Neutral Citation Number: [2024] EWHC 769 (Admin)

Case No: AC 2023 002761

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

Royal Courts of Justice,
Strand WC2A 2LL

Date: Friday 5 April 2024

Before :

Simon Tinkler
(sitting as a Deputy High Court Judge)

- -

Between :

The King (on the application of AK)	**Claimant**
- and –	
Westminster City Council	**Defendant**

- -
- -

Stephanie Harrison KC and Nadia O'Mara (instructed by **Public Interest Law Centre**) for the **Claimant**
Ian Peacock (instructed by **Bi-borough Legal Services**) for the **Defendant**

Hearing date: Wednesday 13 March 2024

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JUDGMENT

Simon Tinkler sitting as a Deputy High Court Judge:

Introduction and background facts

1. This is a claim for judicial review of a decision by Westminster City Council ("**Westminster**"). It is also a claim for judicial review of the policy under which the

decision was made. There is an anonymity order in this case in relation to the identity of the Claimant and her child.

2. The Claimant lives in social housing in a London Borough that borders Westminster. Her child was sexually abused by her neighbour. This abuse was discovered in 2021. The neighbour still lives next door to the Claimant. This has had an incredibly traumatic effect on the Claimant and her child. In order to avoid encountering her neighbour, the Claimant's child has been living abroad with relatives whilst alternative safe and suitable accommodation is found. Her landlord has tried to find them alternative accommodation. Her landlord has been unable to find safe and suitable accommodation available in her borough. It is now over two years since the search for accommodation started and her child moved abroad. Both the Claimant and her child are suffering serious medical issues as consequence of the situation. These include suicidal ideation and depression. Before the move abroad the Claimant's child spent time sleeping rough to avoid her previous housing, self-harming, taking drugs and has been excluded from school.

3. The Claimant and her child have close connections with Westminster. They lived there for six years when her child was at primary school. All the Claimant's family who are in the UK live in Westminster. She has a social network there. She applied to Westminster for a "reciprocal transfer" under which Westminster would provide her accommodation and in return Westminster would have access to equivalent accommodation in her current Borough for one of their tenants. On 18 June 2023 Westminster refused to agree to that request for a reciprocal transfer. The email from Westminster to the Claimant's solicitors said:

> "*Unfortunately,…due to the demand from priority groups and that by agreeing a reciprocal we would, based on current projections be rehousing* [the Claimant] *over 10 years out of turn I am unable to agree this request*"

4. They say that this refusal is in line with their housing policy (*Housing Allocation Scheme (February 2023)*' (the "**Policy**"). The decision to refuse the reciprocal transfer is the decision being challenged (the "**Decision**").

5. The Claimant says that the Policy treats people who are tenants in Westminster differently to people who live outside Westminster. She says that the Policy itself is unlawful as it:

   i) discriminates indirectly against women without proper justification contrary to s19 and thus s29 of the Equality Act 2010 **(Ground 1 (a))**;

   ii) had not had due regard to the matters set out in, and had thus breached the public sector equality duty in s149 Equality Act 2010 ("**PSED**") (**Ground 1(b));** and

   iii) violates Article 14 of the European Convention on Human Rights ("**ECHR**") when read with Article 8 of the ECHR **(Ground 1(c))**.

   She says Westminster has also breached its duty under s11 Children Act 2004 by failing to have regard to the need to safeguard and promote the interests of children **(Ground 3).**

She also says that the Decision was not properly made in accordance with the Policy and/or established legal principles **(Ground 4).**

The Claimant originally also argued that the Policy and Decision were in breach of s10 Children Act 2004 (**Ground 2**). That argument was not pursued at the hearing.

6. The Claimant asks the court to (a) quash the relevant parts of the Policy and/or declare them unlawful and (b) quash the Decision and require the council to reconsider her application, and when doing so treat her as if she were a tenant of Westminster and/or award her the points that a tenant of Westminster would receive.

7. Westminster, like many local authorities, has a very limited stock of housing available. It is unable to provide housing to everyone in Westminster who has a housing need. It says that although the Claimant's position is extremely unfortunate, the Policy is lawful. It also says that it properly exercised its discretion in making the Decision. It says the Claimant therefore has no valid claim against it.

