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Case No: CO/3062/2021
CO/641/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 20th January 2023

Before:

MR JUSTICE EYRE

- -

Between:

SHANICE KHAYYAT (1) **DORA IBRAHIM (2)**	**Claimants**
- and -	
WESTMINSTER CITY COUNCIL	**Defendant**

- -
- -

Zia Nabi (instructed by **Osbornes Law**) for the **Claimants**
Ian Peacock (instructed by **Bi-Borough Legal Services**) for the **Defendant**

Hearing date: 27th October 2022

- -

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.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Friday, 20th January 2023.

Mr Justice Eyre:

Introduction.

1. The Claimants seek judicial review of the lawfulness of the Defendant's Housing Allocation Scheme of March 2020 ("the Scheme") pursuant to permission given by Hugh Southey QC and Hill J respectively[1]. The Defendant initially declined to place either claimant on its housing register ("the Register"). The Defendant accepted that each claimant was homeless within the meaning of the Housing Act 1996 ("the Act"). However, the Defendant did not accept that it owed either claimant the duty pursuant to section 193(2) of the Act to secure that accommodation was available for occupation by the claimant ("the Main Housing Duty"). The effect of the Scheme was that only those to whom the Main Housing Duty was owed were to be placed on the Register and it was pursuant to that policy that the Defendant refused the Claimants' applications.

2. In the case of each claimant matters have moved on since the Defendant's initial refusals. The Defendant subsequently accepted that the Main Housing Duty was owed to each claimant and each was placed on the Register. The First Claimant is now the tenant of secure accommodation. In her case the question of the date when she should have been placed on the Register has become academic though the lawfulness of the Defendant's stance remains relevant to the question of costs if nothing else. The Second Claimant is in temporary accommodation in which, barring a change in circumstances, she will be entitled to remain until she also becomes the tenant of secure accommodation. In her case the question of when she should have been placed on the Register still has the potential to have practical consequences for when she will obtain secure accommodation in that it may affect her priority as against others on the Register.

3. The Main Housing Duty is owed to those who are homeless, eligible, in priority need, and not intentionally homeless. The effect of the Scheme is to limit places on the Register to those homeless persons to whom the Main Housing Duty is owed. It has the consequence that there are categories of homeless persons who are eligible for the purposes of the Act but who will not be placed on the Register (such as those who are not in priority need or those who are determined to be intentionally homeless).

4. It is common ground that the Defendant is entitled to have a policy which prevents some homeless persons from being placed on the Register. It is also common ground that there is a distinction between policies which operate lawfully to prevent the inclusion on the Register and those which are unlawful. A policy which falls the wrong side of the dividing line between those categories will be unlawful as failing to secure that a reasonable preference in the allocation of housing is given to the persons for whom the relevant local housing authority is required by section 166A of the Act to secure such a preference. The parties are at odds as to where the dividing line between lawful and unlawful exclusion policies is to be drawn and as to which side of the relevant line the Scheme falls.

[1] The two claims are being heard together pursuant to Hill J's order of 22nd March 2022 and I will follow the convenient, if technically inaccurate, approach adopted by counsel of referring to the Claimants as the First and Second Claimant.

5. The lawfulness of the Scheme depends, therefore, on whether a policy which excludes from the Register those homeless persons to whom the Main Housing Duty is not owed is lawful.

The Relevant Parts of the Legislative Framework.

6. The starting point is section 159(1) of the Act which requires a local housing authority to comply with the following provisions of Part VI of the Act in allocating housing accommodation.

7. Section 160ZA(1) prohibits the allocation of housing accommodation to those who are made ineligible by the provisions of that section or by regulations made under it. Neither claimant was rendered ineligible by those provisions.

8. The relevant parts of section 166A require in the following terms that each local housing authority is to have an allocation scheme determining the priorities to be applied and setting out the procedure to be followed in the allocation of housing accommodation. The allocation scheme is to secure that reasonable preference is given to those in the specified categories:

> "(1) Every local housing authority in England must have a scheme (their "allocation scheme") for determining priorities, and as to the procedure to be followed, in allocating housing accommodation. For this purpose *"procedure"* includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken.
>
> (2) The scheme must include a statement of the authority's policy on offering people who are to be allocated housing accommodation –
>
> > (a) a choice of housing accommodation; or
> >
> > (b) the opportunity to express preferences about the housing accommodation to be allocated to them.
>
> (3) As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to –
>
> > (a) people who are homeless (within the meaning of Part 7);
> >
> > (b) people who are owed a duty by any local housing authority under section 190(2), 193(2) or 195(2) (or under section 65(2) or 68(2) of the Housing Act 1985) or who are occupying accommodation secured by any such authority under section 192(3);
> >
> > (c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions;
> >
> > (d) people who need to move on medical or welfare grounds (including any grounds relating to a disability); and
> >
> > (e) people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others).
>
> The scheme may also be framed so as to give additional preference to particular descriptions of people within one of more of paragraphs (a) to (e) (being descriptions of people with urgent housing needs). The scheme must be framed so as to give additional preference to a person with urgent housing needs who falls within one or more of paragraphs (a) to (e) and who –

> (i) is serving in the regular forces and is suffering from a serious injury, illness or disability which is attributable (wholly or partly) to the person's service,
>
> (ii) formerly served in the regular forces,
>
> (iii) has recently ceased, or will cease to be entitled, to reside in accommodation provided by the Ministry of Defence following the death of that person's spouse or civil partner who has served in the regular forces and whose death was attributable (wholly or partly) to that service, or
>
> (iv) is serving or has served in the reserve forces and is suffering from a serious injury, illness or disability which is attributable (wholly or partly) to the person's service.
>
> For this purpose *"the regular forces"* and *"the reserve forces"* have the meanings given by section 374 of the Armed Forces Act 2006.
>
> …
>
> (5) The scheme may contain provision for determining priorities in allocating housing accommodation to people within subsection (3); and the factors which the scheme may allow to be taken into account include –
>
> > (a) the financial resources available to a person to meet his housing costs;
> >
> > (b) any behaviour of a person (or of a member of his household) which affects his suitability to be a tenant;
> >
> > (c) any local connection (within the meaning of section 199) which exists between a person and the authority's district.
>
> …
>
> (11) Subject to the above provisions, and to any regulations made under them, the authority may decide on what principles the scheme is to be framed.
>
> …
>
> (14) A local housing authority in England shall not allocate housing accommodation except in accordance with their allocation scheme".

