, I was later told this by a council officer (to whom I refer later in this statement). Latterly I only ever placed bids on properties that appeared from the property description to meet my sister's needs i.e. adapted properties. When selecting properties to bid on I would identify properties that were described as being adapted for disabled use. I remember that there were disability symbols next to the descriptions. There appeared to be no point in placing bids on properties that did not cater for her needs because firstly this would not be sensible, and secondly, I knew, from experience, that the council would decline the bids on the basis that the properties were not in line with Zakiya's medical recommendations/mobility requirements. It would have been a waste of a bid.*
>
> *14. Property descriptions did not ever include the words 'capable of being adapted' or words to that effect. I recall a telephone discussion with a male Housing Officer in which he informed me that it was pointless bidding for properties that were not described as adapted. I enquired as to whether I could bid for an un-adapted property and then ask the Council to carry out necessary adaptations. I remember the Housing Officer telling me that this would not be possible. I recall that this telephone discussion took place at around the time when the council agreed that we could place bids for three bedroomed properties. The housing officer was male. I do not recall his name. I spoke with him after telephoning the council's Housing Options team"*

81. Mr Manning invited me to discount this evidence because the individual who provided this advice was not identified. I agree that the evidence would hold more weight if the advice given to Abdifatah had been put in writing or that the officer had been identified. However, this evidence is consistent with Abdifatah's evidence from

December 2020 and is also consistent with the properties for which he arranged for bids to be placed for his mother.

82. At the start of the second day of the trial Mr Manning applied for permission to put in a further witness statement from Ms Pumphrey concerning the Council's decision making systems. Although this evidence was served very late and despite objections by Mr Nabi for the Claimants, I am prepared to admit the evidence, albeit with the caveat that I treat this evidence with considerable caution given how late it was filed. It does not seem to me that the full approach set out in *Safeer* needs to be followed when evidence is submitted by a public body at a very late stage. Nonetheless, in considering this evidence I have followed the *Safeer* approach.

83. At paragraphs 4 and 5 of her latest statement Ms Pumphrey said as follows:

> *"4. I should also like to confirm that when I used the term "adaptable property" in my witness statement, I was referring to a general needs property that can be adapted. There are only 2 kinds of property, general needs properties and adapted properties. When considering a bid for a general needs property from a bidder with a need for an adapted property, we look at the needs of the household who bid for it and take advice from an Occupational Therapist and Surveyor to ascertain whether the property can be adapted to meet those needs. If it can be, then the property is considered adaptable; if it cannot be, then the property is considered unadaptable. There is no separate category of adaptable properties on the bidding website that would need to be identified as such for bidders: bidders can simply bid for an unadapted general needs property and then the assessment is made as to whether it can be adapted for them.*
>
> *5. When we say on our print off that a property was "not in line with medical recommendation" this does not mean that it is already adapted. It means either it is an adapted property but cannot be made suitable for the needs of the bidder's household or that it is an unadapted property i.e. a general needs property as explained above and cannot be made suitable for the needs of the bidder's household. This is reflected in paragraph 7.1 of the Housing Allocation Scheme (at bundle pages 636 and 637).*

84. Ms Pumphrey also exhibited a page from the present version of the Council's website. This said:

"If an applicant requires adaptations and bids for a standard unadapted property, it should be suitable for their needs or suitable to be adapted. The usual shortlisting rules will apply.

If the property is accepted, tenants may then apply for a Disabled Facilities Grant to help towards the costs of making changes to the home by telephoning 0121 303 1234, option 1 for an Occupational Therapist assessment, or email csadultsocialcare@birmingham.gov.uk . More information is available here - ***Help to use or move around your home****"*

85. This evidence goes to the core of the Council's defence to this case but there is no explanation as to why it only appeared midway through the trial. The Council's case is that the fault here lay with the First Claimant because (a) she only bid for houses when she should have bid for other types of properties and (b) she put herself in an unnecessarily limited position by only bidding for adapted properties when she ought to have realised that she was entitled to bid for general use properties which could then be adapted. The Council's answer (albeit not set out clearly in its Detailed Grounds of Resistance) was that the absence of adaptable properties should have been no barrier for Mrs Nur because other properties should have been treated by Mrs Nur as being "*adaptable*" and that, if she had bid for such a property, the Council would have sought specific advice from a surveyor and an OT to determine whether a property could be adapted or not, and only skipped the bid if the property could not be adapted. Thus, contrary to the evidence given by Mrs Pumphrey in her earlier witness statements, it was not open to a disabled person to bid for any general use property. A disabled person's bid for a general use property would be skipped as an unsuitable bid if council officers sought advice from a surveyor and an OT and were satisfied that the property was unsuitable because it could not be adapted to meet the needs of the disabled person.

86. I regret to have to observe that there seem to me to be substantial difficulties in accepting this late evidence as being a reliable guide as to how housing officers in Birmingham operated the policy when a household with a disabled person applied for a general needs property during the period when the Council was in receipt of bids made on behalf of Mrs Nur. Given the *Safeer* approach I must take to evidence which has not been tested by cross examination set above, it is necessary to explain the problems with accepting that this is reliable evidence of the practice of the Council during the period when Mrs Nur was bidding for properties.

87. First, there is nothing in writing to suggest this how the policy worked. It would have involved allocating a property which was "unsuitable" to a household in the hope that it could be made suitable by adaptations. It thus would involve reading words into paragraph 8 of the policy. Whilst that may be permissible, that case would be assisted if the Council had a procedural manual for Housing Officers to instruct them to make consistent decisions in the operation of the Allocation Scheme as described by Ms Pumphrey. If there was no procedural manual, I would have expected some written evidence in a memorandum or some other evidence of instructions being given to Housing Officers that this was the procedure they were expected to follow if a household with a disabled person bid for a property which was, at that point, not suitable for them.

88. The Council have produced no evidence whatsoever to suggest that this supposed procedure was communicated by Ms Pumphrey to the Housing Officers who were operating the allocation systems. There is no evidence of any training material which showed that this was the procedure that officers were expected to follow. The total absence of any documentary evidence that this was the procedure to be followed when a household with a disabled person applied for a general needs property means, in my judgment, that I should hesitate before accepting that the procedure of seeking advice as set out by Ms Pumphrey was standard practice.

