IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 778 (Admin)

Case No. CO/633/2022

Royal Courts of Justice

Friday, 17 March 2023

Before:

MR JUSTICE KERR

B E T W E E N :

THE KING
on the application of
MARCIO GOMES — Claimant

- and -

ROYAL BOROUGH
OF KENSINGTON AND CHELSEA — Defendant

MR CHRISTOPHER JACOBS (instructed by Howe & Co Solicitors) appeared on behalf of the Claimant.

MR ANDREW LANE (instructed by Royal Borough of Kensington and Chelsea) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE KERR:

Introduction

1 This is an application for judicial review of decisions about the rehousing of the claimant, a former resident of Grenfell Tower, in the years following the Grenfell Tower disaster of 14 June 2017.

2 An application for anonymity was made in the original Statement of Facts and Grounds filed on 22 February 2022, in respect of the claimant's three children. The defendant does not oppose the application. The claimant's name is already in the public domain and he does not seek anonymity for himself. The application is made "to protect the identities of the claimant's children, whose interests are affected by this application … ."

3 Applying CPR rule 39.2(4) and recognising how important open justice is, I consider myself bound nonetheless to order that the identity of the three children be withheld. That order does not extend to the claimant himself; any risk of jigsaw identification is adequately safeguarded by an order prohibiting identification of his children. For the avoidance of doubt, the order therefore does not mean the claimant must not be named, particularly as he has already given evidence to the Grenfell Tower Inquiry.

4 Under rule 39.2(5) I direct that the court's anonymity order need not be published on the website of the judiciary of England and Wales; I do not think that is generally necessary where the order relates only to the private lives of children caught up in litigation brought by their parents.

5 I turn to the substantive application for judicial review. The decisions challenged are:

(1) the decision of 23 November 2021 to refuse to offer the claimant a three bedroom property;

(2) in the amended Statement of Facts and Grounds but not in the claim form, there is pleaded a failure to reconsider that offer of accommodation in light of further representations from the claimant's solicitors made on 2 February 2022;

(3) by amendment, to the legality of the Grenfell Settled Home Policy implemented on 23 March 2022 (shortly after the acknowledgement of service was filed in this claim).

The Defendant's Obligations under the Housing Act 1996

6 A summary of the legislation is found in the defendant's skeleton, on which I gratefully draw. A local housing authority ("LHA"), such as the defendant, has two primary housing responsibilities. For those individuals applying for housing assistance as homeless, Part 7 of the Housing Act 1996 ("the 1996 Act") provides various powers and duties on the part of the LHA which can ultimately be, for those owed the full housing duty, the securing of suitable accommodation under section 193(2) of the 1996 Act (whether in the private rented or social housing sector).

7 Part 6 of the 1996 Act enacts a system of rules the LHA must follow in allocating housing, founded on the adoption of a housing allocation scheme. The provisions in Part 6 must be complied with; see section 159(1). There is provision for transfers for existing secure or introductory tenants; see section 159(4B).

8 Other provisions include a description of situations where "reasonable preference" must be given to the applicant, e.g. where an applicant is homeless or occupying insanitary or overcrowded accommodation: section 166A(3).

9 An applicant has the right to request a review of any decision made about the facts of their case, see section 166A(9)(c). Allocation of council housing may not be done "except in accordance with their allocation scheme"; see section 166A(14).

10 As Males LJ noted in *R (Favio Ortega Flores) v Southwark London Borough Council* [2020] EWCA Civ 1697 at [13] and [14], the effect of the duty in section 166A(14) is that:

> "13. …Once an Allocation Scheme is established, it must be followed. ….
> …
> 14. Section 166A(14) requires a local authority to comply with the Allocation Scheme which it has 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 an applicant should be placed."

11 I should also refer to the Court of Appeal's decision in *R (Ward) v Hillingdon LBC* and *R (Gullu) v Hillingdon LBC* [2019] PTSR 1738. Lewison LJ at [99] said that it was not for the court to re-write a policy. In similar vein, Lady Hale JSC noted in *R (Ahmad) v Newham LBC* [2009] PTSR 632 at [15]:

> "… The trouble is that any judicial decision, based as it is bound to be on the facts of the particular case, that greater weight should be given to one factor, or to a particular accumulation of factors, means that lesser weight will have to be given to other factors. The court is in no position to rewrite the whole policy and to weigh the claims of the multitude who are not before the court against the claims of the few who are. Furthermore, relative needs may change over time, so that if the council were really to be assessing the relative needs of individual households, it would have to hold regular reviews of every household on the waiting list in order to identify those in greatest need as vacancies arose. No one is suggesting that this sort of refinement is required. It would be different, of course, if the most deserving households had a right to be housed, but that is not the law."

The Facts

12 In 2007, the Gomes family moved to a flat on the 21st floor of Grenfell Tower. The claimant lived there with his wife and their two daughters, to whom I shall refer as "L", born in March 2005, and "M", born in November 2006.

13 Before the tragedy, the defendant's scheme for allocation of its housing stock had most recently been revised in February 2017. It is still the governing document for allocation generally, subject to other Grenfell-specific policy documents to which I will come shortly.

14 I will call it "the general 2017 Scheme" to differentiate it from the later Grenfell-specific policy documents. It included, in the ordinary way, a system for establishing priorities for applicants. Paragraph 1.11 permitted allocation of properties outside the normal order of priority where, among other things, there was a need for temporary accommodation where the tenant could not return to the original tenancy.