9. Section 169(1) requires a local housing authority to have regard in the exercise of its functions under Part VI to guidance issued by the Secretary of State. The relevant guidance is contained in the "Allocation of accommodation: guidance for local housing authorities in England" first issued in June 2012 and updated in March 2022. The following paragraphs are relevant for current purposes:

> "3.27 Housing authorities should avoid setting criteria which disqualify groups of people whose members are likely to be accorded reasonable preference for social housing, for example on medical or welfare grounds. However, authorities may wish to adopt criteria which would disqualify individuals who satisfy the reasonable preference requirements. This could be the case, for example, if applicants are disqualified on a ground of antisocial behaviour.
>
> …
>
> 4.4 In framing their allocation scheme to determine allocation priorities, housing authorities must ensure that reasonable preference is given to the following categories of people (s. 166A(3):

(a) people are who homeless within the meaning of Part 7 of the 1996 Act (including those who are intentionally homeless and those not in priority need)

(b) people who are owed a duty by any housing authority under section 190(2), 193(2) or 195(2) of the 1996 Act (or under section 65(2) or 68(2) of the Housing Act 1985) or who are occupying accommodation secured by any housing authority under s.192(3).

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

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

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

4.5 In framing their allocation scheme to give effect to s.166A(3), housing authorities should have regard to the following considerations:

- the scheme must be framed so as to give reasonable preference to applicants who fall within the categories set out in s.166A(3), over those who do not
- although there is no requirement to give equal weight to each of the reasonable preference categories, authorities will need to demonstrate that, overall, reasonable preference has been given to all of them
- there is no requirement for housing authorities to frame their scheme to afford greater priority to applicants who fall within more than one reasonable preference category (cumulative preference) over those who have reasonable preference on a single, non-urgent basis".

10. Homelessness is defined by section 175 and subsections (1) and (3) are in these terms:

"(1) A person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere, which he –

(a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court,

(b) has an express or implied licence to occupy, or

(c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession.

…

(3) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy…"

11. Section 189A(1) provides thus for an assessment to be made of the cases of those who are eligible and either homeless or threatened with homelessness:

"If the local housing authority are satisfied that an applicant is –

(a) homeless or threatened with homelessness, and

(b) eligible for assistance,

the authority must make an assessment of the applicant's case.

12. Section 189B imposes on local housing authorities an initial duty ("the Relief Duty") to all those who are homeless and eligible for assistance in the following terms:

> "(1) This section applies where the local housing authority are satisfied that an applicant is –
>
> (a) homeless, and
>
> (b) eligible for assistance.
>
> (2) Unless the authority refer the application to another local housing authority in England (see section 198(A1)), the authority must take reasonable steps to help the applicant to secure that suitable accommodation becomes available for the applicant's occupation for at least –
>
> (a) 6 months, or
>
> (b) such longer period not exceeding 12 months as may be prescribed.
>
> (3) In deciding what steps they are to take, the authority must have regard to their assessment of the applicant's case under section 189A.
>
> (4) Where the authority –
>
> (a) are satisfied that the applicant has a priority need, and
>
> (b) are not satisfied that the applicant became homeless intentionally,
>
> the duty under subsection (2) comes to an end at the end of the period of 56 days beginning with the day the authority are first satisfied as mentioned in subsection (1).
>
> …"

13. The duty owed to those who have become homeless intentionally is set out thus in section 190:

> "(1) This section applies where –
>
> (a) the local housing authority are satisfied that an applicant -
>
> (i) is homeless and eligible for assistance, but
>
> (ii) became homeless intentionally,
>
> (b) the authority are also satisfied that the applicant has a priority need, and
>
> (c) the authority's duty to the applicant under section 189B(2) has come to an end.
>
> (2) The authority must –
>
> (a) secure that accommodation is available for his occupation for such period as they consider will give him a reasonable opportunity of securing accommodation for his occupation, and
>
> (b) provide him with (or secure that he is provided with) advice and assistance in any attempts he may make to secure that accommodation becomes available for his occupation.
>
> …
>
> (4) In deciding what advice and assistance is to be provided under this section, the authority must have regard to their assessment of the applicant's case under section 189A.

(5) The advice and assistance provided under subsection (2)(b) must include information about the likely availability in the authority's district of types of accommodation appropriate to the applicant's housing needs (including, in particular, the location and sources of such types of accommodation)".

14. Finally, section 193 provides in the following terms for the Main Housing Duty which is owed to those who are eligible; who have a priority need; and who are not homeless intentionally:

"(1) This section applies where –

(a) the local housing authority –

(i) are satisfied that an applicant is homeless and eligible for assistance, and

(ii) are not satisfied that the applicant became homeless intentionally.

(b) the authority are also satisfied that the applicant has a priority need, and

(c) the authority's duty to the applicant under section 189B(2) has come to an end.

…

(2) Unless the authority refer the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant.

