Neutral Citation Number: [2015] EWHC 1765 (Admin)

Case No: CO/4559/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2015

Before :

HIS HONOUR JUDGE BLAIR QC
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between:

THE QUEEN (ON THE APPLICATION OF HAKIMA ALEMI)	**Claimant**
- and -	
WESTMINSTER CITY COUNCIL	**Defendant**

- -
- -

Jan Luba QC & Tim Baldwin (instructed by **Hodge Jones & Allen**) for the **Claimant**
Ian Peacock (instructed by **Westminster City Council**) for the **Defendant**

Hearing date: 9th June 2015

- -

Approved Judgment

His Honour Judge Blair QC :

Introduction

1. This is a claim for Judicial Review of the Defendant's Housing Allocation Scheme as it applies to persons who have become unintentionally homeless. The Claimant was granted permission to bring this claim on only one of her grounds at an oral renewal hearing on 15th January 2015 following the refusal of permission on the papers on 18th November 2014. At a later date an application on behalf of the Claimant for an expedited hearing was granted, as a result of which I heard the oral submissions of counsel for the parties on 9th June 2015.

2. The Claimant was granted permission to challenge the Defendant's Housing Allocation Scheme on the ground that it unlawfully breaches the duty imposed by section 166A(3) of the Housing Act 1996 ("the 1996 Act") because it suspends an applicant's ability to bid for social housing until 12 months have elapsed following acceptance as an unintentionally homeless eligible person in priority need (i.e. a person covered by the main housing duty in Part VII, section 193(2) of the 1996 Act).

3. This gives rise to a novel point of law, there is no previous reported case which answers the question. The parties are agreed that I must construe the legislative provisions so as to identify their correct legal interpretation and then decide whether, as a matter of fact, the Defendant's Housing Allocation Scheme falls within the lawful boundaries of the legislation – this was part of the exercise that was being undertaken in the case of R (Ahmad) v Newham LBC [2009] HLR 31 (HL) – see Baroness Hale paragraph 14 and Lord Neuberger at paragraphs 46 & 55. Therefore although this is, in its most immediate sense, a challenge by the Claimant of a decision communicated to her by the Defendant in a letter dated 22nd July 2014, it is more generally a challenge to the lawfulness of the Defendant's Scheme which generated that decision letter.

4. At the time the relevant parts of the Defendant's Scheme were applied to the Claimant its provisions were to be found by examining a number of different documents, but in October 2014 the relevant wording was all incorporated into one Scheme document. Nothing turns on the evolution of the source documents and so by agreement between the parties and for ease of reference I am being asked to address the Claimant's legal challenges by reference to four relevant paragraphs as they appear in the October 2014 consolidation (paragraphs 2.1.3, 2.8.1, 8.1.12 & 16.2.11). The wording of the latter two paragraphs reads as follows:-

> "Applicants accepted after 16th June 2014 will not be able to participate in CBL (Choice Based Lettings) until after 12 months after their acceptance date. The Council will be seeking to identify suitable accommodation in the private rented sector for such applicants during the year that the applicant cannot participate in CBL. If no suitable private rented sector accommodation has been identified during that year the Council will continue to seek such accommodation while the applicant is also able to participate in CBL. This does not apply to older applicants requiring Community

> Supportive Housing and those assessed with mobility category 1 or 2…"

I am asked on behalf of the Claimant to declare that those four paragraphs are unlawful, that the Claimant no longer be suspended from bidding for social housing and that the offending paragraphs in the Scheme be quashed.

Background Facts

5. When the Claimant unintentionally lost her private rented accommodation in Westminster because of government changes to welfare provision she applied on the 18th March 2014 to the Defendant for assistance as a homeless person. Her household comprises herself, her husband (who is in employment) and their three children who are all in school in the Westminster area.