8. Further relevant facts and arguments are set out below in relation to each of the grounds of claim.

The court's decision

9. In my judgment, the relevant aspects of the Policy are indirectly discriminatory contrary to s19 and s29 Equality Act 2010. Westminster has not yet shown justification for this discrimination. Westminster has also failed to comply with its PSED. The relevant sections of the Policy are therefore unlawful for both those reasons. I do not need to decide whether the Policy is also in breach of the ECHR.

10. The court will declare that the relevant sections of the Policy are unlawful. It will not, however, quash those sections as there are means by which Westminster can make the Policy lawful which do not require it to be quashed.

11. Westminster will be required to reconsider the Claimant's application by 4pm on Tuesday 30 April 2024. When reconsidering her application it must treat her on the same basis as a person who is a tenant of Westminster.

Preliminary applications

12. The Claimant's skeleton argument exceeded the usual length. The Defendant did not object. I gave permission for the extended skeleton to be admitted.

13. The Claimant applied to admit two additional pieces of evidence. These were a medico-legal report and witness evidence from Solace Women's Aid. I agreed to admit the evidence on a provisional basis. I would determine the weight and relevance, if any, as and when the need arose. As it turned out, neither piece of evidence was required. There was no dispute regarding the serious medical impact on the Claimant of the situation and the additional medico-legal report was not required. The other evidence before the court allowed conclusions to be reached relating to the proportion of women moving, the challenges for women fleeing violence and the difference between temporary and permanent accommodation without the need to consider the evidence from Solace.

14. The Claimant set out in her skeleton argument that she believed that the Defendant had unlawfully fettered itself when exercising (or not) its discretion under Policy 5.3. The Defendant said that this was not a point that had been pleaded. If it was to be raised at the hearing then the Defendant said the Claimant needed permission. The Defendant would oppose any such application. In my judgment, the initial claim, and certainly the claim as amended in the Reply (with the consent of the court) set out the argument on fettering discretion in sufficient detail for the court to hear it as part of the hearing before me. There was accordingly no need for any application.

Evidence

15. There were two witness statements from the Claimant. There were letters from professionals who provide support to the Claimant and her child. There was also evidence from various reports and research into the relative position of women in the context of violence (including sexual violence).

16. Westminster did not submit any evidence, whether as to the basis for the Decision or to justify the Policy, or in relation to any other factual matter.

The Policy

17. The Housing Act 1996 requires local authorities to have a housing allocation policy. Westminster's policy is the *Housing Allocation Scheme (February 2023)*. The only complaint before the court regarded sections 5.1 and 5.3 of the Policy (together with associated definitions).

18. Those sections address situations of pressing housing need. Section 5.1 relates to "*management transfers*". These are transfers by people who are existing tenants of Westminster. Section 5.3 relates to transfers requested by people who are not tenants of Westminster. These are called "*reciprocal transfers*".

> ***"5.1. Management Transfers***
> *5.1.1. On occasions there are good management or other reasons (e.g. threatened or actual violence, racial harassment) to allow a tenant transfer outside the normal allocation priorities. The Director of Housing or delegated person(s) has the option of agreeing a Management Transfer on an exceptional basis (H.C 27th June 1995 The Supply and Allocation of Rented Housing).*
>
> *5.1.2. Management Transfers are for existing Westminster Council tenants and will only be agreed where the household can be re-housed safely within the borough subject to a risk assessment and consideration of any other exceptional grounds. Where re-housing within Westminster is not appropriate the household will be given advice on alternative housing options in other areas which may also include, where appropriate, making an application for assistance under Part VII of the Housing Act 1996 to another local authority.*"
>
> Page 23 of the Policy stipulates that those with a 'Pressing Housing Need' on the transfer list, including those accepted for a management transfer, will be awarded 450 points. In essence this means that a person accepted for a management transfer under s5.1 will be rehoused in a matter of weeks whereas the Claimant, having applied under s5.3 would have to wait some 10 years to be rehoused.
>
> ***"5.3. Reciprocals***
> *5.3.1. Usually Registered Provider tenants will only be able to bid via Choice Based Lettings if they fall into one of the Priority Groups for re-housing.*
>
> *5.3.2. However, in certain circumstances the Council may agree to assist RP tenants on a reciprocal basis. This is usually in a crisis or when it is of benefit to the Council to offer a reciprocal because this will produce a vacant property that is valuable to the Council in meeting housing demand.*
>
> *5.3.3. All reciprocal arrangements are agreed on a discretionary basis and the Council retains the right to decline a request for a reciprocal agreement if it is not considered to be in the interests of the Council.*
> *[…]*
> *5.3.6. Reciprocals are only agreed when there is no material loss to the Council in terms of available housing stock. In most cases, this means that the Council will expect back a property of equal or larger size than the unit offered. The unit must also be comparable in terms of quality and type."*