15 Paragraph 6.4 of the general 2017 Scheme stated:

> "6.4 Eligible property sizes
>
> We assess the size of property each household requires. This is set out below:
>
> In calculating how many bedrooms you need, we will allow you:
>
> • One bedroom for you and your partner, if you have one
>
> • One bedroom for every two children of the same sex, aged up to and including 20
>
> • One bedroom for a child of the opposite sex, aged over ten
>
> • One bedroom for any other adult aged 21 or over.
>
> We will only allow bedrooms for people who are entitled to be on your application. We do not allow an extra bedroom if you are pregnant. You should notify us when the baby is born; whether this entitles you to an extra bedroom will depend on your household's circumstances.
>
> Applicants may bid only for the size of property we have identified, unless we give permission to bid for larger or smaller properties.
>
> In exceptional circumstances, we may allow an extra bedroom for:
>
> • Supporting health and independence, where it has been recommended by the Assessment Team
>
> • Under-occupiers vacating large family homes (three or more bedrooms)
>
> • Anyone to whom we have made an undertaking to offer a particular size of property, as part of a legal or contractual agreement.
>
> The allowance of an extra bedroom will be subject to assessment and agreement by a senior delegated officer within the Housing Department … ."

16 As is well known, it was on 14 June 2017 that the terrible fire at Grenfell Tower occurred. The tower burned and many died and were injured and displaced, among them the claimant and his family.

17 On the night of the fire, rescue services were unable to reach the family. They fled when the fire entered their flat and managed to escape. The claimant's wife and the children were critically ill on admission to hospital and placed in induced comas. The claimant's wife was seven months pregnant at the time and, very sadly, the baby died *in utero*. The family recovered apart from the unborn child.

18 On 20 June 2017 the defendant, in its capacity as the LHA, completed an assessment of the family's accommodation needs. In July 2017 the defendant adopted the "Grenfell Rehousing Policy", as it is called and as I shall refer to it. I do not have the version adopted in July 2017 but I have the November 2017 revision.

19 It referred to the "humanitarian disaster" of the fire and explained that it was adopted under paragraph 1.11 of the general 2017 Scheme; and it referred to the defendant's commitment to provide a new home in social housing within a year for those in emergency hotel or interim temporary accommodation. The last sentence of paragraph 1 provided that the Director of Housing:

> "has the delegated authority in exceptional circumstances to amend or waive this policy."

20 Paragraphs 2, 3 and 4 dealt with the scope of the policy, eligibility, types of available accommodation, security of tenure, rent, service charges and so forth. Paragraph 5 provided for assessment of need.

21 Paragraph 5.1 provided for the completion of needs assessments, such as that done for the claimant and his family. Accommodation provided to former Grenfell residents would be not less favourable than they had enjoyed at Grenfell before the fire. Priority bands were included. The bereaved were (under paragraph 6) in band 1, the highest priority.

22 Paragraph 5.2 provided for "bed size", which refers to the number of bedrooms per property offered. That would be the same as the number where the household members were

previously living, subject to eliminating any former overcrowding and the exercise of "flexibility" to reflect needs, as agreed with a family liaison officer. In line with rules used for housing benefit purposes, children of the same sex would be expected to share up to the age of 16, and of different sexes, up to the age of 10.

23 Paragraph 5.3 provided:

> "5.3 Split households
>
> Where it has been agreed (and included within the housing needs assessment) that a household will be split into two or more households, each household will be assessed separately and in accordance with this policy."

24 Paragraph 6 set out the "priority bands" for different categories of former Grenfell Tower residents. It ended with the following provision:

> "Exceptional cases
>
> It is not possible to set guidelines that are appropriate for every individual situation in advance. The Council will exercise discretion in exceptional cases."

25 Paragraph 7.3 under the heading: "Rehousing" provided that:

> "If a household accepts a property, then their application under this policy will be closed."

26 Under the Grenfell Rehousing Policy, the claimant and his family were to be provided with a three bedroom property. However, they asked for a four bedroom property as they were planning to have more children. On 30 October 2017, this was approved by officers of the defendant as an "exception", as the claimant's family were a bereaved household; it was considered reasonable to include the baby lost *in utero* and "given the trauma, that the girls have their own rooms."

27 The Grenfell Rehousing Policy was revised in November 2017. The provisions I have just quoted are from the November 2017 version but it is not suggested that the earlier provisions, against which the claimant's family was assessed, were materially different.

28 The then leader of the defendant, Councillor Elizabeth Campbell, gave interviews on rehousing the victims. On 13 December 2017 she was interviewed by LBC radio and made statements expressing the intention to be flexible and humane in allocating housing, a complex and difficult task that was ongoing. She acknowledged that some relationship breakdowns had occurred and indicated that previously together couples would, in some cases, have become two units of housing rather than one.

29 In April 2018, the claimant and his family moved to the four bedroom property allocated to them. The claimant's wife and children are still living there.

30 On 11 June 2018, the Guardian's political correspondent reported that the then leader, Councillor Campbell, had responded to a report from a Law Centre that was critical of the defendant's response to the tragedy and to rehousing the victims. The leader's quoted response was as follows:

> 'Elizabeth Campbell, the leader of the council, said: "It has been a hugely complex challenge, but 90% of families have accepted an offer of a permanent home and 90% of these homes are ready to move into.
>
> "I have seen and heard the personal stories bravely told in the first two weeks of the public inquiry, every day. The families involved are not statistics that need to be moved around a balance sheet. So, we will no longer set deadlines. They are not required. What is required is understanding, support and above all a willingness to do everything we can to help. No matter how large or small the task.'