6. On 1st July 2014 the Defendant notified the Claimant that it accepted it had a duty under section 193(2) of the 1996 Act to ensure she had somewhere suitable in which to live. The Defendant stated it had registered her for housing and had offered her temporary suitable accommodation in Enfield (she and her household had been placed at that address on 26th March 2014). It added that it may contact her to make her an offer of accommodation in the private sector as *per* section 193(7AA) of the 1996 Act. The letter went on to say:

> "***Getting you a more settled home***
> We have registered you for a home with us (Westminster City Council) a housing association or a private landlord. Our Housing Register section will write to you within the next week or so to give you the details…"

7. Three weeks later, on 22nd July 2014 the Defendant wrote to her again. It said that it had placed her on its homeless persons' priority housing list. However, it added that:

> "As with most other homeless housing applicants registered for housing after 15 June 2014, for the first year you will be registered for a tenancy with a private landlord only…
>
> "Please note that even if we register you for a council or housing association home in 12 months' time, we may still offer you a private tenancy after that if a suitable one becomes available before you get a council or housing association property.
>
> "The reason we now register most homeless families for a private tenancy as the first option is because council and housing association homes are in very high demand and very short supply. This has led to us having thousands of homeless housing applicants on our housing register with most of them having to wait seven to ten years before getting a council or housing association home. As there are not enough council or housing association homes available we also offer private rented tenancies to homeless housing applicants. The Localism

> Act 2011 allows us to do this. Please remember that although we have a duty to find you a home, this does not mean we have a duty to give you a council or housing association property…"

8. What had been happening at around the time the Claimant was made homeless was a change in the Defendant's approach to persons owed the main housing duty. The Localism Act 2011 amended section 193 of the 1996 Act by providing housing authorities a power to discharge their main housing duty to the unintentionally homeless by an offer of a suitable assured shorthold tenancy of at least 12 months in the private rented sector ('prs') – section 193(7AA)-(7AC).

9. On 9th May 2014, the Defendant's Cabinet Member for Business, Skills and Housing (as the Defendant's appointed decision maker) decided to accept a Report of its Strategic Director of Housing, Regeneration and Property. The Report included:-

> "3.7.2 Until now we have not enforced a private sector offer but have been working with applicants who are willing to go down the prs route…
>
> "3.7.3 Most applicants currently wait 7-10 years for a social housing tenancy and we now intend to start identifying more households for whom the prs would be suitable and start making offers to them to bring our duty to an end…
>
> "3.7.4 To strengthen the message to applicants and to give Housing Options time to assess whether applicants will be able to manage in the psr (sic) and to find them a suitable property it is proposed to stop homeless households being able to bid for social housing for 12 months after the date that we accept a duty. We aim to start this as soon as administratively possible after 1st April.
>
> "3.7.5 This will not apply to [three exceptions]. For those for whom the prs is not suitable (e.g. very vulnerable households) the one year delay in bidding will not affect the overall waiting time. Some applicants who have extra points for employment and 10 years residence in Westminster can be rehoused very quickly and the 12 month suspension may have a marginal impact on this group.
>
> "3.7.6 Because the households with the fewest needs, especially those coming out of the private sector, are the ones who are most likely to be able to move straight into a private sector tenancy, the long term effect may be that those waiting for a social tenancy are more vulnerable than those who currently hold social tenancies."

10. The Defendant adopted the above proposal with effect from 15th June 2014 – a fortnight before its decision letter in respect of the Claimant.

11. In its reply (on 20th August 2014) to the Claimant's Pre-action Protocol Letter (which included complaint about alleged breaches of the statutory duty in section 166A of the 1996 Act) the Defendant relied on the case of R (Babakandi) v Westminster City Council [2011] EWHC 1756 (Admin) (to which I will refer in detail later). The Defendant's letter went on:-