Statutes

19. The relevant statutes in this case are listed below. There was no substantive dispute regarding their interpretation and I need not set them out in full.

    i) The Equality Act 2010 (ss 19, 23 and 29) (relating to indirect discrimination);

    ii) The Equality Act 2010 (s 149) (in relation to the Public Sector Equality Duty);

    iii) The Human Rights Act 1998 and the ECHR (Articles 8 and 14);

    iv) The Housing Act 1996 (s166A) (relating to the general duty to housing allocation schemes); and

    v) The Children Act 2004.

Statutory guidance

20. There is Statutory Guidance for local authorities that relates to housing allocation policies. It is worth setting out the key extract because they illustrate the general approach that local authorities should take, and factors that they should consider, in their housing policies.

21. The Statutory Guidance, *'Domestic Abuse: Statutory Guidance'* (July 2022), issued under s. 84 of the Domestic Abuse Act 2021, provides:

> *"316. The Homelessness Code of Guidance for Local Authorities [170] states that in formulating their homelessness strategies, housing authorities should consider the particular needs that victims of domestic abuse have for safe accommodation, this could include implementing a reciprocal agreement with other housing authorities and providers to facilitate out of area moves for victims of domestic abuse. There are a number of potential accommodation options for victims of domestic abuse, and housing authorities will need to consider, which are the most appropriate for each person on a case-by-case basis, taking into account their circumstances and needs."*

22. The Statutory Guidance, *'Providing social housing for local people'* (31 December 2013) provides, at [19]:

> *"It is important that housing authorities retain the flexibility to take proper account of special circumstances. This can include providing protection to people who need to move away from another area, to escape violence or harm;"*

23. The Statutory Guidance, *'Allocation of accommodation: guidance for local authorities' (2023)* states, at [3.28]

> *"When deciding what classes of people do not qualify for an allocation, authorities should consider the implications of excluding all members of such groups. For instance, when framing residency criteria, authorities may wish to consider the position of people who are moving into the district to take up work or to escape violence, or homeless applicants or children in care who are placed out of the borough."*

24. The Homelessness Code of Guidance requires local housing authorities to work cooperatively with one another to provide services to reduce violence against women and girls ('VAWG'):

> ***Support for victims of domestic abuse***
> *2.73 In formulating their homelessness strategies, housing authorities should consider the particular needs that victims of domestic abuse have for safe accommodation, which will include having accommodation placements available outside the district. Housing authorities should also work cooperatively with other local authorities and commissioners to provide services to tackle domestic abuse; and should involve any local Violence Against Women and Girls Forum and service provider(s) in developing the homelessness strategy.*
> […]
> ***Providing suitable accommodation***
> ***[…]***
>
> *21.43 Account will need to be taken of any social considerations relating to the applicant and their household that might affect the suitability of accommodation offered to them to prevent or relieve homelessness, or under the main housing duty. Any risk of violence or racial harassment in a particular locality should be taken into account. Where domestic abuse is involved and the applicant is not able to stay in the current home, housing authorities may need to consider the need for accommodation that would not be found by the perpetrator (which may involve an out of district placement) and which has security measures and appropriately trained staff to protect the occupants. Housing authorities may consider implementing a reciprocal agreement with other housing authorities and providers to facilitate out of area moves for victims of domestic abuse"*

25. In connection to victims of violence, that Guidance also states:

> *"26.30 Account will need to be taken of any social considerations relating to the applicant and their household that might affect the suitability of accommodation offered to them, including the locality of the risk of violence. In some cases, supported accommodation may be a suitable option, particularly for young people involved in violence living independently for the first time, or moving out of area and away from support networks. Equally, large, shared, supported accommodation options may be unsuitable where there is a risk of exploitation or harm, depending on the applicant and their circumstances.*
>
> *26.31 Section 208(1) requires housing authorities to secure accommodation within their district, in so far as is reasonably practicable. However, in cases where a victim is at risk of violence in a particular locality, accommodation in that area is unlikely to be suitable. In such cases, there could be benefits of the applicant to being accommodated in a safe area outside of the district, for example, to help break links with previous contacts who could exert a negative influence, or to reduce the risk of violence. There may be multiple localities in which an applicant is unsafe and a robust assessment may be necessary. Housing authorities are encouraged to engage with regional probation teams, police or other appropriate professionals to ensure placements are suitable. The applicant's assessment as to where they feel safe should always be of key consideration.* "

Overview of submissions

26. A summary of the submissions is set out in the next two paragraphs. The detailed submissions on each point are considered in relation to the individual grounds.