…

(6) The local housing authority shall cease to be subject to the duty under this section if the applicant –

(a) ceases to be eligible for assistance,

(b) becomes homeless intentionally from the accommodation made available for his occupation,

(c) accepts an offer of accommodation under Part VI (allocation of housing), or

(cc) accepts an offer of an assured tenancy (other than an assured shorthold tenancy) from a private landlord,

(d) otherwise voluntarily ceases to occupy as his only or principal home the accommodation made available for his occupation…"

The Factual Background.

15. The history of the Claimants' applications and of the decisions which were made was not contentious and, save for some potential impact on the precise terms of the relief to be granted, is of minimal relevance to the issue I have to consider. It can, therefore, be summarised shortly.

16. The First Claimant sought to be placed on the Register in July 2020. That application was refused on 19th February 2021 on the ground that she was not owed the Main Housing Duty. However, on 12th May 2021 the Defendant accepted that the First Claimant was owed the Main Housing Duty. On 24th June 2021 the Claimant was placed on the Register with effect from 11th May 2021. On 6th September 2021 the First Claimant commenced proceedings seeking a declaration that her registration should be

effective from either January 2020 (when she was first determined to be homeless) or July 2020 (when she first applied to be placed on the Register). However, on 21st April 2022 the First Claimant was granted accommodation by way of a secure tenancy rendering the question of the date when she should have been placed on the Register academic.

17. The history of the Second Claimant's dealings with the Defendant is rather more convoluted and marked by circumstances of real hardship. I will condense the history considerably though it may be necessary to analyse it in more detail if, in due course, the parties remain in dispute about the appropriate relief in light of the conclusion I reach in this judgment. The Second Claimant was accepted as being homeless from 2018 onwards. However, it was not until 29th June 2022 that the Defendant accepted that the Second Claimant was not intentionally homeless. On 30th June 2022 the Defendant accepted that it owed the Second Claimant the Main Housing Duty and placed her on the Register. The Second Claimant was then given temporary accommodation where she has remained and which she will be entitled to occupy until she obtains a secure tenancy. The Second Claimant contends that she should have been placed on the Register with effect from either 5th August 2018 (which was when the Defendant first accepted that she was homeless) or 16th November 2021 (the most recent date when the Defendant accepted that she was homeless).

The Scheme and its Operation.

18. I need not rehearse the terms of the Scheme. That is because the Defendant agreed that those terms could have been more clearly expressed and that reading those terms in abstract there was scope for differing interpretations of the Scheme. What is significant is that as the Scheme is operated it excludes from admission to the Register those homeless persons to whom the Main Housing Duty is not owed. That exclusion is subject to a discretion vested in the Defendant's Director of Housing to admit to the Register persons who would otherwise be excluded. It is not, however, suggested that this discretionary power saves the Scheme if it is otherwise unlawful. A policy which operates to exclude persons in respect of whom the Defendant has a duty to secure that a reasonable preference is given could not be rendered lawful by the existence of a discretion which could operate to remove some of such persons from the ambit of the exclusion.

19. Under the Scheme those who are on the Register are placed in different priority groups and given a certain number of points determined by their particular circumstances (thus those to whom it is accepted the Main Housing Duty is owed are given 150 points). When accommodation becomes available it is generally advertised to those on the Register and those persons are able to bid for the accommodation. The accommodation in question is then generally allocated to the bidder with the highest or higher number of points. Where those bidding have an equal number of points the accommodation is given to whichever of those persons has been on the Register the longer or longest.

20. The Defendant provided an analysis of the applications which it had received under the Act in the year 2020/21. There was some debate between counsel as to the proper interpretation of the figures which had been provided in the evidence for the Defendant. The differences between the competing interpretations are not material in light of the view I have taken of the applicable law and I will proceed on the basis of Mr Peacock's analysis of the figures. The effect was that approximately 30% of those whom the

Defendant accepted to be homeless were found to be persons to whom the Main Housing Duty was owed and who were, as a consequence, placed on the Register. Fractionally over a further 30% were persons whose homelessness was relieved during the currency of the Relief Duty. That left just under 40% of those whom the Defendant accepted as being homeless: they were persons whose homelessness was not relieved during the currency of the Relief Duty but who were not placed on the Register. If those whose homelessness was relieved during the Relief Duty period were excluded from consideration the effect was that 43¼% of those remaining were placed on the Register while 56¾% were not. Mr Peacock submitted that whether one had characterised those placed on the Register as 30% of those who were found to be homeless or as 43¼% of those whose homelessness remained unrelieved after expiry of the Relief Duty period that was a sufficiently large proportion of those for whom the Defendant was to secure a reasonable preference that the Scheme could not properly be said to be "fundamentally at odds with the statutory requirements" (a point the significance of which will become apparent below).

21. The Defendant also produced figures showing that the need for social housing in its area substantially exceeds the available supply and that those on the Register typically have a long wait for accommodation. Thus the average waiting time for studio accommodation was 10 years; for one-bedroom accommodation 2 years; for three-bedroom accommodation 16 years; and for four-bedroom accommodation 19 years. Against that background it is said that the effect of confining places on the Register to those to whom the Main Housing Duty is owed (who are persons with a priority need) is to ensure that preference is given to those with the greatest need. It was not suggested on behalf of the Claimants that there was any other motivation for the Scheme and I accept that this is the reason why the Defendant adopted the Scheme.

22. At the time of the hearing before me the Defendant was consulting on a change to the Scheme. If implemented this would have the effect of placing on the Register those homeless persons to whom the Relief Duty is owed pursuant to section 189B. The proposal is that such persons should receive 20 points as opposed to the 150 points given to those to whom the Main Housing Duty is owed. For the reasons I set out at the start of the hearing I rejected the contention that the hearing should be adjourned in the light of this proposal. In short it was possible that the consultation would result in the proposed change being abandoned or modified. Moreover, even if the Scheme were to be changed as proposed its lawfulness or otherwise in its unmodified form would remain potentially relevant to the rights of the Second Claimant.