89. The second problem with accepting this evidence is that it contradicts the evidence of Abdifatah about what he was told by a housing officer. It is clear from Mrs Nur's bidding history that he acted in accordance with the practice he was told to adopt.

90. The third problem is source of support for Ms Pumphrey's evidence at paragraph 5 of her statement, namely paragraph 7.1 of the Policy, does not assist her. This paragraph rightly states that the mismatch between supply and demand means that the Council cannot provide properties in accordance with bidders' preferences and encourages bidders to bid for properties across a "*wide geographical area of the City*". However, this paragraph says nothing which could be taken by a bidder who has a disabled person in their household as encouragement to bid for a general use property on the basis that was unsuitable for the family at that stage but with the idea that adaptations could be undertaken to the property after the bid is accepted. I cannot accept that a bidder would

read this paragraph as encouraging a bid for a property which, at that stage, was unsuitable.

91. The fourth problem is that, whilst the evidence matches the wording on the Council website, there is no indication given in the evidence as to how long the website has had this wording and it was never referred to prior to midway through the trial of this action. Unusually for a judicial review case, I made an order placing the Council under a specific disclosure duty. If this wording had been on the Council's bidding website during the period when Mrs Nur was making bids, this document ought to have been disclosed in compliance with paragraph 6(b) of the terms of the Order of 17 December 2020 because it was plainly relevant. It was not disclosed at that time, and indeed was not disclosed until midway through the trial. Thus, not only is this evidence late but, if the contents of the website were the same throughout the time when Mrs Nur was placing bids, the only conclusion is that the Council acted in breach of the terms of the directions order in this case by not disclosing this document at an earlier stage.

92. The fifth problem with this evidence is that this is not what the Council's entry on its computer system states in relation to any of Mrs Nur's bids. The computer entry states that the bid was skipped because "*Property not in line with medical recommendations and/or mobility category*", not that the property was presently not in line with medical recommendations and/or mobility category and an assessment had been reached that it could not be adapted to bring it in line with the recommendations.

93. The sixth problem with this evidence is one of practicality. The bidding process follows a strict timetable with bids accepted or skipped over a very short number of days. It is very hard to accept that it was standard practice for Housing Officers to seek and obtain advice about a particular property from an Occupational Therapist and a Surveyor within the very short period between the day when the bids are placed and the day when decisions are made about whether a bid should be skipped or allowed through to the final decision making process. It seems wholly impractical to say that housing officers sought and obtained advice from two independent experts within the short time window available before a decision was made that a bid was skipped. I can accept that this advice could be sought as part of the process to pursue a Disabled Facilities Grant application but not in the tight window of time before a bid was skipped.

94. A seventh problem with the Council's case on this point is that, if the processes described by Ms Pumphrey were standard procedures for the Council, it is inexplicable that no one from the Council ever thought to explain to Mrs Nur or her solicitors at any point during the long period when she was unsuccessfully bidding for adapted properties that the Council operated a process that would support her bidding for an unadapted property and then help her to secure adaptions to it to make it suitable for her daughter's needs. It is also inexplicable as to why this was not set out in the Council's pleadings. Given Mrs Nur's high position on the register, there was, on the Council's case, a relatively straightforward way for Mrs Nur to secure a suitable property for her family. With the possible exception of an entry in the small print bidding website (which may or may not have been present when Mrs Nur was making her bids), I regard it as inexplicable that no one from the Council ever thought to explain to Mrs Nur or her solicitors what she should do in order to secure a suitable property for her family.

95. However, there was, in my view, a relatively straightforward way to determine the truth about Ms Pumphrey's evidence about the procedures which she claimed were followed as standard procedures whenever a household with a disabled person made a bid for a property which was not suitable for them but potentially could be made suitable if adaptions were undertaken. There was evidence that between 2 and 4 occasions Mrs Nur made a bid and then found that, at the end of the bidding cycle, her bid had been skipped because a Council officer considered that the property did not meet her daughter's needs as a disabled person. If Ms Pumphrey's account of the procedures followed by the Council was correct, there would be evidence in the Council's files about the inquiries made from an OT and/or a surveyor in respect of each of these bids prior to the bid being "skipped" on the grounds that the property was not considered to be suitable to meet Zakiya's needs and that this property could not be adapted to meet her needs. Mr Manning kindly made inquiries and was able to confirm that the Council's files contained no evidence that any inquiries had been made of either an OT or a surveyor in any of the cases where a property bid for by Mrs Nur had been skipped on this basis. Mr Manning said that his instructions were that the Council officers had made that decision because they knew each of the properties and knew they could not be adapted to meet Zakiya's needs. However, there was nothing in the Council's records to record that assessment.

96. Taking all these matters together, it is clear to me that Ms Pumphrey's evidence about a standard process that was said to be routinely followed by Housing Officers at Birmingham City Council when faced with bids from households including a person who had disabilities and needed an adapted property could not possibly be correct. If the standard process operated by Council officers was that advice ought to be sought from an OT and a surveyor before a bid for an unsuitable property was skipped by Council officers, it is inconceivable that no record was ever made by Council officers in any case that they were overriding the standard procedure because of a level of personal knowledge by a housing officer in relation to each of the relevant properties.

97. That account of events appears to me to be virtually certain to be wrong because the adaptations required for Zakiya in this case were standard and were relatively modest, namely a level access shower, access to stairs with bilateral handrails and a downstairs toilet. A property would have to have highly unusual features so that these standard adaptations, such as a level access shower or a downstairs toilet, were not only not part of an existing property but where there was something so distinctive about the property which meant that it could not be adapted to provide those features. It seems to me highly unlikely that, on each occasion when a bid was made, a housing officer would have reached that view based on his or her personal knowledge of the property in question and thus made the decision to skip the bid without going through the standard process of seeking advice from a surveyor and an OT. Further, if the standard practices were being departed from due to personal knowledge by housing officers, it seems unbelievable that no record was ever made of that fact.