27. The Claimant's submissions were that:

    i) The Policy treats people who live in the borough differently from people who live out of the borough;

    ii) People who need to move borough to escape violence / crisis are more likely to be women than men;

    iii) The Policy is therefore indirectly discriminatory because it adversely affects a higher proportion of women than men;

    iv) Westminster has not shown that the indirect discrimination under the Policy is a proportionate means of achieving a legitimate aim;

    v) Westminster has failed to comply with its PSED duties as it has not carried out any appropriate assessment;

    vi) That also means that under the authority in *Coll*[1] the Defendant will find it very difficult to demonstrate justification for any indirect discrimination – it simply has not done the work to justify the discrimination;

    vii) A right to accommodation is a right that falls, in this case, within the ambit of Article 8 and thus 14 of ECHR; the case of *Thlimmnenos*[2] illustrates the requirement for Westminster to treat different groups differently; Westminster has failed to do so in breach of Article 14 and there is no objective and reasonable justification for that discrimination;

    viii) Westminster has failed to take into account the duties to consider children generally, and also failed to take into account the position of the Claimant's child specifically and so is in breach of s11 Children Act 2004; and

    ix) The Decision itself was made without following the Policy and without due consideration of all relevant factors and should be quashed on that basis, even if the Policy is lawful.

28. The Defendant's submissions can be summarised as follows:

    i) Sections 5.1 and 5.3 of the Policy do not on their face treat people differently who are tenants of Westminster and people who are not and/or any differences that do exist are immaterial and/or not relevant in this case;

    ii) Even if those sections of the Policy do treat people differently then the Claimant has not shown that the differences constitute indirect discrimination;

[1] [2017] UKSC 40; [2017] 1 WLR 2093
[2] (2001) 31 EHRR 411

iii) If there is indirect discrimination then it is a proportionate means of achieving a legitimate aim under s19(2)(d) Equality Act 2010;

iv) If the Policy is indirectly discriminatory then Westminster have a further defence which is that both sections 5.1 and 5.3 give sufficient discretion to the decision maker to ensure that the Policy is not operated as a matter of fact in a discriminatory way;

v) The Claimant has not shown that Westminster has failed to comply with its PSED;

vi) If Westminster has not currently complied with its PSED then any non-compliance is immaterial and/or would make no difference;

vii) The legal authorities show that a right under a housing allocation policy is not a right within the ambit of Article 8 and so the ECHR claim should fail; and

viii) The decision maker had all relevant evidence when they made the Decision and all such evidence was properly taken into consideration in making the Decision.

Discussion

Public Sector Equality Duty

29. It is convenient to address the PSED first. The Claimant says that Westminster has not complied with this duty. The duty was described by McCombe LJ[3] as imposing:

> *"… a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude."*

30. It is of course difficult for the Claimant to prove that Westminster has not done something it should have done. The Claimant does, however, point to the relevant statutory guidance as set out above from [22] – [25] relating to victims of violence. She also points to the Domestic Abuse Act 2021 which specifically addresses this issue. The Policy, on its face, makes no reference to any of the relevant aspects of the relevant guidance or changes in statute. The Claimant says that if Westminster had considered the guidance or changes in statute then the Policy would reflect that somewhere.

31. The policy was originally put in place, Westminster believe, in the 1990s. The Policy is itself dated 2023 and seems to have been operated in a similar form for many years before that. A revised version was apparently issued in 2024 but it is not before the court. Westminster says that the 2024 policy is very similar to the 2023 policy. There are therefore occasions in the very recent past when Westminster, on its own evidence, considered the Policy. It says that "*it can find no evidence*" that it considered the PSED on any of these occasions. Westminster accepts that the Policy has essentially been

[3] R (Bracking) v SSWP [2013] EWCA Civ 1345 at para 60

unchanged throughout the period since the 1990s notwithstanding developments in statute, guidance and case law in that period.