31 On 7 September 2018, the claimant's wife gave birth to another daughter, to whom I will refer as "K", who is now four and a half years old. The claimant has been diagnosed with Post Traumatic Stress Disorder ("PTSD") arising from the fire. All three of the claimant's children have medical difficulties. The two oldest were been caught up in the fire and suffered PTSD and serious injury; and the third, K, has been diagnosed with autism.

32 In April 2019, the Grenfell Rehousing Policy was again revised, but the provisions I have quoted above from the November 2017 version remained the same, including paragraph 1 (delegated authority in exceptional circumstances to amend or waive the policy); paragraph

5.3 (split households); the "exceptional circumstances" provision at the end of paragraph 6; and paragraph 7.3 (application closed where a household accepts a property).

33 The revised policy document was accompanied by a guidance document for those eligible, dated April 2019. At page 3 of the guidance document under the heading: "What size of property will you be offered?" the following appeared:

> "When we look at the number of bedrooms you will need, we will use the same rules used by housing benefit. This means that children of the same sex will be expected to share until the eldest reaches 16, and that boys and girls will be expected to share until the eldest reaches 10."

34 In June 2021, the claimant and his wife separated. The claimant attributes the breakdown of the marriage to the Grenfell tragedy. His wife and the children continue to live at the four bedroom property. The claimant now lives with his mother. His evidence is that the children are unable to stay with him at his mother's property because there are no spare bedrooms.

35 On 6 July 2021 the claimant confirmed to the defendant that he had separated from his wife and had moved in with his mother; and requested housing support.

36 On 21 September 2021 the claimant's solicitors wrote a detailed letter to the defendant submitting that because of the separation of the claimant from his wife, the family should retrospectively be treated as a "split household" under the Grenfell Rehousing Policy and placed under the first band of priority on the basis of bereavement, owing to the loss *in utero* of their unborn baby.

37 The defendant responded by email on 23 November 2021. This is the primary decision challenged in this judicial review. The email stated:

> "Whilst we acknowledge the points raised in your letter of 21st September and accept that the individual needs of families affected by the Grenfell Tower will continue to change over time, we cannot apply the Grenfell Rehousing Policy on each occasion as the policy was implemented to provide a secure home following the loss [oi]f the accommodation at Grenfell Tower. Therefore, this need has already been met under the policy.

> However, we will continue to treat all the survivors in line with our commitments and consider each case on it's own merits. In the case of Mr Gomes, we have considered the circumstance and agreed to award the highest priority under the current Allocations Scheme, Therefore, he has been given Exceptional Priority and 2000 priority points. This is the highest priority available under the policy.
>
> In addition, whilst we would normally offer a single parent a one bedroom property to allow their children to stay on occasion, we have made a further exception and agreed to offer your client a two bedroom property to allow him the additional space taking into account his circumstances. Unfortunately, we cannot offer a further 3 bedroom property as this would result the family in having a total of 7 bedrooms between the two properties. Given the extreme shortage of available 3 bedroom properties, this cannot be considered for your client."

38 On 9 December 2021, the defendant wrote to survivor households, bereaved households and others with an interest in rehousing after the Grenfell disaster. Consultation over a period up to January 2022 began, on a proposed new policy document, which was to become the Grenfell Settled Home Policy. A draft of that document with the sub-heading "Rehousing options for bereaved households" was circulated and consulted upon.

39 Again, it stated that it was adopted pursuant to paragraph 1.11 of the general 2017 Scheme. At 26 pages long, it was more detailed than the Grenfell Rehousing Policy it was to supersede. Its purpose was to enable former Grenfell Tower residents, including those already rehoused under the Grenfell Rehousing Policy, to apply one further time for rehousing under special provisions applying only to former Grenfell residents, after which they would revert to the general 2017 Scheme.

40 There was, again, a power conferred on the most senior officers "in exceptional circumstances to amend or waive this policy" (see the introduction, last sentence). There were new provisions about family separation. Paragraph 1.2 defined a "separated or separating tenant or partner" as including one like the claimant who, before the separation occurred, had been a joint tenant with a spouse or partner when "rehoused to a permanent home with the joint tenant or spouse or partner under the Grenfell Rehousing Policy".

41 Paragraph 1.3 provided:

> "When a household moved to a new permanent home under the Grenfell Settled Home Policy, their Grenfell Settled Home application will be closed."

42 Paragraphs 1.2 and 1.3 read in combination meant, it is agreed, that the claimant would become entitled to apply for further rehousing under the Grenfell Settled Home Policy. Those qualifying for rehousing became entitled (under paragraph 3.1) to 1,500 points under the general 2017 Scheme.

43 Paragraph 5.3 was headed: "Visiting children where parents have separated". It applied directly to the situation the claimant was in and stated:

> "5.3 Visiting children where parents have separated
>
> Section 1.2 explains that a separating or separated tenant or partner may be rehoused to their own new permanent home under the Grenfell Settled Home Policy. Where parents rehoused to a new permanent [sic] have children who will stay with them (ie their children's main residence is elsewhere), the following rules will apply.
>
> Where a parent is rehoused to a studio or one bedroom home, they may have one additional bedroom for visiting children.
>
> Where a parent is rehoused to a two bedroom home or larger, visiting children will be expected to share bedrooms with any siblings resident in the new permanent home."