98. For all these reasons, in my judgment I reject the late evidence from Ms Pumphrey that it was the Council's standard practice to seek advice from a surveyor and an OT before skipping a bid for a general use property was made by a bidder who a need for an adapted property. I am satisfied that this evidence simply cannot be correct.

99. I therefore conclude that the evidence given by Mr Abdulahi is correct on this point, namely that, as a matter of general practice during the period when Mrs Nur was making bids for properties, bids which were made by households on the register for a general use property which were made by a bidder who had a need for an adapted

property would be "skipped" because the property was not considered to be suitable for the needs of the disabled person in the household. The same approach must have been applied where a person applied for an adapted property but where the existing adaptations meant that it was not suitable to meet the needs of a particular disabled person.

The allocation of a house to the Claimants.

100. Permission was given for this challenge to proceed by Mr Justice Swift at a hearing on 6 February 2020. On 18 September 2020 the Council made a "direct offer" of a house for Mrs Nur at 229 West Boulevard Road, Birmingham B23 2DE. This property needed some adaptations and that was accomplished with the aid of a Disabled Facilities Grant and the family moved into the house on 9 December 2020. Paragraph 7.1 of the Policy allows the Council to make an offer of a property to a person on the register at any time outside of the bidding process. Accordingly, in making this allocation, the Council were not acting in breach of their own policy and were thus not acting unlawfully under section 166A(14) of the Housing Act 1996.

101. No explanation has been advanced by the Council as to why the Council decided that an offer should be made to Mrs Nur entirely outside the Council's bidding system. However, once the offer was made, the Council wrote to Mrs Nur's solicitors to suggest that the offer of a property rendered her legal case academic and invited them to put forward proposals to resolve this challenge. I dealt with the question as to whether this claim became academic in the first judgment and will not repeat those observations here. However, it seems to me that the only inference that I can draw from these facts is that the primary reason that Mrs Nur was offered a house outside of the bidding system was that she had the benefit of solicitors who were acting on her behalf and had been granted permission to bring these proceedings. That may well have led the Council to take a pragmatic approach in seeking to rehouse her in the hope that it would avoid having to defend the lawfulness of its housing allocation policy in the High Court.

102. However, Mrs Nur's circumstances cannot be unique and, indeed, they are almost certainly relatively common. I know from my own practice as a lawyer and from other cases that come before me that individuals with learning difficulties are often described

as having a mental age which is equated to a young child. When persons with learning difficulties reach adulthood, they very often remain cared for by their families, with very similar levels of support provided to them as parents are required to provide to young children in discharge of their parental responsibilities. There is evidence from the Claimant's solicitor that the incidence of young people with disabilities continuing to live within their families is high and that a higher proportion of such families are accommodated in social housing. The reasons for this are not difficult to understand from the facts of this case because, as Mrs Nur explains, she is unable to hold down a job because she spends her time providing care to Zakiya. As a result, Mrs Nur qualifies for welfare benefits but, in practice, that means that the level of her income means that she will need support for housing costs from housing benefit.

103. The problem that Mrs Nur faced was that she thought that she was only able to bid for properties that were adapted so as to be suitable for someone with her daughter's disabilities but the only adapted properties that came up on the Council's system were houses. Whenever she bid for a property which was advertised as having been adapted to meet the needs of a disabled person, she was unsuccessful for one of three reasons. First, because there was someone who had a higher bid position than her on the register. No complaint is made by Mrs Nur about the Council's decisions in such cases. The second reason her bids were skipped was because Housing Officers decided that the particular property was not suitable to meet Zakiya's needs. In such cases there is no evidence that any proper consideration was given as to whether the property could be adapted to meet Zakiya's needs and thus she was excluded from being able to bid for properties which may have been suitable. The third reason was that her bid was skipped for an adapted house because she had no dependent children. Whilst there were occasions where she was unsuccessful for the first and second reasons, the third reason worked, in practice, to bar to Mrs Nur securing a property because all of the properties which were advertised as having been adapted to meet the needs of a disabled person were houses. The Council made it clear that its practice was that it was not prepared to allocate such a house to a family without children if there was a bidding household which contained children. There was such a high demand for houses that, in practice, there was always at least one Band 2 household bidding for the property which contained children. It follows that the practices followed by the Council mean that, in reality, Mrs Nur's bids would always fail. Indeed, it seems likely that, if she had not

brought these proceedings and been offered a house outside of the bidding system, she would still be submitting weekly bids for adapted properties.

The Claimants' Grounds.

104. I ruled in favour of the Claimant on Ground 1 and say nothing further about that ground here.

Ground 2: Indirect discrimination.

105. It is common ground that the Council's housing allocation policy is relevant "*provision, criterion or practise*" for the purposes of section 19 of the Equality Act 2010 ("**the EA**").

106. A practice is discriminatory under section 19 EA if it would put persons who have a disabled member of their household ("**disabled households**") at a particular disadvantage when compared with persons who do not have a disabled member of their household ("**non-disabled households**"). As in all cases concerning discrimination, it is important to identify the comparator. Section 19(1) EA provides:

> *"On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case"*

107. However, as Lady Hale observed at §13 of *Chief Constable of West Yorkshire v Homer* [2012] ICR 704 ("***Homer**")* the comparator cannot bet set up by reference to the protected characteristic itself or discrimination law would be self-defeating. Monaghon on Equality Law says at §6.347:

> *"In general, the pool should comprise all those who may be – or could be – subject to the provision, criterion or practice in issue. In other words the pool must be one which suitably tests the alleged discrimination"*

108. Applying that approach, the comparison must be between persons on the register who are applying for properties and have a disabled person in their households and persons on the register who are applying for properties who do not have a disabled person in their household. Hence some comparators will have children in their households and others will not.

109. I have found that persons in disabled households such as Mrs Nur were only, in practice, able to have any chance of bidding successfully for adapted properties under Birmingham's system. Non-disabled households were able to bid for all properties on the Council's list. Thus, the pool of properties that could be bid for by a person from a non-disabled household (whether that household included children or not) was substantially larger than the pool of properties that a person from a disabled household could bid for (again whether they had children as part of the household or not). That pool of potential properties is further diminished by the rule which gives priority for houses to households with children. Indeed, on the facts of this case, the pool of properties which Mrs Nur could bid for in the relevant period did not contain any properties.