The Approach to be taken and its Application here.

23. As I have already noted it is common ground that it is lawful for a local housing authority to adopt a policy which has the effect that some eligible homeless persons are not placed on its housing register. It is also common ground that the power to do so is not unlimited and that there are circumstances in which such a policy will be unlawful. Unsurprisingly, the Claimants contend that the Scheme falls the wrong side of the line and is unlawful while the Defendant says that the policy is lawful.

24. In *R (Ward) v Hillingdon LBC* [2019] EWCA Civ 692, [2019] HLR 30 Lewison LJ said, at [6], "All eligible persons included in the `reasonable preference' groups must be treated as qualifying for inclusion in the allocation policy". He then explained the potentially limited consequences of such inclusion saying:

> "...but s.166A(3) does not allocate priorities as between the preference groups listed in that subsection. That is dealt with by s.166A(5), which enabled the housing authority itself to determine priorities. So there is no general impediment to a housing authority placing some preference groups in different bands within the scheme: *R. (Jakimaviciute) v Hammersmith and Fulham LBC* [2014] EWCA Civ 1438; [2015] P.T.S.R 822 at [26]-[27] and [50]. Equally, compliance with s.166A(5) does not guarantee success in being allocated housing; because in many if not most districts demand for accommodation exceeds supply: *R. (Lin) v Barnet LBC* [2007] EWCA Civ 132; [2007] H.L.R. 30".

25. Lewison LJ's words were expressed in the most general of terms. However, Mr Peacock is right to say that each of the claimants in that case had been admitted to Hillingdon's housing register and that the issue was whether placing them in the lowest band on that register had amounted to unlawful indirect discrimination. It follows that Lewison LJ's dictum was obiter and it is also to be read as subject to the explanation of the law given in *R v Wolverhampton MBC ex p Watters* (1997) 27 HLR 931 and in *R (Jakimaviciute) v Hammersmith & Fulham LBC* [2014] EWCA Civ 1438, [2015] PTSR 16 to which I will turn shortly. It is nonetheless to be noted that Lewison LJ clearly had the decision in *Jakimaviciute* well in mind (referring to it in the same paragraph as the general words set out above which began that paragraph) and his words (in a judgment with which King and Underhill LJJ agreed) are not compatible with a policy which results in the exclusion from the Register of entire "reasonable preference groups".

26. Dyson LJ explained in *R (Lin) v Barnett LBC* [2007] EWCA Civ 132, [2007] HLR 30 at [25] that the duty under section 166A, as it now is, is not a duty to provide accommodation or to secure accommodation. Instead it is a duty to give a reasonable preference to those within the section relative to those who are not. That involves giving such a person a "reasonable head start" but even when given such a preference it is possible that the person in question will never be allocated accommodation.

27. In *R v Wolverhampton MBC ex p Watters* the claimant's application to be placed on the council's housing register had been refused because she had more than two weeks' rent arrears outstanding from previous council tenancies. The claimant said that this approach was unlawful because she was in a category to whom the council was required to give reasonable preference and the refusal to place her on the register was a failure to give such preference. The Court of Appeal rejected that argument with Leggatt and Judge LJJ (with Potter LJ agreeing with both judgments) explaining that the fact that requirement was to give "reasonable" preference enabled a selection to be made which could have the effect of preventing some of those who were within the categories set out in the Act from being placed on the council's housing register.

28. Thus Leggatt LJ said, at 936:

> "...If section 22 simply required "preference" to be given, Mr Gallivan 's argument would be correct. But it does not: it requires "reasonable preference". That envisages that other factors may weigh against and so diminish and even nullify the preference. In the sentence I have cited from the judgment of Sedley J. in ex *p. Njomo (supra)* he asserted that the Council must not "eclipse or distort the priority". If he meant that the statutory preference cannot be outweighed by other relevant considerations, he was in my judgment wrong. No preference is to be given except reasonable preference. That involves balancing against the statutory factors such factors as may be relevant. So the Council is entitled to take account of substantial arrears of rent due to the Council. As the judge remarked, the Council has a duty to have regard to the financial consequences of its action and to the need to balance its housing revenue account. The answer to Mr Gallivan's sole point is that because, as is

> common ground, rent arrears may be taken into account in the process of selecting tenants, it follows that, when in the Council's judgment an applicant's rent arrears are such as to outweigh the reasonable preference that would otherwise avail him, that applicant will not be selected".

29. Judge LJ expressed matters thus, at 937 – 938:

> "Although the effect of section 22 of the Housing Act 1985 is to produce an advantage for prospective tenants who bring themselves within the relevant criteria, they do not enjoy an automatic entitlement to be allocated local authority housing appropriate to their needs. The section is concerned with the process of "selection" of tenants by the housing authority and there is nothing to suggest that the suitability of the prospective tenants, or indeed any other relevant considerations, are to be ignored. Even in the case of applications by those within the criteria which entitle them to preferential treatment, the express requirement that the preference should be reasonable rather than absolute entitles the housing authority, in addition, to consider any other relevant fact including the extent to and circumstances in which the applicants have failed to pay due rent or have otherwise been in breach of the obligations of their existing or earlier tenancies. Such considerations are not excluded from the selection process".