44 It is common ground that under the terms of the Grenfell Settled Home Policy, the claimant's entitlement would be to a two bedroom property, the one additional bedroom being for visiting children who would have to share the additional bedroom if more than one visited at a time and stayed overnight.

45 The claimant's solicitors made further representations in a letter of 2 February 2022. It bore some resemblance to a pre-action protocol letter before claim but was not obviously one. The defendant was invited to reconsider its decision letter of 23 November 2021. The solicitor's letter indicated that claimant considered he should be allocated a four bedroom property with a garden but would be prepared to accept an offer of a suitable property with three bedrooms. Supporting evidence was attached. It consisted of the following.

46 There was an enclosed letter of 31 January 2022 from the family's social worker expressing the hope that due to their needs, the three children would not have to share a bedroom when visiting their father. There was a letter of 31 January 2022, to similar effect from a psychotherapist. And there was a detailed draft witness statement dated 2 February 2022 from the claimant, headed as if in a judicial review claim (though no proceedings had been issued).

47 In the draft witness statement, the claimant made his case eloquently, stating at paragraph 35 that his children and he needed a four bedroom property, not high rise and, if a flat, not higher than the fourth floor, with a garden. Ideally, it should be light, spacious and airy and away from fire stations. At paragraph 36, he explained the difficulty, namely that he was having to stay at his mother's which meant the children's visits there could not include overnight stays as there were not enough bedrooms.

48 A proper pre-action protocol letter was then sent on 8 February 2022 by the claimant's solicitors. They challenged the refusal of a three bedroom property on 23 November 2021. They again sought the retrospective application to the claimant of the split households provision in the 2019 revised Grenfell Rehousing Policy and stated that the offer of a two bedroom property was unreasonable on various grounds.

49 They complained, among other things, that a family that went to great trouble to stay together as long as possible ought not to be in a worse position than one which broke up immediately after the tragedy, before being rehoused. They alleged breaches of section 11 of the Children Act 2004 and of Article 8 of the European Convention on Human Rights and failure to take account of material considerations.

50 The defendant responded on 21 February 2022, denying having acted unlawfully. The response letter explained that the claimant's family's entitlement under the Grenfell Rehousing Policy was spent because the family, before the separation, had accepted a four

bedroom property, so that paragraph 7.3 applied. Any current needs of the family would fall to be dealt with under the general 2017 Scheme, pending adoption of the Grenfell Settled Home Policy which was to be implemented imminently.

51 The claim was then filed and issued the next day, 22 February 2022, just short of three months after the original decision challenged, made on 23 November 2021. Although the defendant contended that the application was not made promptly, that contention was, realistically, not pursued before me. The defendant filed its acknowledgement of service on 18 March 2022. The Grenfell Settled Home Policy was adopted on 23 March 2022.

52 On 2 August 2022, Sweeting J granted permission to bring the claim on all eight grounds advanced in the Statement of Facts and Grounds . The claimant then made an application on 1 November 2022 under the Grenfell Settled Home Policy. However, the form was only partly filled in; much of it was blank, though it was signed and dated 1 November 2022. The defendant treated it as a valid application.

53 On 12 January 2023, Sir Duncan Ouseley rather reluctantly, granted permission, by consent, to the claimant to amend his seventh ground of challenge by submitting that "the Grenfell Settled Homes Policy" is unlawful."

54 The submission in the amended Statement of Facts and Grounds is that the Grenfell Settled Home Policy 'fails to take account of the defendant's statutory duty under Section 11 of the Children Act 2004 to act "having regard to the need to safeguard and promote the welfare of children"'; that the Grenfell Settled Home Policy is "fettered by its inflexibility" and that the defendant "operates a policy which fails to enable the operation of discretion to take account of the needs of children who were traumatised by the Grenfell fire."

55 On 15 February 2023, the defendant wrote to the claimant determining his application under the Grenfell Settled Home Policy. The outcome was that, as a person entitled to the

benefit of that policy who had initially been rehoused under the Grenfell Rehousing Policy, the claimant became entitled to 1,500 additional points for the purpose of his rights under the general 2017 Scheme. It is common ground that this equates to a two bedroom property, i.e. the same as he was offered on 23 November 2021.

Issues, Reasoning and Conclusions

56 There are eight grounds of challenge. The claimant invites the court to deal with the first three grounds together, an invitation I am happy to accept.

57 The first ground is that the defendant failed to act in accordance with public statements as to how Grenfell survivors would be treated under the Grenfell Rehousing Policy. The second is that the defendant failed to provide the claimant with accommodation as an exceptional case which accords with the underlying rationale of the split households policy. The third is that the defendant failed to offer the claimant adequate accommodation when making an exception in his case in November 2021.

58 The claimant submits that the defendant misdirected itself or acted unreasonably when it determined in its letter of 23 November 2021 that the claimant's rights under the then Grenfell Rehousing Policy (April 2019 revision) were spent pursuant to paragraph 7.3. The defendant , submits the claimant, had a residual discretion under paragraph 6 in exceptional cases to reopen an application that would normally be closed. Paragraph 6 refers to the impossibility of setting guidelines that are "appropriate for every individual situation in advance" and says the defendant will "exercise discretion in exceptional cases".