110. However, even if I was wrong in that a person such as Mrs Nur could bid for properties that were unadapted but which were capable of being adapted, in my judgment she was still at a "particular disadvantage" in this bidding process because (a) she could only bid with any chance of success for adaptable properties but not unadaptable properties, and (b) she had no means of knowing in advance whether an unadapted property was adaptable or not. Thus, she was at a particular disadvantage because if she bid for unadapted properties, she would inevitably waste a number of bids in bidding for properties that council officers later determined could not be adapted. Thus, the pool of properties she could bid for was smaller than those properties that were available to a non-disabled household.

111. That disadvantage was aggravated by the rule giving preference to households with children for houses because, in practice, the only adapted properties were houses. In considering whether a members of a disabled household such as Mrs Nur were put at a disadvantage by this policy, it is also relevant to take account of the fact that disabled households were less likely to be able to bid successfully for houses than non-disabled households because they were less likely to have a child in their household. The Council rightly accept that, for the purposes of section 19 EA, it does not matter that the application is made by Mrs Nur on behalf of her household and that Zakiya is the disabled person: see *Coleman v Attridge Law* [2008] ICR 1128 and the line of cases on associative discrimination.

112. Accordingly, I find that the Council's policy left disabled households such as Mrs Nur's household at a particular disadvantage for the purposes of section 19 as compared to non-disabled households. It is thus necessary to examine whether the policy is a "*proportionate means of achieving a legitimate aim*": see section 19(2)(d) EA.

Legitimate Aim.

113. There is no clear rationale in the 2014 documents which explains why preference was proposed to be given when allocating houses to households with dependent children (it being common ground that a dependent "child" means a person under the age of 18). The explanation advanced by Mr Walsh for this policy was as follows:

> *"My recollection from the policy development workshops was that this was not a major point of controversy, with an acceptance that it was rational to seek to give preference to households with dependent children because of the benefits of providing children with access to outside space. In contrast, it was considered to be less desirable – albeit inevitable given the profile of our stock – to allocate flatted accommodation to households with dependent children due to issues such as parents struggling to negotiate stairs with pushchairs and lack of access to private outdoor space"*

114. The Claimants accept that, in making the decision to offer a measure of preference to houses for families with dependent children, the Council is pursuing a legitimate objective. I agree. Accordingly, the key question is proportionality, not legitimate aim.

115. The correct approach to determine whether a measure which amounts to indirect discrimination can be justified as being proportionate was set out by Lady Hale in *Homer* at paragraphs 19ff. Lady Hale cited with approval the approach outlined by Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, who said at paragraph 151:

> *". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

116. There is no direct evidence that all families with dependent children "need" houses. I accept the evidence from Mr Walsh which explains that the Council officers thought

that giving families with dependent children priority for houses would be beneficial for children. However, that evidence does not go as far as demonstrating that there is a "*real need*" to give a preference for houses to all households with dependent children. The dearth of evidence means that, whilst I accept anecdotally that there may well be a real need for some families to have a house, it is unclear if there could be said to be a real need for this preference for all such families.

117. However, the real difficulty for the Council in demonstrating that the measure is proportionate arises when seeking to "*weigh the need against the seriousness of the detriment to the disadvantaged group".* The "disadvantaged group" here are households with an adult with learning difficulties, and that such households were proportionally less likely to include children. The evidence demonstrates that this policy applied so that all of the properties available to the Council which had been adapted to meet the needs of the disabled were classified as houses as opposed to other types of accommodation and thus only available to households with children. Aside from the allocations of the houses bid for by Mrs Nur in this particular case, there is no evidence whether adapted properties were all allocated to families with a disabled member in that household or were allocated to families with children, regardless as to whether the household also included a disabled person or not. However, it appears clear that no one from the Council asked themselves whether it was appropriate to operate a policy which, in effect, meant that a disabled household which did not contain a child would, in practice, have no realistic chance of being allocated a property which was adapted for their needs.

118. The evidence also shows that, on any occasion on which Mrs Nur bid for an adapted property:

    a. there was always at least one Band 2 household with dependent children who also bid for the property;
    b. Mrs Nur's bid was thus "skipped" because she did not have dependent children in her household; and
    c. When the property was allocated, it was always allocated to a household with dependent children where one of the member of the household had some form of disability.

119. Thus, the "*detriment to the disadvantaged group"* was, in practice, absolute because the way that the system worked meant that Mrs Nur was highly unlikely to have ever been allocated a property which had been adapted to meet her daughter's needs as a disabled person. Lady Hale went on to say as follows (relating to Mummery LJ) at paragraph 20:

> *"He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:*
>
> > *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"*
>
> *As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.*

120. Lady Hale further observed at paragraph 23:

> *"A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate"*

121. She also observed at paragraph 24:

> *"Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer"*

122. It seems to me that, in assessing the proportionality of the PCP, I am obliged to look at how the Council's policy worked out in practice. Including the words "practice" in section 19(1) means that Parliament must have intended a focus to be on the practical effect of measures not their theoretical operation in idealised circumstances. I am thus not limited to looking at the words of the policy itself but have to look to see how Housing Officers made decisions which they believed to be in accordance with the policy. I am also required to look at the effect of the operation of the decision making systems of the Council as a whole, demonstrated by the totality of the evidence in this case.

123. In *Essop & Ors v Home Office (UK Border Agency)* [2017] UKSC 27 Lady Hale said at §25 that indirect discrimination "*requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual*". The question, Lady Hale explained, is whether people sharing a particular protected characteristic are subjected to requirements which many of them cannot meet and which cannot be shown to be justified. She said "*The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot*".

124. In my judgment, the practice of giving a "preference" to households with children in the manner in which it was applied by the Council cannot be justified for the following reasons.