30. The test of what exclusion is permissible and what impermissible is now to be found in *Jakimaviciute.* In that case the local housing authority adopted a policy which excluded from its housing allocation scheme those who had been placed in long-term suitable temporary accommodation. That approach was found to be unlawful. The court first concluded that the council's power to set qualification criteria under section 160ZA was subject to the duty to secure reasonable preference to those within the scope of section 166A and then held that the approach which had been adopted failed to secure such reasonable preference.

31. Richards LJ (with whom Tomlinson and Bean LJJ agreed) accepted the claimant's submission that "the duty under section 166A(3) to frame the allocation scheme so as to secure that reasonable preference is given to certain classes of people is a fundamental requirement which applies to the arrangements for allocation as a whole, including the setting of any qualification criteria under section 160ZA(7)" (see at [26]). At [31] he said:

> "Moving on to section 166A(3) of the 1996 Act itself, it is an elaboration of the duty in section 166A(1) and requires the scheme to be so framed as to secure that reasonable preference is given to the classes specified in sub-paragraphs (a) to (e), including those who are owed a housing duty under section 193(2) of the 1996 Act. The reasonable preference duty applies on its face to the framing of the scheme as a whole and so as to require the giving of reasonable preference to all those specified, not just to those who are qualifying persons. There is no sensible reason why it should be read as applying only at a stage where the qualification criteria have operated to exclude certain applicants from registration under the scheme. Thus, on the natural interpretation of the statutory provisions the setting of the qualification criteria is subject to the reasonable preference duty".

32. In that case the claimant had accepted that the local housing authority had a wide discretion as to the securing of reasonable preference to the classes specified in section 166A but through her counsel had said that "the duty is owed to *all* the members of each class and that reasonable preference cannot be given by giving them *no* preference at all. There is a distinction between setting priorities within a class and giving members of a class no preference" (see at [43] original emphasis).

33. The claimant said that the council's policy had amounted to "an impermissible attempt to redefine the preference class identified in section 166A(3)(b)" (see at [44]). This was said to be "an attempted redefinition of the statutory class or, putting the point another way, to an attempt to thwart the statutory scheme. It is permissible to adopt a rule excluding individual applicants by reference to factors of general application, such as lack of local connection or being in rent arrears, but it is not permissible to cut down the statutory class…" (see at [45]).

34. Richards LJ accepted the claimant's submissions. At [47] he summarised the position in this way:

> "…The disqualification effected by [the council's policy] is fundamentally at odds with the requirement under section 166A(3)(b) of the 1996 Act to frame a scheme so as to secure that reasonable preference is given to people who are owed a housing duty under one of the provisions of Part VII. The great majority of people within that class, far from being given any preference, are excluded altogether from consideration for housing accommodation under the scheme; and they are excluded for a reason that cannot sit with Parliament's decision to define the section 166A(3)(b) class as it did. It does not assist the council to point to the fact that the only people to whom housing accommodation may be allocated under the scheme are people within the section 166A(3) classes. It is the exclusion of a large proportion of one of those classes that causes the problem. Nor do I accept that the power to effect such an exclusion is inherent in the flexibility allowed to an authority in securing that reasonable preference is given."

35. It follows that a local housing authority can adopt a policy which excludes individuals who would otherwise be entitled to receive a reasonable preference (and so to be placed on a housing register) provided it does so by way of "factors of general application". That is by way of factors which are capable of applying to an individual in any of the section 166A(3) categories (thus a person in any of those categories may be in rent arrears or may have or may lack a local connection). The policy under challenge in *Jakimaviciute* did not operate by reference to factors of general application and was struck down. The Defendant's argument in this case raises the question of the true basis on which it was struck down and more important the true location of the dividing line between lawful and unlawful policies.

36. Mr Peacock accepted that the Scheme did not operate by way of factors of general application. However, he contended that the true division between lawful and unlawful policies is not between policies based on factors of general application and all others with the former being lawful and the latter necessarily unlawful. Rather he says that the test is to be seen as whether a given policy operates to exclude such a large proportion of those to whom the Act requires a reasonable preference to be given to amount to an attempt to thwart the statutory scheme. It is his submission that a policy which is not based on factors of general application can be lawful provided it does not operate to thwart the statutory scheme. He contends that whether a policy does so operate is a question which can be determined by considering the effect of the policy in question. He says that the Scheme is a policy which does not thwart the statutory scheme. In that regard Mr Peacock pointed to the proportion of those who were homeless who were accepted on to the Register and relied on the analysis I have summarised at [20] above. He said that analysis showed that the Scheme operated to secure a reasonable preference for a large proportion of those for whom the Act required such a preference to be secured and so could not be said to be thwarting the purpose of the Act.

37. Mr Peacock advanced a number of arguments in favour of that interpretation of the test. Those were put forward against the background point that the issue here is lawfulness not rationality. As Mr Peacock said if a policy is not rational then it will fall without reference to lawfulness. That meant that the question was whether a rational policy is unlawful if it operates in a particular way. The point is correct so far as it goes but is of limited assistance and the argument is somewhat circular. A public body can only operate lawful policies and so the court will typically be considering lawfulness before addressing rationality. Moreover, it is to be remembered that a policy which is found to be unlawful is not thereby stigmatised in some way. The court is not determining whether a particular policy might or might not be sensible or desirable in abstract but whether it is within the powers given by the Act.

38. Next, Mr Peacock relied on the fact that the effect of the policy considered in *Jakimaviciute* was to exclude a large proportion of one of the reasonable preference classes. He said that understanding of this point was crucial to a proper analysis of the basis for the Court of Appeal's decision. He put the point thus in his skeleton argument.

> "The decisive factor in *Jakimaviciute* was that such a large proportion of one of the reasonable preference classes (87% on the evidence) was excluded that it was fundamentally at odds with the statutory requirements."