59 The claimant submits that the defendant was wrong not to treat his case as exceptional and to afford him the benefit of the "split household" provision at paragraph 5.3 of the Grenfell Rehousing Policy. The defendant failed to treat the claimant's case as exceptional to the extent of agreeing to provide him with a three bedroom property, as he was requesting, though it did offer him a two bedroom property.

60 The claimant provided a list of features which, he said, made his case exceptional even among the cohort of Grenfell survivors to whom the Grenfell Rehousing Policy applied and who were therefore likely, by definition, to have undergone deeply harrowing experiences. The claimant and his family had escaped from the 21st floor. They had lost a son *in utero*. The claimant's two eldest daughters are also bereaved.

61 He, and his daughters, Mr Jacobs submitted, suffer from significant mental health difficulties as a result of the traumatic circumstances of the fire. Two daughters were placed in an induced coma for a time. A third was born after the fire. A two bedroom property would mean all three daughters having to share a room during any overnight stays. The Grenfell Rehousing Policy, the claimant submitted, stated that each child of the family should have a separate room on initial placement.

62 The defendant, the claimant submitted, was not acting in accordance with the public statements of the leader. Another family which had split up very soon after the fire, while still in interim hotel accommodation, had been treated as two separate family units, as provided for by paragraph 5.3. It was wrong to penalise the claimant, whose family tried as long as they could to stay together, so that they had already been placed in the four bedroom property when the separation occurred.

63 The cumulative impact of all those matters should, the claimant submitted, have persuaded the defendant to provide a three bedroom property, not just a two bedroom property, in November 2021 when it made the decision challenged. Not to do so was unreasonable and unlawful. The claimant is unable to spend time alone with his daughters except at his mother's accommodation where he lives and where overnight stays are not possible unless his sister, who also lives there, makes way by temporarily absenting herself.

64 The claimant submits that by failing to provide the claimant with a three bedroom property, the defendant operated the Grenfell Rehousing Policy inflexibly, in a manner that in practice did not admit of exceptions; cf. the student grant case of *R v London Borough of Bexley ex p. Jones* [1995] ELR 42, at p. 55. The defendant, as in that case, had, the claimant submitted, done what was expressed in Leggatt LJ's words as follows:

> "effectively disabled themselves from considering individual cases and there has been no convincing evidence that at any material time they had an exceptions procedure worth the name. There is no indication that there was a genuine willingness to consider individual cases."

65 Further, the claimant submitted, the defendant purported to offer a two bedroom property by way of exception. The offer of a two bedroom property in November 2021 was made outside the general 2017 Scheme (as contended in the defendant's reply pleading). It was not an exceptional concession made under paragraph 6.4 of the general 2017 Scheme. That was unreasonable, the claimant submitted, because two bedrooms would not be enough for the daughters to stay overnight unless all three shared a room. That would have adverse effects on the two children traumatised and bereaved by the Grenfell fire.

66 The refusal to provide a three bedroomed property should, for those reasons, be declared unlawful, Mr Jacobs for the claimant submitted. In oral argument, he sought at first the remedy of reconsideration by the defendant, under the 2019 Grenfell Rehousing Policy, of the claimant's application made in September 2021. However, he also submitted that provision of a three bedroom property was the only lawful outcome which meant, he accepted, that the reconsideration exercise would be pointless and the court should require the defendant to provide a three bedroom property as the claimant's remedy.

67 The defendant makes the following submissions on interpretation of the policies. First, there is no challenge to the general 2017 Scheme. The challenge, by amendment, is to the Grenfell Settled Home Policy of 2022. The present challenge therefore leaves the general

2017 Scheme intact, including paragraph 1.11 which enables exceptions to be made that are specific to the special circumstances of former Grenfell Tower residents.

68 Mr Lane for the defendant submitted that allocation of housing in accordance with the general 2017 Scheme, including special cases dealt with under arrangements validated by paragraph 1.11, is not a matter of choice but of obligation; see section 166A(14) of the 1996 Act: "A local housing authority in England shall not allocate housing accommodation except in accordance with their allocation scheme."

69 The claimant, the defendant points out, does not dispute that he and his family received appropriate accommodation in 2018 under the general 2017 Scheme, as supplemented by the Grenfell Rehousing Policy (the July or November 2017 versions). They had requested a three bedroom property and received a four bedroom property as exceptional additional provision.

70 The defendant submitted that the two bedroom property offered to the claimant in November 2021 after he separated from his wife was not, contrary to the claimant's contention, made outside the general 2017 Scheme and the Grenfell Rehousing Policy. There are references in the Grenfell-specific policies to paragraph 1.11 of the general 2017 Scheme. An exception to normal property size limits can be made under paragraph 6.4 of the general 2017 Scheme.

71 Before the current Grenfell Settled Home Policy was adopted, there was no policy lacuna, Mr Lane argued. In the decision challenged, dated 23 November 2021, the defendant allocated the claimant the "exceptional priority" status allowed for at section 4.3 of the general 2017 Scheme.

72 Both the Grenfell Rehousing Policy and the more recent Grenfell Settled Home Policy apply for the purpose of one offer only; see (in the 2019 revised version of the Grenfell Rehousing

Policy) paragraph 7.3; and in the Grenfell Settled Home Policy the explanatory statement that it "provides survivor households with the opportunity to move one further time to an alternative permanent home".