125. First, all of the reasons advanced to justify giving a preference for houses for households with dependent children appear to me to apply virtually equally to households where a member is a young adult with learning difficulties. For present purposes, it is necessary to look at the particular disability of the Second Claimant and not the class of disabled persons as a whole. Adults with learning difficulties are highly dependent on their carers, often parents, and are assessed as having a mental age of a child. The difference is that, whilst children without learning difficulties can be expected to develop and mature in accordance with their chronological ages, the rate of intellectual development for adults with learning difficulties is far slower, if there is any development at all. The benefits for adults with learning difficulties in having access to outside space, not being in flatted accommodation where their noise or crying might offend others and the difficulties for parents associated with push-chairs apply equally to someone like Zakiya who has mobility problems. It cannot be proportionate to treat parents who have to provide care for a disabled adult with learning difficulties so adversely in comparison to all families with children.

126. Secondly, the needs of a disabled household meant that such households were already limited in the number of properties they could bid for because disabled households could only bid for adapted properties. However, even if I am wrong and the practice allowed disabled households to bid for both adapted and adaptable properties, a

disabled household was still limited in the properties it could bid for. Applying a further restriction by giving preference to families with children meant that the limited pool of properties available to disabled households was further diminished. There is no evidence to show that the remaining pool of properties that were available to disabled households on either basis meant that this restriction nonetheless left disabled households without children with a reasonable pool of properties they could bid for. On the Claimants' case this pool was empty. However even on the Council's case, it was a limited pool but there is no evidence as to how limited it was. A higher proportion of disabled people live in households that do not have a child than non-disabled people. Thus *de facto* removing their ability to bid for houses only leaves disabled households able to bid for adaptable properties. The Council have not proven how many general use houses were potentially available for disabled households because they could be adapted. Thus, even on the Council's case, I cannot reach the conclusion that limiting disabled households to bid for properties in this pool was proportionate because I have no evidence about the size of the pool.

127. It is, in my judgment, no answer to say that the policy was justified because houses were, practice, only allocated to persons who had both children and a person with disabilities. First, the evidence does not show that this was a Council policy or that it happened on wider instances than in this case. That happened in this case but it was not how the Council officers interpreted the policy in the relevant period. However, even if that were the case that all adapted properties were let to households with a disabled member and a child, the policy still led to a blanket ban in practice for disabled families without children being able to bid successfully for adapted properties. I accept that, in the absence of any evidence of the extent of any alternative provision, the Council have not satisfied the burden of proof to show that it is proportionate to give such a level of preference to bidders with children in their families over disabled household who do not have a child. The de facto blanket approach which prevents a non-child disabled household from being allocated an adapted property is not proportionate because it does not weigh the real needs of the different types of households for the precious resource of an adapted property.

128. Lastly, it is not an answer to say that the Council retained a discretion to allocate property outside of the bidding system. An allocation was not made in this case until

shortly before a trial and for the purpose of seeking to avoid this trial. There was no further explanation as to how a property would be allocated outside the bidding system and thus that feature cannot be sufficient to restore any proportionality to the process.

129. I thus find that the Council's policy, as it operated in practice, amounted to indirect discrimination against the First Claimant, as a person with a disabled person in her household, and against the Second Claimant as a household and that, even though the policy was brought in for a legitimate aim, it was not proportionate and hence was unlawful.

Public Sector Equality Duty.

130. The Claimants advanced a case in their skeleton argument that the failure to monitor the effects of the policy breached the Public Sector Equality Duty ("**PSED**") in section 149 EA. No objection was taken to this ground by the Council but, whilst preparing this judgment, I have noted that this is not a ground that is advanced on behalf of the Claimants in their Amended Statement of Facts and Grounds. CPR 54.15 provides that the Court's permission is required if a Claimant seeks to rely on additional grounds. No application was made by Mr Nabi for permission.

131. I have been critical of the Council in this case for its failure to follow the CPR and for its failure to comply with court orders. I must apply that approach in an even-handed way, particularly given the importance that the Court of Appeal has given in a series of recent judgments to maintaining procedural rigour in judicial review proceedings. Although I can see that the Claimants may have a good case for a Declaration that the Council has acted in breach of the PSED, I am not going to rule on a ground which was not set out in the Amended Statement of Facts and Grounds and in respect of which no permission was explicitly sought. I thus decline to award the Claimants any relief based on the PSED issues raised in the Claimants' Skeleton.

132. Further, it is not clear to me that any relief would be needed because I am informed that the Council are in the process of reviewing the policy and that Council officers will take in to account the terms of this judgment in that review. I can thus be confident that, without having to make findings of a breach of the PSED, the Council will consider the structural problem with the Council's policy in that, as it worked out in

practice, it resulted in a family who had a disabled adult in their household but no children being effectively barred from being allocated a house with adaptations needed by a disabled person. I fully accept that the consequential discrimination was wholly unintentional and arose from a combination of policies all of which were individually unobjectionable or even laudable. However, one of the purposes of the PSED is to ensure that unintended discrimination is identified by a public body before it results in individuals with protected characteristics from suffering adverse outcomes.

Reasonable adjustments.

133. The Claimants advanced a case that the Council acted in breach of its duty to make reasonable adjustments. Section 20 EA provides:

> *"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*
>
> *(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*
>
> *(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled*

person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	*Applicable Schedule*
Part 3 (services and public functions)	*Schedule 2*
Part 4 (premises)	*Schedule 4*
Part 5 (work)	*Schedule 8*
Part 6 (education)	*Schedule 13*
Part 7 (associations)	*Schedule 15*
Each of the Parts mentioned above	*Schedule 21*

134. In this case, the focus of the parties has been on the effect of the rules in the allocation policy and the operation of that policy, which is accepted to be a PCP within section 20(2). Accordingly, where the policy puts a disabled person at a substantial disadvantage the Council has a duty to "*to take such steps as it is reasonable to have to take to avoid the disadvantage".*

135. The duty to make reasonable adjustments is not imposed by section 20 EA. Instead, section 20 (in either an amended or unamended form) defines what a person must do if the duty is imposed by another part of the EA. Both the Claimants and the Council accept that the Council was under a duty to make reasonable adjustments but they disagree about the statutory route by which the duty is imposed and thus disagree as to whether the form of the duty should be amended by provisions in Schedule 4 EA. This difference matters because, in summary, a duty under Part 3 is a pro-active duty whereas a duty under Part 4 is said to be a more limited and solely reactive duty.