32. Westminster also has a general ongoing obligation to consider its PSED obligation. That involves a duty of inquiry. The duty must also be exercised "*in substance, with rigour and with an open mind*".

33. If Westminster had considered its PSED on any of the multiple occasions in recent years in which guidance has been issued centrally or when Westminster reviewed its policy then it would have evidence of such consideration readily to hand. It has failed to provide any such evidence.

34. I conclude from that absence of evidence, together with the absence on the face of the Policy of any consideration of the PSED duty or recent guidance, that Westminster has not, as of today, had regard to the factors to which it should have regard in relation to the Policy, and it has therefore not complied with its PSED.

Indirect discrimination

The PCP

35. There was some debate as to whether the impugned policy was s5.3 of the Policy, or both s5.1 and s5.3 together. Westminster accepted that whichever it was, the provisions constitute a provision, criterion or practice ("**PCP**") for the purposes of s19 (1) Equality Act 2010.

Are people who are not tenants of Westminster treated differently under the Policy?

36. The first question is whether s5.1 and s5.3 of the Policy do as a matter of fact treat people differently. The sections are different. The people to whom the sections apply are different. The consequences of falling into the sections are different. The key differences seem to me to be:

    i) The reference in Table 1 to Westminster's Housing Allocation Scheme to management transfer tenants receiving 450 points (enough effectively rapidly to obtain accommodation) whereas 400 points are given for reciprocal transfers;

    ii) The statement in s.5.3.12 that "*The applicant will not be rehoused out of turn*"; there is no such statement in s5.1

    iii) The specific reference in s5.1 to "*threatened or actual violence*" being an example of a "*good management reason*"; there is no such reference in s5.3; and

    iv) s5.1 includes various specific factors that Westminster will take into account such as risk of violence, urgency and safety of tenants; there are no such factors listed in s5.3.

37. It is plain to me that s5.3 and s5.1 are different and that s5.1 is significantly more advantageous to an applicant than s5.3. Indeed, Westminster effectively accepted that in their skeleton argument:

> "*Looked at in isolation, s 5.1 operates to the disadvantage of those who are not existing tenants of the Defendant.*"

Are people who are not Westminster tenants treated differently as a matter of fact?

38. Westminster argued that both sections 5.1 and 5.3 give a discretion to the decision maker. The sections therefore could, it said, be operated in a way that means there is no difference between them either generally, or for people in the Claimant's situation. In other words, although the sections are different, they are operated as a matter of fact in a way that actually treats people who need to move borough to escape violence in the same way as people who are tenants of Westminster and are escaping violence.

39. That is theoretically true. Westminster provided no evidence, however, as to how it exercised these discretions, let alone evidence that it exercised them in a way that removed the differences between s5.1 and s5.3. Indeed, if Westminster did actually operate a policy under which they treated the Claimant as if she had applied under s 5.1 then there would be no case before the court because they would have treated her in the manner in which she asks to be treated. I reject Westminster's argument that it operated the Policy in a way that treated people from outside the borough in the same way as tenants from the borough.

Is the Policy indirectly discriminatory?

40. The next question is whether the policy is indirectly discriminatory. The question has been considered by courts in relation to housing policies regarding indirect discrimination against those with disabilities, those who are travellers and those who are fleeing domestic violence[4]. The relevant principles were summarised in *TX*, in particular at paragraphs 32 to 35, and 38.

41. In considering this question it is important to distinguish between matters which might mean (a) the PCP is not discriminatory and (b) those which might justify the discrimination as being a proportionate means of achieving a legitimate aim.

42. There was some debate as to whether the PCP was s5.3 alone, or ss 5.1 and 5.3 together. That, in my view, slightly obscures the real question. The question is whether s5.3 indirectly discriminates against women by effectively imposing a residence requirement. In other words the PCP is s5.3. It so happens that there is another section, namely s5.1, which is not said to be discriminatory. That section does however illustrate how people who are not tenants of Westminster are treated under s5.3, and how a section that did not effectively impose a residence requirement might operate.