73 The defendant submits that, on the evidence, in particular in the witness statement of Mr Smajli, it does not have enough housing stock to accommodate all those in the borough who need a three bedroom property. It is not unlawful or unreasonable to apply the policies in a manner that distributes their benefits in a manner fair to all those entitled to those benefits.

74 I turn to my reasoning and conclusions in respect of the first three grounds. First, I agree with the defendant that compliance with the general 2017 Scheme is a matter of obligation not choice. I accept, also, that it requires the defendant, as the LHA, generally to allocate priority in accordance with the priority bands set out in it and to allocate properties with the number of bedrooms provided for.

75 However, it also includes provisions creating some flexibility which allows for discretion to depart from its norms in certain cases. One such provision is paragraph 1.11 which allows different provision to be made to meet a specific situation, such as the Grenfell fire disaster, creating an emergency need for accommodation. Another is paragraph 6.4, which allows an extra bedroom to be provided in defined "exceptional circumstances".

76 Next, I accept that the Grenfell Rehousing Policy adopted pursuant to paragraph 1.11 of the general 2017 Scheme was not a departure from the latter Scheme but operated alongside it. It created a special category of former Grenfell residents and applied to them different and more favourable provision than available to others covered only by the general 2017 Scheme. It did not thereby remove the former Grenfell residents from the scope of the general 2017 Scheme, it merely gave them added rights not available to others who had not lived in Grenfell Tower.

77 Next, I agree with the parties that, as is not disputed, the allocation in 2018 of a four bedroom property was compliant with the Grenfell Rehousing Scheme. In fact, a three bedroom property would have sufficed to comply with it, and it was a three bedroom property that was at first considered appropriate. The extra bedroom was properly provided based on a needs assessment and by way of exception.

78 That, as the claimant does not dispute, was lawful. Paragraph 1 included provision for the defendant, through its Director of Housing: "in exceptional circumstances to amend or waive this policy." Paragraph 5.2 included provision for "flexibility" in determining the number of bedrooms. Paragraph 6 included provision for the exercise of "discretion" to depart from the priority band system "in exceptional cases".

79 Next, I accept the defendant's submission that, on a correct reading of the Grenfell Rehousing Policy, paragraph 7.3 had the effect of terminating the rights of a household's members once a property had been accepted. That provision, straightforwardly, means what it says. In consequence, I agree with the defendant that, on a correct reading, paragraph 5.3 did not apply to the claimant when he separated from his wife after allocation of the four bedroom property in 2018.

80 The position is different where the separation occurs before allocation and acceptance of a property. In such a case, paragraph 5.3 operates. But it cannot apply to a person who no longer has the right to benefit from the Grenfell Rehousing Scheme, unless the defendant should decide to use its discretionary powers to modify the impact of the Scheme on the ground that the circumstances are exceptional. I have already referred to the sources of these discretionary powers, in paragraphs 1, 5.2 and 6 of the Grenfell Rehousing Scheme.

81 I agree with the claimant that after the separation the defendant had the power, in principle, to provide him with a three bedroom property, or even the four bedroom property with a garden that he was asking for. There was sufficient flexibility in both the general 2017

Scheme and in the Grenfell Rehousing Scheme to do so. The former still applied to the claimant. The latter, on its face, did not because of paragraph 7.3. But the defendant could, in principle, have used its discretionary powers to disapply paragraph 7.3 in the claimant's case and extend to him the benefit of paragraph 5.3, the split households provision.

82 The first three grounds boil down to the contention that the defendant was bound to use those discretionary powers to provide, at least, a three bedroom property rather than a two bedroom property. It is always difficult for a party to make good a contention that his opponent is bound to exercise a discretionary power in his favour. The advancing of that contention seeks to convert the power, on the facts, into a duty, which is awkward. In assessing that argument, I must first consider what the defendant did and second whether what it did was lawful applying ordinary public law principles.

83 I attach negligible weight to the public statements of the then leader of the defendant. She was speaking in the political arena, not giving legal undertakings. She was responding to criticism, attempting to address the human dimensions of the tragedy and how the defendant intended to address its consequences. She said nothing about modifying any housing policies in a particular way that could be directly applied to the claimant.

84 I entirely accept that, like other victims of the disaster, the claimant and his daughters have experienced severely traumatic events and suffered deeply and grievously from them. The suffering of the victims can only arouse the deepest sympathy of the court and all reasonable people. I am conscious of the detailed evidence about the degree of the claimant's pain and suffering and that of his two older daughters, and the difficulties his youngest one faces.

85 I do not regard the claimant's plight and that of his daughters as necessarily more acute and exceptional than that of the generality of Grenfell victims to whom the Grenfell Rehousing Policy applied. I do not have the necessary evidence to make that comparison. Many victims died and lost loved ones, including this family which lost an unborn child. Other

victims survived but suffered injuries. Their experiences must command the profound sympathy of the court and the public.

86 I do not agree with the claimant that it was necessarily unlawful for the defendant to decline to extend the benefit of the split households provision to the claimant, after he had ceased to be a person to whom the Grenfell Rehousing Policy applied. Confining the effect of the provision to cases where separation occurs before, rather than after, allocation of a property is not necessarily unreasonable.

87 The post-separation property will often, as in this case, become a secondary residence for children of the former marriage or relationship. Breakdowns in relationships between former Grenfell residents may continue to occur into the increasingly distant future, perhaps many years after the fire. Here, it was the togetherness of the family in 2017 and 2018 that enabled them to obtain the four bedroom property rather than a smaller one.