136. Section 36(1) EA imposes a duty to make reasonable adjustments on a "controller of let premises" and a "controller of premises to be let". The Council accepts that it is a controller of premises "to be let" in respect of properties which are on the register and to which the allocation policy applies. Given the definition of "*controller*" in sections 36(2) and (3) EA, I consider that concession is rightly made.

137. Section 38(5) EA provides that Schedule 4 (reasonable adjustments) has effect. At the time that a property comes up for allocation under the policy, the property is "premises to be let". It follows that the relevant part of Schedule 4 is paragraph 3 which provides:

> *"(1) This paragraph applies where A is a controller of premises to let.*
>
> *(2) A must comply with the first and third requirements.*
>
> *(3) For the purposes of this paragraph, the reference in section 20(3) or (5) to a disabled person is a reference to a disabled person who is considering taking a letting of the premises.*
>
> *(4) In relation to each requirement, the relevant matter is becoming a tenant of the premises.*

(5) Sub-paragraph (2) applies only if A receives a request by or on behalf of a disabled person within sub-paragraph (3) for A to take steps to avoid the disadvantage or provide the auxiliary aid.

(6) Nothing in this paragraph requires A to take a step which would involve the removal or alteration of a physical feature.

(7) Sub-paragraph (9) of paragraph 2 applies for the purposes of this paragraph as it applies for the purposes of that paragraph."

138. There are two provisions in this paragraph that are relied upon by the Council. First, the Council submits that it does not come under a duty to take reasonable steps to avoid any discriminatory effects of the policy on a disabled person until it receives a request to "*take steps*" to avoid the disadvantage. Secondly, it submits that the extent of the duty to take reasonable steps cannot include any duty to make physical alterations to a property so as, for example, convert an unadapted property into an adapted property or to change the form of adaptations in a property to make it suitable for a person with a different form of disability. Thus, the process described by Ms Pumphrey which leads to the Council working with someone to get a disabled person securing a Disabled Facilities Grant and then arranging for alterations to be made to a property cannot amount to a "reasonable adjustment" for the purposes of Part 4 EA. The case on this point advanced by Mr Manning is that the Council accept that they had a complaint from Mrs Nur in the form of these proceedings and the Council responded to it by allocating her a house on a discretionary basis. Thus, says Mr Manning, although the Council dispute that Mrs Nur suffered any disadvantage because of her daughter's disability, if they were wrong about that then they complied with any reasonable adjustment duty when, following a request, they provided Mrs Nur with suitable accommodation.

139. Mr Nabi's primary submission in response to this argument is that the reasonable adjustment duty engaged in this case arises under Part 3 EA and not under Part 4. Part 3 EA is titled "Services and Public Functions". Section 28(2). which is headed "Application of this Part", provides:

"This Part does not apply to discrimination, harassment or victimisation—

(a) that is prohibited by Part 4 (premises), 5 (work) or 6 (education), or

(b) that would be so prohibited but for an express exception"

Hence discrimination which is prohibited by Part 4 cannot come within Part 3.

140. Mr Nabi relies on section 32(3) EA, which is at the commencement of Part 4, which provides:

> *"(3) This Part does not apply to the provision of accommodation if the provision—*
>
> *(a) is generally for the purpose of short stays by individuals who live elsewhere, or*
>
> *(b) is for the purpose only of exercising a public function or providing a service to the public or a section of the public"*

141. Mr Nabi also refers to the Court of Appeal decision in *R (Ward and others) v Hillingdon LBC* [2019] PTSR 1738 which constituted a challenge to a local authority allocation housing policy which required a person to have 10 years continuous residence in the borough to satisfy the local connection requirement before a person could join the housing list. That was challenged on equality grounds and the challenge was upheld. In that case Lewison LJ noted at §9:

> *"It is common ground that in allocating accommodation under Part 6 of the Housing Act 1996 Hillingdon is providing services to a section of the public. Accordingly, section 29 (1) of the Equality Act 2010 comes into play. It provides:*
>
> *"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."*

142. I agree with Mr Manning that no point was taken in that case that the operation by the local authority of its housing register was governed by duties under Part 4 EA and thus the duty under section 29 EA did not apply to the local authority. It may well be that, on the facts of that case, it did not matter whether the duty not to discriminate against

the claimants arose under section 29 or under section 33 (which prohibits discrimination in any "disposal" of premises, which includes decisions about to whom a property should be let). However, I note that there was a cast list of hugely experienced counsel in that case and the Equalities and Human Rights Commission ("**EHRC**") was represented by leading counsel. I thus assume that the common position recorded by the court reflected the views of the EHRC. The EHRC's view that a local authority's duties relating to the operation of its housing register was governed by duties under Part 3 EA carries some weight.

143. As far as I have been able to determine, there is no direct authority on the question as to whether a housing authority that operates a housing allocation policy as required by section 166A of the Housing Act 1996 is bound by the provisions of Part 3 or Part 4 of the EA. Mr Manning referred me to an unreported decision of HHJ Worster in the Birmingham County Court of *Ralley v Birmingham City Council* [B00BM613: 7 December 2015]. However, that case was decided before the *Ward* decision and, in any event, was a case about the discharge of homelessness duties as opposed to the operation of a housing allocation scheme. I have read that judgment carefully but do not consider that it assists on this issue. I make no observations as to whether Judge Worster's conclusions were correct or not, but they involved the discharge of a different public function to the present case.

144. Counsel were agreed on three matters. First, it is clear from the above definitions that this function is either under Part 3 or Part 4; it cannot be under both Parts. Secondly, the issue turned on the wording of section 32(3)(b), namely whether the provision of social housing accommodation "*is for the purpose only of exercising a public function or providing a service to the public or a section of the public".* Thirdly, those persons who were on the housing register were a "section of the public". Mr Nabi submits that decisions made by the Council about who is allocated a property are the discharge of public functions or is the provision of a service to the public and thus Part 4 is excluded.