43. I return to the question of whether s5.3 is discriminatory. The cohort affected by s5.3 is people escaping violence (or possibly gender based violence, but in this case it makes no difference) who wish to have a reciprocal transfer under s5.3. The question is, to adapt Lewison LJ's question in *Ward*: are women put at a disadvantage in satisfying the effective requirement in s5.3 to be a tenant of Westminster as compared with men?[5]

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[4] See R (Ward) [2-19] EWCA Civ 692; R(H) [2017] EWCA Civ 1127; R (TX) [2023] HLR 17
[5] R (*Ward) [2019]PTSR* at p 1760 at B

44. Westminster accepted in its skeleton argument "*the fact that those who need to move due to violence are more likely to be women*." The evidence from the Pan-London Housing Reciprocal Scheme also, and unsurprisingly, makes that clear.

45. That report also makes it clear that women also make up a disproportionate number of the people who request to move borough to escape violence. That report stated, for example, that 9/10 referrals for a transfer to another borough were women and girls, 63% were fleeing some form of violence against women and include 58% who were fleeing domestic violence. It is therefore clear to me that people who need to move borough to escape violence are more likely to be women than men. This is an inevitable consequence of women being more likely to need to move to escape violence.

46. Section 5.3 which effectively excludes people who are not from the borough from a housing transfer is therefore indirectly discriminatory. It does not matter that a woman who is a tenant of Westminster who is escaping violence would be able to obtain a transfer within Westminster. That is no different to the situation where an organisation sets a minimum height requirement for a job. The fact that some women will exceed the height does not mean that the measure is not indirectly discriminatory in relation to women generally.

47. Westminster argued in their skeleton that "*the fact that there may be more women [in social housing who need to move due to violence] than there are men [in social housing who need to move due to violence] (due to women being more likely to be victims of gender-based violence) does not mean that they are particularly disadvantaged by a provision which disadvantages both groups in the same way*". That, in my view, is wrong. It is precisely because there are more women than men in those groups combined that indirect discrimination has been caused.

48. The next question is whether the Claimant herself suffered from the discrimination. Westminster said that the Claimant did not actually need to move out of her borough. It was not, however, disputed that she needs to move from her current accommodation. Her housing association do not have any accommodation available that is in her borough and is safe and suitable and she has not been offered any safe and suitable accommodation by her local authority. It follows that she needs to move borough.

49. Westminster also said that she could move to other boroughs as alternatives to Westminster. It is not relevant that the Claimant might be safe in other boroughs. The question is whether Westminster is unlawfully discriminating against her, not whether she could live in other boroughs notwithstanding their discrimination.

50. The final element of the test for indirect discrimination is that there is a causal link between the PCP and the Claimant's situation, which plainly there is.

Justification

51. The Claimant says that Westminster has failed to comply with its PSED. She says that it follows that Westminster will find it very difficult to show that it is a proportionate

means of achieving a legitimate aim under s19(2)(d) Equality Act 2010. The Claimant relies on this passage from *Coll*[6]:

"42. Cranston J's finding that the Secretary of State was in breach of the public sector equality duty also means that the ministry is not in a position to show that the discrimination involved in the different provision made for men and for women is a proportionate means of fulfilling a legitimate aim. It may or may not be. But it is for the Secretary of State to show that the discrimination is justified. Given that the ministry has not addressed the possible impacts on women, assessed whether there is a disadvantage, how significant it is and what might be done to mitigate it or meet the particular circumstances of women offenders, it cannot show that the present distribution of APs for women is a proportionate means of achieving a legitimate aim".

52. Westminster says that this passage does not go as far the Claimant asserts. In particular Westminster rely on the relief granted in paragraph 45 in *Coll* in which the Supreme Court said that there was: *"…direct discrimination against women … which is unlawful unless justified … No such justification has yet been shown by the Secretary of State"*. The word "*yet*" implies, Westminster say, that it was still open to the defendant to show justification notwithstanding that there was breach of PSED. A logical implication is that if the defendant subsequently complies with its PSED then any claim for judicial review on that ground alone may well have become academic.

53. If Westminster are right then the test for justification of the discrimination would then be the four-stage test set out in *Bank Mellat v HM Treasury (No 2).*[7]

54. In this case it does not matter, however, whether the Claimant or Defendant is correct about the interpretation and consequences of *Coll.* The law is clear that once the discrimination has been shown, it is for the Defendant to prove that it is justified. (see for example paragraph 76 of R (*Ward))*[8]. Westminster has simply not supplied any evidence to attempt to justify the discrimination.