88 I do not think it assists the claimant's case to describe his position as showing a "lacuna" in the defendant's policies. A policy is not required by law to cover every conceivable situation. If it were, there would be no need for the "discretionary" powers whose exercise the claimant seeks to compel. The provision of accommodation to victims of the fire has to be finite and, terrible as their plight has been, must be balanced against the needs of other borough residents who were not victims, and in the context of high housing need and a scarcity of properties, especially multi-bedroom ones.

89 Against that background, I return to the decision letter of 23 November 2021. The decision was not to reapply the Grenfell Rehousing Policy to the claimant, rather it was to increase his allocation under the general 2017 Scheme to 2,000 points by way of exception, the highest level of priority under the general 2017 Scheme; and to allow an extra bedroom because of the claimant's family circumstances, i.e. a two bedroom property instead of a one bedroom property.

90 The refusal to offer a three bedroom property was based on the point that this would make a total of seven bedrooms between the two properties, for a family of five people in total, and would use up two three bedroom properties of which there was an "extreme shortage", as the decision letter stated. The closing sentence of the paragraph setting out the defendant's reasoning stated that this "cannot be considered for your client" but it clearly was considered and, by that reasoning, rejected.

91 I can see nothing unreasonable about that exercise of the defendant's statutory powers under the housing legislation and its own housing policies. Its decision did not breach any obligation under them. It struck a fair balance between the claimant's needs and those of others. The strength of the claims of others is not before the court and is a matter for the defendant, not the court. The claimant's counsel was driven to submit that no reconsideration was necessary because the only lawful outcome was what the claimant is demanding. That submission overlooks the competing claims of others.

92 I also reject the claimant's submission that the defendant had effectively disabled itself from considering individual cases, as the London Borough of Bexley did in the *Jones* case where a student grant was refused. The facts of that case were completely different. There was no inflexibility in the present case and no refusal to consider the claimant's position as an individual case. That is demonstrated by the extra bedroom he was offered, to which there was no equivalent in the *Jones* case.

93 For those reasons, the first three grounds of challenge fail. The fourth ground is, to quote the heading in the claimant's skeleton argument: "failure to act in the best interests of the Claimant's children", in breach of the defendant's obligation under section 11(2)(a) of the Children Act 2004 ("the 2004 Act") to make arrangements for ensuring that its functions are discharged having regard to the need to safeguard and promote the welfare of children.

94 Mr Jacobs, for the claimant, submitted that the defendant failed, in breach of that duty, to consider the evidence from the social worker and psychotherapist about his children's needs, set out in their respective letters of 31 January 2022. The claimant's solicitors' letters of 2 and 8 February 2022 had both referred to the duty under section 11 of the 2004 Act.

95 The defendant's response letter of 21 February 2022 did refer to that duty but, Mr Jacobs pointed out, not to the evidence from the psychotherapist and social worker; it concentrated on entitlement under the housing policy documents and pointed out that the children already had a bedroom each at the four bedroom property where their mother lives.

96 The claimant submitted that the defendant should have carried out a fresh needs assessment of the children, including the youngest child, K, born after the fire; and that the defendant did not do so. The duty, the claimant submits, applies not only to the formulation of general policies but also to decisions in individual cases; see *Nzolameso v Westminster City Council* [2015] UKSC 22, [2015] PTSR 549, per Baroness Hale DPSC at [24].

97 The defendant submits that, while the duty does apply to the making of individual decisions as well as in formulating policy, the interests of children are fully taken into account in the adoption of the three policy documents relevant to these proceedings; the circumstances of the claimant's children were fully considered and an extra bedroom beyond the normal one bedroom was offered precisely to take account of their interests; and the children already have a bedroom each at their mother's property.

98 I accept the defendant's submissions. I do not think it is tenable to assert that the section 11(2) duty entails the provision of a further extra bedroom over and above the extra bedroom already offered. The duty is not to offer particular accommodation, nor to conduct a needs assessment in every case, nor to refer to every piece of evidence; it is to make arrangements to ensure that the defendant's functions are discharged having regard to the need to safeguard and promote the welfare of children.

99 I am satisfied that such arrangements were in place when the defendant responded to the claimant's requests in November 2021 and February 2022. Moreover, the arrangements were brought to bear on the individual decisions relating to the claimant and his children. The duty does not redefine the defendant's functions or elevate the degree of priority of the claimant's children over the children of other Grenfell victims. For those reasons, I reject the fourth ground of challenge.

100 The fifth ground is that the defendant's decision breaches the rights of the claimant and his children under article 8 of the European Convention, and that the decision was therefore unlawful under section 6 of the Human Rights Act 1998. The claimant accepts that the Court of Appeal in *R(H) v Ealing LBC* [2018] PTSR 541 did not reach a concluded view as to whether allocation of accommodation engages article 8 and that two of the three members of the court were inclined to doubt that it did.

101 The claimant's argument is that, on the facts here, the decision of the defendant must have engaged article 8 not as a housing allocation decision but because of the disruption to the claimant's family life with his daughters and the effect of the decision on their mental health which is an important aspect of family life. The proposition that denial of adequate accommodation is proportionate due to housing stock shortages, should not be accepted. The defendant failed to consider whether article 8 was engaged, the claimant submitted.

102 In my judgment, the claimant's arguments on article 8 are not well-founded. First, Mr Jacobs did not suggest that I should decide the question left open by the Court of Appeal in the *Ealing* case and hold that article 8 applies to housing allocation decisions generally. I assume that it does not for present purposes, based on the weight of Court of Appeal authority.