145. Mr Manning invites me to focus on the word "only" and suggests that the exclusion from Part 4 applies where the provision of accommodation is ancillary to the discharge or another public function but not where the primary role of the public body is the

provision of accommodation. He thus submits that section would exclude a person who was imprisoning individuals by providing prison accommodation (which are not short stays). The person is not "only" providing accommodation but is also providing another service and thus the provision of accommodation as part of the overall discharge of the public function comes within Part 3 and not under Part 4. He makes the point that Part 3 is more onerous than Part 4 and public sector providers of accommodation should not be placed under more onerous requirements that private sector providers of accommodation.

146. I have been referred to the EHRC Statutory Guidance at paragraphs 3.23, 3.34 and 3.25. That Guidance reproduces the words of the statute and gives some examples but it does not appear to me that it assists the Council. The EHRC made its position clear in the *Ward* case that Part 3 applied to the function of operating a housing allocation system and nothing in the Guidance suggests the opposite.

147. This point was well argued on both side and my mind wavered on the point both during the hearing and in my post-hearing deliberations. However, I have come to the conclusion that Mr Nabi is right on this point and the Court of Appeal was correct in *Ward*. In my judgment, the effect of section 32(3) is to exclude Part IV EA entirely from the function of providing accommodation by a person who is doing the providing of accommodation solely either (a) in the exercise of a public function or (b) where the provision of accommodation is made to the public or a section of the public. The "only" in section 32(3)(b) refers to the purpose of the person who is providing the accommodation, not as to whether the accommodation is provided as part of a wider provision of public services. If that person is providing accommodation for multiple purposes, only one of which is the exercise of a public function, then Part 4 applies and the accommodation provider is treated under the EA in the same way as any other provider of accommodation. However, if the person who is providing accommodation is doing so solely in order to exercising a public function, then the rules under the EA about not discriminating in the exercise of a public function apply to that person and not the rules relating to the provision of accommodation. That construction is supported by section 32(4) which provides that the references in section 32(3) to the exercise of a public function and the reference to the provision of a service are both to be construed in accordance with Part 3.

148. It seems to me that there is a good reason why more onerous duties should be placed on public bodies that are discharging statutory functions when providing accommodation as opposed to private sector providers of accommodation. Hence, for example, the PSED only applies to public authorities but not to private service providers. The PSED is a forward looking duty which requires public bodies to be pro-active in identifying where a policy will result in unintentional discrimination and to think about what can be done pro-actively to advance equality of opportunity and foster good relations between persons who share a relevant protected characteristic and persons who do not share it. It would be consistent with that approach for the more onerous duties concerning reasonable adjustments to be imposed on public sector bodies that are fulfilling statutory duties as opposed to operating in a commercial market.

149. In this case, the Council is required by statute to have and to operate a housing allocation policy. It has not been suggested that the Council was operating its housing allocation policy for any other purpose than to fulfil its statutory role as a housing authority, including complying with its statutory obligations under section 166A of the Housing Act 1996. I thus consider that, in operating the bidding system and making decisions about who should be allocated properties under its policy, the Council is either providing a service to the public in providing accommodation under section 29(1) or is discharging a public function under section 29(6) EA. It does not matter for present purposes but given that a proportion of the houses on the register are let by housing associations as opposed to being let directly by the Council, it may well be that the better analysis is that, in complying with its duties under section 166A, the Council is discharging a public function under section 29(6) EA. It thus follows that a pro-active duty to make reasonable adjustments applies under section 29(7) as opposed to the reactive duty under Part 4 EA.

150. The reasonable adjustments duty on the Council is thus under Part 3 EA and accordingly paragraph 2 of Schedule 2 applies. This paragraph provides:

> *"(1) A must comply with the first, second and third requirements.*

(2) For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally.

(3) Section 20 has effect as if, in subsection (4), for "to avoid the disadvantage" there were substituted—

> *"(a) to avoid the disadvantage, or*
> *(b) to adopt a reasonable alternative method of providing the service or exercising the function."*

(4) In relation to each requirement, the relevant matter is the provision of the service, or the exercise of the function, by A.

(5) Being placed at a substantial disadvantage in relation to the exercise of a function means—

- *(a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or*
- *(b) if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment.*

(6) In relation to the second requirement, a physical feature includes a physical feature brought by or on behalf of A, in the course of providing the service or exercising the function, on to premises other than those that A occupies (as well as including a physical feature in or on premises that A occupies).

(7) If A is a service-provider, nothing in this paragraph requires A to take a step which would fundamentally alter—

- *(a) the nature of the service, or*
- *(b) the nature of A's trade or profession.*

(8) If A exercises a public function, nothing in this paragraph requires A to take a step which A has no power to take"

151. Accordingly, in determining what reasonable adjustments should be made to the Council's housing policy, I must look to the position of disabled persons generally and not just to persons who have the particular disability suffered by Zakiya. The question under section 20(3) is whether the way in which the Council's housing allocation policy operated in practice put disabled people at a "substantial disadvantage". Mr Nabi points out that "substantial" in this context means "*means more than minor or trivial*": see section 212 EA.

152. Mr Manning argues that the preference given for houses to families with children applied equally to households that contained a disabled person and to households that did not contain a disabled person and so the policy did not cause disabled persons any substantial disadvantage. He thus argues that, whether it appeared fair to Mrs Nur or not, this was a lawful policy choice made by the Council and impacted equally on households who contained a disabled person and those households that did not. He argues that there is no evidence that households that included a disabled person were less likely to include children, and thus he says that the key policy in question here did not work to the substantial disadvantage of households that contained disabled persons.

153. I do not accept that submission for multiple, overlapping reasons. First, it is wrong to suggest that there is no evidence that households that included a disabled person were less likely to include children. There was statistical evidence to that effect, as I explained above. Thus, although this policy, on its face, applied equally to everyone, it hit harder on households that included a disabled person because such households were less likely to include children.

154. Secondly, it ignores the fact that, in practice, a household containing a disabled person was encouraged to bid for "suitable property" and, in practice, that meant that such households could only bid for an adapted property. Thus, disabled households suffered the disadvantage that the pool of properties they could bid for was substantially smaller than the pool of properties that a household containing a non-disabled person could bid for.