39. It would, Mr Peacock contended, make no sense to seek to apply a test of whether a particular qualification did or did not amount to a redefinition of section 166A(3). That was because almost any exclusion based on a supposed factor of general application could be expressed as an attempt to redefine the scope of section 166A(3). Thus a requirement of local connection or of the absence of rent arrears could be characterised as an attempted redefinition because it would operate as if the words "who have a local connection" or "who are not in rent arrears with the council" had been added to each of the categories in the section. Thus by way of example the category in section 166A(3)(a) would be changed from "people who are homeless (within the meaning of Part 7)" to "people who have a local connection and who are homeless (within the meaning of Part 7)". The Court of Appeal could not be taken to have laid down a test which made no sense and which, because it was nonsensical, would not be workable.

40. In a related argument Mr Peacock said that an approach which only permitted exclusions operating by reference to factors of general application lacked logic. This was because such exclusions even though of general application could affect some groups disproportionately. The example he gave in his skeleton argument was that the exclusion of those who had rent arrears or who had a history of anti-social behaviour would disproportionately affect those who were existing tenants of an authority and who were seeking a transfer because the authority in question would have a more detailed knowledge of the housing history of its tenants than it would of other persons.

41. For the Claimants Mr Nabi said that the test of lawfulness is whether a policy purports to redefine the statutory scheme by excluding those to whom the Act requires a reasonable preference to be given other than by way of factors of general application. He added that the Scheme clearly operated as an attempted redefinition of the statutory scheme. The provisions of the Scheme and the exclusion of all those to whom the Main Housing Duty is not owed amounted to the striking of a red line through section 166A(3)(a) and through large parts of 166A(3)(b). The Scheme excludes all of those to whom the Main Housing Duty is not owed. Therefore, Mr Nabi contended, even if a

policy which did not operate solely by reference to factors of general application could be lawful depending on the analysis of its effect this was not such a policy. That was because, even if Mr Peacock was correct as to the applicable test, the effect of the Scheme was to thwart the intention of the Act.

42. It follows that it is necessary to consider with care the effect of *Jakimaviciute* and the true nature of the test laid down there. Before returning to that decision itself and to an analysis of the arguments of counsel the approach which has been adopted in cases applying *Jakimaviciute* is to be noted.

43. The policy under challenge in *R (Alemi) v Westminster City Council* [2015] EWHC 1765 (Admin), [2015] PTSR 1339 provided that although a person to whom the Main Housing Duty was owed was allocated a place on the housing register such a person was suspended from bidding for any social housing until 12 months after the council had accepted that it owed the Main Housing Duty to that person.

44. Sitting as a High Court Judge HH Judge Blair QC considered *Jakimaviciute.* He said, at [28], that "the differentiation which is permitted by the legislation …is restricted to adjusting the relative priority of sub-groups by reference to features which do none the less afford them *some* opportunity to be *allocated* social housing within the LHA's current cycle, however remote that possibility might be " (original emphasis). Judge Blair held that the policy he was considering was unlawful because for a period of 12 months it did not give those in the position of the claimant "a reasonable preference in the *allocation* of social housing" (original emphasis).

45. Mr Peacock appeared for the defendant in that case. He had advanced an argument as to the proper interpretation of *Jakimaviciute* and the test to be applied which was markedly similar to that advanced before me. Judge Blair summarised the argument thus at [24]:

> "Mr Peacock's third submission is that section 166A(3) looks at a general target duty towards groups of people and does not give individual rights – "It is the groups rather than the individual households within them which have to be given reasonable preference": see Baroness Hale in R (Ahmad) v Newham London Borough Council [2009] PTSR 632,paras 13 and 15. He argues that the fact that the defendant's scheme does not allow a relatively small proportion to bid for a 12-month period (almost certainly less than 15% of the register) does not mean that the classes specified in section 166A(3) of the 1996 Act as a whole are not accorded reasonable preference. In R (Jakimaviciute) v Hammersmith and Fulham London Borough Council [2015] PTSR 822 a scheme used section 160ZA(7) to disqualify 87% of those owed the section 193(2) main housing duty from appearing on the LHA's register. Mr Peacock argues that it was really that statistic which persuaded the Court of Appeal that it had to be struck down, because they acknowledged (at the end of para 45 of that judgment) that an LHA could adopt a rule to exclude individual applicants by reference to factors of general application such as a lack of local connection or being in rent arrears: see section 166A(5)(a)(c) of the 1996 Act. Further, it was stated in para 47: "It is the exclusion of a large proportion of one of those classes that causes the problem". Furthermore Richards LJ said, at para 50, that an LHA may wish to consider whether it would be possible to achieve a similar outcome, not by carving out a sub-group from the section 166A(3) classes by disqualifying them under section 160ZA(7), but by according them lesser weight in a differential banding structure if they did indeed have a lesser housing need".

46. Judge Blair rejected that argument in the following terms, at [32]:

> "…[the policy] carves out a whole sub-group which is *altogether* excluded from the potential of being allocated social housing for 12 months. They have *no* preference. Part VI of the Act does not permit the removal of a whole sub-group from a group which section 166A(3) requires be given reasonable preference in the allocation of social housing, when that sub-group is not defined by reference to differentiating features related to the allocation of housing, but applies a simple time bar to all who otherwise qualify. …" (original emphasis)

47. Thus Mr Peacock had been contending there that the policy in question was lawful because it only affected a small proportion of those for whom the council had to provide a reasonable preference. Judge Blair rejected that argument by taking as his reference point not the totality of those for whom such preference had to be provided but the sub-group which was being excluded from that provision. The policy was unlawful because the entirety of a sub-group whose members should have been provided with a preference was excluded even though the number of persons affected was small when seen in the context of the total numbers to be given a preference.