103 On that assumption, the question cannot be sidestepped by invoking article 8 on the basis that the family life of the claimant and of his daughters is particularly vulnerable to disruption and their need for accommodation particularly severe and acute and thus different from that of other Grenfell victims or those in need of housing generally. As I have observed, I do not have the evidence to make that comparison.

104 Furthermore, if article 8 were engaged, it would place a substantive and not a procedural obligation on the defendant. The question would not be whether the defendant failed to consider whether article 8 was engaged; it either is engaged or it is not. If it were engaged, the claimant's rights under it (and those of his daughters) would either be violated or not, irrespective of what considerations the defendant did or did not have in mind. The fifth ground fails for those reasons.

105 The sixth ground is that the defendant has failed to take account of material considerations. On examination, these turn out to be the same considerations as advanced under the unsuccessful fourth ground invoking the 2004 Act, as discussed above: namely, the evidence from a social worker and psychotherapist about the claimant's daughters' vulnerability and need for secondary residence accommodation to facilitate contact of a proper quality with their father.

106 I do not think the sixth ground adds anything to the fourth. The defendant manifestly had the welfare of the claimant's children in mind; that was largely what the discussion between the parties was about. The evidence from the caring professionals confirmed what was not in dispute, namely that it would benefit the children to have extra bedrooms. That evidence said nothing about any comparison with the competing claims of others entitled to the benefits of the defendant's housing policies.

107 The seventh ground is framed as a challenge to the legality of the Grenfell Settled Home Policy. As noted above, the pleaded challenge is that the Grenfell Settled Home Policy

"fails to take account of the Defendant's statutory duty under Section 11 of the Children Act 2004 to act 'having regard to the need to safeguard and promote the welfare of children'"; and is "fettered by its inflexibility"; and that the defendant "operates a policy which fails to enable the operation of discretion to take account of the needs of children who were traumatised by the Grenfell fire."

108 I think this ground should be understood not as a challenge to the Grenfell Settled Home Policy itself, despite that policy being the target decision in the amended pleading. I think the real challenge is to the way it is being operated and, more specifically, to the manner in which the claimant's application under it was determined and the outcome of that application.

109 In the claimant's skeleton argument, the complaint is that the decision letter of 15 February 2022 "purports to be a decision under the new policy." The letter shows, says the claimant, in his skeleton argument, that:

> "no account has been taken of the exceptional circumstances that relate to the Claimant and his family. The decision suffers from the same defect as the November 2021 and February 2022 decisions under challenge in the instant application - insofar as [the defendant] has failed to apply any discretion as based on the exceptional and compelling compassionate circumstances in the instant case."

110 That way of putting the seventh ground of challenge is no more than an updated version of the other grounds. The nub of the complaint is that the defendant is bound to provide the claimant with a three bedroom property, a proposition I have already rejected. In an attempt to impugn the policy itself, the claimant goes on to argue, in his skeleton, that the Grenfell Settled Home Policy:

> "fails to establish the parameters of the circumstances to which the exercise of the discretion relates, particularly in relation to the exercise of the discretion in connection with paragraph 5.3 – 'Visiting children where parents have separated."

111 Elsewhere, the claimant complains that the policy breaches section 11 of the 2004 Act because it fails to "specify the application of the discretion", is "over-rigid" and shows a "closed mind".

112 It is true that under the Grenfell Settled Home Policy the discretion to make exceptional decisions in exceptional circumstances is at large and the provisions set out in the document do not attempt to define exhaustively, or at all, what circumstances are exceptional. It does not, for example, include a procedure for assessing when to make an exception in the case of children with mental health or other medical difficulties, any more than its predecessor did.

113 The allegations of inflexibility and a closed mind are not, in my judgment, properly advanced as complaints about the legality of the terms of the policy itself. Whether they are well founded or not depends on how the policy is operated. Provision is made for exceptional decisions. The defendant's mind is only "closed" if it is unwilling to make such decisions in exceptional cases. That a more substantial exception was not made in the claimant's case does not prove that the defendant's mind was closed nor that the policy was operated in an over-rigid manner.

114 The criticism that the policy is not detailed enough in specifying in what circumstances an extra bedroom may be provided, over and above the norm, is not in my view well founded. There is no requirement for this policy to spell out every possible situation in which an exception could be made. It is enough that the discretion to make such an exception exists, even if the discretion is at large.

115 This policy was consulted upon for two months. According to the evidence of Mr Smajli of the defendant, a point that emerged from the consultation was that the extraordinary challenges faced by Grenfell survivor families could manifest themselves in relationship breakdowns. A new version of paragraph 5.3 was introduced in recognition of that and

could be relied on by those, like the claimant, whose relationship broke down after the first property allocation under the predecessor policy.

116 Again, I accept the submission of the defendant that no unlawfulness of any kind is shown merely because the outcome for the claimant is one bedroom less than he has been asking for. The same reasoning applies to this ground as to the other, rejected, grounds which I have discussed above.

117 The eighth and final ground is a free standing allegation of irrationality or a *Wednesbury* allegation of unlawfulness. It adds nothing and must fail like the others. Despite the sympathy for the claimant and his children which the court and all reasonable people must surely have, he has not come close to making out a case of unlawful conduct by the defendant and the claim must be dismissed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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