55. Westminster attempted to sidestep this lack of evidence in their submissions. Those submissions boiled down, in reality, to submissions of what Westminster might have been able to show if it had put forward evidence or explanation. The most they offer is the view in the skeleton argument that "*Even if D should have given …consideration to equalities issues…it is clear that it would have made no difference*". Westminster say this is because the discriminatory impact "*largely arises from [Westminster's] consideration of the nature of the reciprocal property being offered*". In submissions Westminster explained that if for example they were offered a reciprocal property in Cumbria then they would be justified in declining a reciprocal transfer because a property in Cumbria would be of little use to them. That misses the point. The decision they made was not on the basis of the reciprocal property being unsuitable. That was not a factor they even mentioned. Westminster seems to me be to arguing that compliance with its PSED would have produced the same Policy yet has not undertaken any assessment to see whether this is actually the case.

[6] [2017] UKSC 40; [2017] 1 WLR 2093
[7] [2014] AC 700 at para 74
[8] [2019] EWCA Civ 692

56. In summary, Westminster has not put any evidence or real argument forward as to how its Policy, and lack of guidance in relation to that Policy, is justified. Its argument that any discrimination is justified must, in my judgment, fail.

Breach of Articles 8 and 14 ECHR (Ground 1(c))

57. My conclusions above resolve the issues in favour of the Claimant. There is no need for me to determine the alternative argument regarding Articles 8 and 14. There are conflicting authorities on that point generally. Those will be best resolved when the case in question needs them to be resolved.

Breach of s 11 Children Act 2004 (Ground 3)

58. Westminster accepts that s11 is engaged. That section requires it to ensure its functions are discharged having regard to the need to safeguard and promote the welfare of children. The scope of the duty has been considered in cases such as *R (KS)v Haringey* [9]. It is clear that the section requires the local authority to identify the principal needs of the relevant child/children and actively promote them. Westminster says that the decision maker "*will have been aware of the situation of the Claimant's [child]*" because it had specific regard to the situation of the Claimant's child when assessing her main housing need. It says that the decision maker had that information in front of them when making the Decision. Westminster says that it therefore had specific regard to the situation of the Claimant's child when assessing her application. Westminster also say that the Policy takes into account the needs of all children generally in compliance with s11 because the Policy applies to two bedroom properties and the vast majority of people eligible for those properties have children.

59. The Claimant says that there is no evidence that Westminster has taken into account the needs of her child when assessing her application. She says that it cannot be assumed that the decision maker took information into account merely because the decision maker had the information. The Claimant also says that there is no evidence that (a) the Policy on its face takes into account the needs of children or (b) that shows how Westminster takes those needs into account when making any decision under the Policy.

60. There is, however, no evidence that the decision maker considered the situation of the Claimant's child. The evidence actually points the other way. The decision maker simply states in the initial response that "*it is unlikely that I will be able to agree – demand for accommodation far exceeds supply*". The Decision refers only to the "*demand from priority groups*" and to "*rehousing her over 10 years out of turn*". The clear implication is that the decision maker considered the long list of people on the housing ladder and decided that as a matter of principle "*queue jumping*" was not permissible. In my judgment the Claimant has shown that Westminster has breached s11 when considering her application.

61. Having decided that the individual decision is in breach of s11, and having decided above that the Policy is unlawful on the grounds of indirect discrimination and breach of the PSED, I do not need to consider whether the Policy itself breaches s11.

[9] [2018] EWHC (admin) HLR 41

62. There were arguments made regarding s17 Children Act and s1 Localism Act in the pleadings and in the skeleton arguments. Those arguments were not taken forward at the hearing and I make no finding on them.

Failure to follow policy and established principles (Ground 4)

63. The Policy on its face gives a significant degree of discretion to the relevant decision maker. There was no evidence of any published or internal guidance on how the decision maker should exercise that discretion. The Policy, however, refers in s 5.3.2 to the "*circumstances*" in which the Council "*may agree*" to assist [reciprocal tenants]. One situation is "*a crisis*". There is no evidence as to whether the decision maker considered the Claimant's situation to be a "*crisis*", nor how that decision was made, nor how the decision interacted with other factors when the Decision was made. On that basis it seems to me that the Decision has been made without taking into account something which the Policy requires it to take into account, namely the "*crisis*" which the Claimant says she was in.

64. The Claimant also argued that Westminster actually operated a system in which "*queue jumping*" was the only criterion. She says that constituted an unlawful fetter on the apparently broad discretion in the Policy. The Claimant says that the discretion is therefore illusory. As Leggatt LJ said, "*It is legitimate for a statutory body to adopt a policy….but it can only do so provided that the policy fairly admits of exceptions to it*"[10].