155. Thirdly, when bidding for that limited pool of adapted properties, those households with a disabled person which did not contain a child came up against the problem that houses were always allocated to a household who had a child. In this case the Council has suggested that all adapted properties were let to families which contained a child and a disabled person, but I find that was not how the policy generally worked out in practice. In general, households with children were preferred over households without children regardless as to whether the household had a child.

156. Fourthly, even if disabled households could have discerned from the Council's system that they were entitled to bid for adaptable properties, they were at a substantial disadvantage because there was no information provided to them which allowed them to work out whether a property was adaptable or not. Thus, they were effectively required to "bid blind", having no idea whether housing officers would decide that a general use property for which they had registered a bid was determined by the housing officer to be adaptable or non-adaptable.

157. I am thus satisfied that the Council was under a duty to make reasonable adjustments to its allocation policy so as to meet the needs of disabled persons who applied for property under the housing allocation policy.

158. Once it is established that a pro-active duty to make reasonable adjustments applies in this case, the question as to whether the Council took steps to discharge that duty is relatively straightforward to resolve. The Council took no steps to adjust the policy to meet the needs of disabled people. The case advanced in the Council's Skeleton is that there were no reasonable steps that the Council could have taken to adjust its policy to meet the needs of the disabled.

159. The Council faces an evidential difficulty in advancing this case because it appears that no one from the Council has analysed the extent to which the operation of the existing policy adversely impacted on households with disabled members, and thus has not undertaken any analysis to see what steps could be taken to ameliorate those disadvantages. It is slightly surprising that the Council primarily defended this case on the grounds that Mrs Nur was not being discriminated against because she bid for a house when she did not have a need for a house, and any failure on her part to secure a

property under the policy was her own fault because she was bidding for a type of property that she did not need.

160. That approach ignores the fact that Mrs Nur only bid for adapted properties, which was a type of property that she did need, and all available adapted properties happened to be houses. In my judgment there are a variety of adjustments that could be made to the policy to ensure that a disabled person had a fair and reasonable opportunity of securing a suitable property. The Claimants have suggested a range of reasonable adjustments. It is not for the court to indicate what adjustments would be reasonable because the devising of policy is a matter for the Council. However, in my judgment, the following are eminently reasonable adjustments that could have been made by the Council to the Policy:

    a. Properties that were adapted to meet the needs of disabled persons could be exempted from the automatic preference given for all houses to households with children. If that step were taken, all disabled bidders (whether their household included a child or not) would be treated equally when competing for a property which had been adapted to meet the needs of a disabled person;

    b. If the preference given for all houses to households with children (which in practice would be all presently adapted properties) is to be maintained, pro-active steps could be taken to enable disabled people to secure other suitable accommodation when applying the policy. This could be achieved by:

        i. information being provided to bidders about whether a non-house property was "adaptable" so that disabled households could know which non-house properties they were able to apply for and which they should ignore; and
        ii. a measure of preference could be given to disabled households in applying for properties which could be adapted to meet the needs of the disabled, so that they had a better chance of securing a property from the limited pool of properties they were able to bid for.

161. I thus reject the Council's case that there were no reasonable adjustments that it could have made to the policy to ensure that it counteracted the disadvantages suffered by disabled households. I also reject the argument that the Council discharged its duty to

make reasonable adjustments once the disadvantages concerning the way in which the property worked for disabled households was made clear to the Council. The reasonable adjustments that were required by section 20 were reasonable adjustments to the PCP "*to avoid the disadvantage*". The "*disadvantage*" referred to in section 20(3) is a reference to the disadvantage suffered by disabled people generally and not just by Mrs Nur: see the wording at paragraph 2(2) of Schedule 2 EA.

162. Hence once it is appreciated that the operation of the PCP caused disadvantages for disabled people generally, the reasonable adjustment duty under section 20(3) required action to ameliorate the disadvantage suffered by disabled people generally under the policy, not just by Mrs Nur. It was plainly reasonable for the Council to have exercised its discretion under the policy to find a house for Mrs Nur which could then be adapted to meet Zakiya's needs. However, in my judgment, that was insufficient to discharge the Council's wider duties under the EA because it did nothing to ameliorate the disadvantage suffered by other disabled people who were subject to the policy.

163. Mrs Nur's case revealed a structural problem with the way the Council's policy operated when the applicant was a disabled person in a household without children. The Council ought to have realised that Mrs Nur's difficulties were far from uncommon. Indeed, as the ONS statistics demonstrate, disabled persons in Birmingham were less likely to live in a households which included a child than non-disabled persons. Thus, in my judgment, 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. In those circumstances, creating an exemption for Mrs Nur alone was not enough to be "reasonable". The wider duties on the Council, as a public body, ought to have gone further by considering what changes were needed to the policy to ensure that other persons in the same position were not adversely impacted.

164. I have not yet been asked to assess the level of damages payable by the Council to Mrs Nur. I would hope that these could be resolved between the parties because they are likely to be relatively modest. It may well be that, even if the Council had made the adjustments that it ought to have made to the policy to remove the disadvantages suffered by Mrs Nur, the intense competition for suitable properties would not have

resulted in Mrs Nur securing a property at an early stage. She clearly ought to have secured a suitable property earlier than she did, but the very significant mismatch between supply and demand may well mean that she would not have been allocated a property a significant time prior to the issue of these proceedings.

Ground 4.

165. Ground 4 is a claim that the policy was unlawful on the grounds of being *Wednesbury* unreasonable. I agree with Mr Manning that this adds nothing to the Claimants' case and I dismiss this ground. Once it is accepted that the policy of giving preference to households with children pursued a legitimate objective, it is difficult if not impossible to argue that the policy was *Wednesbury* unreasonable. In fairness to Mr Nabi, I think his final position was not to press this ground on the basis that either his case succeeded on other grounds, in which case this ground added nothing, or it failed on other grounds in which case his case on this ground would inevitably fail as well. However, in my judgment the policy was not *Wednesbury* unreasonable in the sense that it was a policy that no reasonable authority could have adopted the policy. I have found that the policy was unlawful because it had unforeseen and unintended discriminatory consequences but that is not the same as saying that it is *Wednesbury* unreasonable. I thus accept the Council's submission in relation to this ground.

166. I invite the parties to agree an appropriate form of order.