48. In *R (HA) v Ealing LBC* [2015] EWHC 2375 (Admin), [2016] PTSR 16 Goss J was concerned with a policy which excluded from the housing register those who had not lived in the authority's area for a period of five years. Goss J had regard to the decision in *Jakimaviciute*. He explained, at [23], that in his reading of that decision the effect was that although a residency requirement could be lawful "it must not preclude the class of people who fulfil the `reasonable preference' criteria. The policy in that case was unlawful because it did not "provide for the giving of reasonable preference to prescribed categories of persons as required by section 166A(3) of the Act".

49. In *R (Montero) v Lewisham LBC* [2021] EWHC 1359 (Admin), [2021] PTSR 1725 Henshaw J considered the lawfulness of a policy which excluded from registration for a period of six months those who did not have a local connection. He concluded that the policy was lawful. In that regard his conclusion on the lawfulness of such a qualification differed from that reached by Goss J in *R (HA) v Ealing LBC* [2015] EWHC 2375 (Admin), [2016] PTSR 16. What is of note for present purposes is Henshaw J's analysis, at [64] – [69], of the approach to be derived from *Jakimaviciute.*

50. At [64] and [65] Henshaw J explained that although a housing authority's power to set disqualification criteria was subject to the reasonable preference requirement it did not follow that there could be no disqualification of a person in a reasonable preference category. There could be circumstances in which a person or group outside the reasonable preference categories could properly have priority over some of those who were in those categories "provided that the former do not dominate the scheme at the expense of the latter".

51. At [66] Henshaw J described the effect of *Jakimaviciute* in these terms:

> "The Court of Appeal in *Jakimaviciute* drew a distinction between: (i) attempting to thwart the statutory scheme by redefining it, which is impermissible, and (ii) adopting a rule excluding individual applicants by reference to factors of general application, "such as lack of local connection or being in rent arrears", which is permissible."

52. Henshaw J then proceeded to contrast the effects of the policy which had been struck down in *Jakimaviciute* with that he was considering.

53. In the former case the policy was:

> "materially at odds with [section 166A(3)(b)] because it restricted the preference accorded by the council's policy to the small sub-group (about 13% on the evidence) falling within section 166A(3)(b) who were in short-term or unsuitable accommodation. It went against the evident policy underlying section 166A(3)(b), which was to give reasonable preference in terms of housing allocation to this group of homeless persons, thus moving them from temporary to permanent housing. The rule, in substance, fundamentally undercut the statutory purpose."

54. In the case of the policy he was considering, however Henshaw J explained that "the use of a qualifying criterion based on residence is not fundamentally at odds with the gist or purpose of section 166A(3). Instead, it is a rule excluding individual applicants by reference to a factor of general application, namely local connection, of the kind which the Court of Appeal in *Jakimaviciute*, in principle, considered to be acceptable."

55. So I return to the question of whether there can be, as Mr Peacock says is the law, a policy which does not disqualify by reference to factors of general application but which is nonetheless lawful because it does not thwart the statutory scheme. Mr Peacock proceeds to say that the assessment of whether the statutory scheme is or is not thwarted will be dependent on the proportion of those to whom the Act requires a reasonable preference to be given who are or are not excluded by the policy.

56. It is right to note that in *Jakimaviciute, Alemi,* and *Montero* reference was made to the numbers or proportions excluded or not excluded by the policies in question. I will deal with the language used in *Jakimaviciute* in more detail below but in context those references are to be seen as part of the exercise of assessing whether or not the policy operated as a redefinition of the statutory scheme. The analysis was one of considering whether there was exclusion of the whole of a sub-group within the reasonable preference category or of such a large part of a sub-group as effectively to be an exclusion of the sub-group in question.

57. My understanding of the distinction laid down in *Jakimaviciute* is the same as that expressed by Henshaw J in *Montero* at [66]. However, in light of Mr Peacock's argument I will express the test slightly differently. Exclusion of those otherwise entitled to a reasonable preference is lawful provided it is done by reference to a factor or factors of general application. Exclusion which is by reference to a factor which is not of general application will not be lawful.

58. This position is clear from the terms of the acceptance by Richards LJ of counsel's submissions in *Jakimaviciute.* It also follows as a matter of principle and analysis. An exclusion by reference to a factor of general application is not a redefinition of the statutory scheme. All those in each of the statutory reasonable preference categories will have the potential to be given the relevant reasonable preference. The fact that there is an additional qualification and a potential exclusion which applies across all the categories does not affect that. All the categories identified in the Act remain within the scope of the reasonable preference provision when there is such an exclusion. By way of contrast an exclusion by reference to a factor which is not of general application will inevitably amount to a redefinition of the statutory scheme. That is because it will exclude from the provision of reasonable preference members of the category or categories to whom the factor applies notwithstanding the fact that the Act provides that persons in that category or categories should receive reasonable preference. It will

do so while not excluding those in other categories. That will amount to a redefinition by having the effect that some of the statutory categories will receive the reasonable preference provided for by the Act but others will not. The Act provides for a reasonable preference to be given to those in the categories or classes set out in section 166A(3). That purpose is inevitably thwarted if one or more of the statutory categories is excluded. The purpose is thwarted even if the members of the category which is excluded are few in number or form a small proportion of the total number of those potentially within the scope of section 166A(3). A policy which is inconsistent with the statutory scheme is necessarily unlawful. It is unlawful by reason of that inconsistency and neither inconsistency nor lawfulness can be seen as a matter of degree. Similarly, the test cannot be whether the authority in question is seeking to thwart the statutory scheme whether this is done deliberately or is an unintended consequence of the authority's policy. As already noted, a policy can be rational but unlawful and a policy might have been adopted for entirely legitimate motives. The question is whether a qualification which is inconsistent with the statutory scheme is involved. The exclusion of any class of person which the Act intended to be included is unlawful regardless of the size of the class and regardless of the intention behind the exclusion.