65. The Decision itself appears to show that the decision maker made the decision solely on the basis of "*queue jumping*". It does not automatically follow that all decisions by Westminster were made on this basis. The fact that this decision maker used that basis, and referred to it twice, would perhaps allow me to infer that Westminster was operating an unofficial, or even semi official, policy that had queue jumping as the only criterion. Certainly, this decision maker seemed to think that this was what they should do. There was no evidence from the decision maker or Westminster to provide an alternative explanation. Given my findings above on the unlawfulness of the Policy under which this decision was made I do not, however, need to reach a definitive conclusion on this point. If I had needed to do so then in my judgment the evidence before me just reaches the threshold for the court to infer that there was a policy or understanding that operated to decide on the basis of queue jumping only, thus unlawfully fettering a decision maker's discretion.

Temporary accommodation

66. Westminster accepts that it has a duty to house the Claimant under s193 Housing Act 1996. It has made an offer of temporary accommodation to her. That offer was not viewed as suitable by the Claimant. That refusal is the subject of a separate review, and if necessary, appeal by Westminster. Westminster accepted in its skeleton argument that "*temporary accommodation is generally less desirable than permanent social housing*". Further evidence supporting the significant difference between temporary and permanent accommodation was set out in the March 2023 Shelter report "*Still living*

[10] R v London Borough of Jones ex parte James [1995] ELR 55 at F.

in London: why the use of temporary accommodation must end" and the January 2023 report from the APPG for Households in Temporary Accommodation.

67. It is clear to me that temporary accommodation is fundamentally different from permanent accommodation with a security of tenure, which is what the Claimant seeks in this application. In my judgment the Claimant's entitlement to, and Westminster's obligation to provide, temporary accommodation do not affect the relief sought in this application. They are separate matters.

Relief

68. I have concluded that section 5.3 of the Policy is unlawful insofar as it relates to women who need to move to escape violence. I will make a declaration in those terms.

69. I have considered whether I should quash the relevant sections of the Policy. There are, however, routes other than wholesale replacement by which Westminster could make its policy lawful. It could, for example, issue guidance on how the discretion under section 5.3 is to be exercised which removes the indirect discrimination. It could also provide justification for the indirect discrimination which satisfies the requirement in s19(2)(d) Equality Act 2010. Westminster has set out a timetable for complying with its PSED in the order which the parties have agreed. Once it has done so, that might allow it lawfully to continue with its current policy. Taking these points together it does not seem to me therefore to be necessary or appropriate to quash the Policy now.

70. I have further considered whether I should grant a suspensory order under which the relevant sections of the Policy will be quashed if not made lawful by a certain date. As there are ways in which the Policy may be made lawful which do not involve changing it, and as Westminster may also leave the Policy unamended but provide justification, it does not seem to me to be appropriate to do this either. A declaration of current unlawfulness is sufficient.

71. I have concluded that the Decision has not been made lawfully. The appropriate remedy is to require Westminster to make the decision lawfully. Under the Policy, if it had not discriminated against the Claimant then it would have considered her application as if she had been a tenant of Westminster. The Claimant would not automatically have been allocated safe and suitable housing. Her application, like those of Westminster tenants, would have been considered under section 5.1. Westminster has, however, agreed that it will review the Policy in the light of this court's findings. The court does not know what the outcome of that review will be. It is clear, however, that the review will take some time. It is possible that Westminster will make its policy lawful before the review is concluded. The court is, however, faced with the Policy as it exists today. It is important that all parties know what they must do in the light of the decision of this court. The appropriate relief is for Westminster therefore to address the current unlawfulness of s5.3 by treating the Claimant as if she were applying under s.5.1. It should do so promptly. In this case, that means doing so within 28 days of the date when the parties were supplied with the draft judgment. It must therefore consider her application and communicate its decision, with appropriate reasons, on or before 4pm on Tuesday 30 April 2024.

72. If Westminster does change the Policy or otherwise ensure that the Policy is lawful in a way that means that s5.1 is no longer the appropriate means to assess the Claimant's application then it has the ability to apply to this court to vary the order made.

73. The claim for damages will be transferred to the appropriate court, if not agreed.

74. I invited the parties to agree the position on costs and other consequential matters, and to provide an appropriate agreed order, which they have done.