59. The statement by Richards LJ in *Jakimaviciute* at [47] that "it is the exclusion of a large proportion of one of those classes that causes the problem" has to be read in context. When that is done it is clear that Richards LJ was not saying that the test of lawfulness was the proportion of the persons potentially covered by section 166A(3) who were being excluded. As the sentence preceding that quoted makes clear Richards LJ was addressing the contention that the policy in question was lawful because it narrowed down rather than expanded the range of persons to whom a reasonable preference was given and did not extend that reasonable preference to persons outside the section 166A(3) categories. The statement was also related to Richards LJ's explanation that the policy redefined the statutory definition even though there were a small number of those in the class affected by the exclusion who might not be excluded. The point was that in reality the class in question was excluded. The fact that some members of a statutory class might still qualify does not save a policy from operating as an unlawful redefinition if the bulk of that class are excluded.

60. Mr Peacock's argument involved an impressive display of advocacy skills and he was right that as a matter of language any condition whether of general application or not could be expressed as a redefinition of the terms of the Act. However, that criticism of the test focused too closely on the language used and on the potential consequences flowing from that rather than looking to the true nature and purpose of the test. The difference is between a redefinition, in the sense identified by Mr Peacock, which affects all the statutory categories but does not exclude any category and one which affects one or more categories but not others: in my judgement the former is lawful but the latter is not. It is of note that Mr Peacock's interpretation of the applicable test would have undesirable consequences in practice. It would mean that the lawfulness of a housing authority's policy would depend on its practical effects. Not only would that give rise to scope for debate but the practical effects might vary over time in the same authority or might differ from authority to authority. Thus identically expressed policies could be lawful or unlawful at different times or in different circumstances.

61. It follows from my conclusion as to the applicable test that the Scheme is unlawful. It operates to exclude persons from receipt of a reasonable preference by reference to factors other than factors of general application.

62. However, even if my understanding of the applicable test is wrong and Mr Peacock's interpretation of the effect of the decision in *Jakimaviciute* is correct the Scheme is still to be seen as unlawful. On that footing the lawfulness or otherwise of the Scheme would depend on whether it operated as a redefinition of the statutory scheme so as to thwart the purpose of the Act with that being judged by assessing its effect and considering the proportion of those potentially within the reasonable preference categories who were excluded. As Mr Nabi said the Scheme clearly operates as a redefinition of the statutory scheme because it strikes through parts of section 166A(3) with the effect that no homeless person other than one with a priority need (and who is thereby the subject of the Main Housing Duty) is to be given a reasonable preference by being placed on the Register.

63. The First Claimant was given permission to proceed with the claim by Hugh Southey QC sitting as a Deputy High Court Judge. In explaining his reasons for giving permission Mr Southey said that "the language used in section 166A(3)(a) is broad and intended to include all who are `homeless'. He then added "the effect of the challenged policy is that it excludes many or all members of a statutory group who are defined as being homeless". I respectfully agree with that succinct analysis which captures in a nutshell the reason for the Scheme's unlawfulness.

64. Finally, I note that the Defendant's position also falls down on the figures here. Mr Peacock said that the fact that 30% of the homeless (or 43¼% of those whose homelessness was not relieved during the Relief Duty period) ended up on the Register showed that the statutory purpose was not being thwarted and that a reasonable preference was being given to a significant proportion of those in the reasonable preference categories. I draw a rather different conclusion from these figures. They show that even on the most favourable view for the Defendant only a minority of those in the reasonable preference categories were being given a reasonable preference. As Mr Nabi said 100% of those homeless who were not in priority need were excluded. Thus even if regard is to be had to the effect of the Scheme it clearly operated contrary to the purpose of the Act.

The Relief to be granted.

65. In the light of my conclusions it follows that the Scheme was unlawful by reason of limiting places on the Register to those to whom the Main Housing Duty was owed and thereby failing to secure a reasonable preference for those to whom section 166A(3) required a reasonable preference to be given and the Claimants are to be granted declarations to that effect.

66. It may well be that there will be scope for competing submissions as to the precise wording of such declarations. It was, however, apparent that there was rather greater disagreement as to the extent to which further relief was appropriate and in particular as to the relief which should be given to the Second Claimant. Mr Peacock said that relief for the Second Claimant could not just be a matter of declaring that she was entitled to be treated as having been entitled to be placed on the Register on a particular date in 2018. Still less could it be a matter of ordering that she was to have such priority

as she would have had if placed on the Register on such a date with the ranking to be given at that time to a person to whom the Main Housing Duty was owed. Mr Peacock submitted that it would have been open to the Defendant to give different numbers of points to different persons placed on the Register and that it was not unlawful, for example, to give fewer points to a person who was intentionally homeless than to a person in priority need. He said that it was potentially open to the Defendant to argue that on the material provided by the Second Claimant it had been justified in taking the view that she was intentionally homeless and that it was only later that she should have been regarded as not falling into that category. Mr Nabi accepted that there had been a developing situation in respect of the Second Claimant but did not accept that for the court merely to declare that the Scheme was unlawful in the terms I have posited would be sufficient vindication of her rights.

67. Those submissions were, of course, made in ignorance of my conclusion as to the lawfulness of the Scheme and more particularly of the reasoning which led to it. It may be that the parties will now be able to agree on appropriate relief. If they are then I will consider any agreed proposals for the form of order. In the absence of agreement I will hear submissions as to the relief which is appropriate in light of this judgment.