> "The Council is pursuing a legitimate aim in ensuring that all priority groups receive a share of the available accommodation and that no particular priority group receives a disproportionate share of the available accommodation. There is no requirement that the priority between different households has to be determined according to their respective needs. The allocation scheme has to secure reasonable preference is given the priority groups – which it does.
>
> "Section 166A(2) requires the allocation scheme to give such reasonable preference to those entitled to such preference, which it does. Further, section 167(2) requires only that the priority groups are given a reasonable preference and does not require that they should be given absolute priority over everyone else or that an individual household in one priority groups (sic) should be given absolute priority over an individual household outside the priority groups.
>
> "The fact that your client is restricted from bidding for a year and so has no realistic chance of being allocated Council accommodation during that period (and in that sense is in the same position as without reasonable preference for that period) does not mean that the allocation scheme does not comply with Section 166A(2) or that there is a breach of Section 166A(2). They are still given a preference only it has being (sic) deferred for a year. Where demand for accommodation substantially outstrips supply, there will almost inevitably be periods where a particular applicant for housing entitled to a reasonable preference has no realistic chance of being allocated accommodation. It must be stressed that your client will be registered for a private tenancy and it is hoped that an offer to the private sector will be made within the period your client will not be able to bid."

(The above references to sections 166A(2) and 167(2) were meant I think to be to section 166A(3).)

Statutory provisions

12. Part VI of the 1996 Act has the title: 'Allocation of Housing Accommodation' and its provisions are compulsory for local housing authorities (LHAs) "in allocating housing accommodation" (section 159(1)).

13. Certain people are excluded as being 'ineligible' from being allocated such housing (section 160ZA(1)-(4)) and LHAs have the power (within limits) to decide what classes of person do not 'qualify' for being allocated housing accommodation by them (section 160ZA(6)-(8)). In the case of the Defendant, its Scheme refers to those classes of people who do not 'qualify' as classes of people who are 'excluded'.

14. The provision I am mainly concerned with is section 166A –

> 'Allocation in accordance with allocation scheme'.
>
> (1) Every [LHA] in England must have a scheme (their "allocation scheme") for determining priorities, and as to the procedure to be followed, in allocating housing accommodation.
>
> For this purpose "procedure" includes all aspects of the allocation process…
>
> (2) The scheme must include a statement of the authority's policy on offering people who are to be allocated housing accommodation -
>
> (a) a choice of housing accommodation; or
> (b) the opportunity to express a preference about the housing accommodation to be allocated to them.
>
> (3) As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to –
> (a)…
> (b) people who are owed a duty by any [LHA] under section 190(2), 193(2), or 195(2)…or who are occupying accommodation secured by any such authority under section 192(3);
> (c)…
> (d)…
> (e)…
>
> The scheme may also be framed so as to give additional preference to particular descriptions of people within one or more of paragraphs (a) to (e) (being descriptions of people with urgent housing needs)…
>
> (5) The scheme may contain provision for determining priorities in allocating housing accommodation to people within subsection (3); and the factors which the scheme may allow to be taken into account include -
> (a) [finances to meet housing costs]
> (b) [behaviour affecting suitability as a tenant]
> (c) [local connections with the LHA's district]

15. Section 169 states that in exercising their functions under Part VI a LHA must have regard to guidance given by the Secretary of State. Such Guidance was issued in June 2012. To my mind the relevant part of that Guidance in Chapter 4 'Framing an

Allocation Scheme' as it applies to this case provides no assistance as to the proper interpretation of the statute, albeit that it emphasises to LHAs (para.4.7) that the new provisions for using the private rented sector to cease their main housing duty (section 193(7AA)-(7AC)) does not water down the section 166A(3) duty to give reasonable preference to the groups there identified.

16. Section 193 – 'Duty to persons with priority need who are not homeless intentionally' addresses what the duty entails. Section 193 falls within Part VII of the Act, which is entitled 'Homelessness'. It is not in the 'allocation' part of the Act – Part VI. Part VI is directed to the allocation, reasonable preference and prioritisation of housing to groups of people within the framework of a LHA's Scheme, whereas Part VII is directed more to the duties owed to individual persons. Thus, section 193(2) imposes the duty to secure accommodation for the eligible and qualifying applicant and then the rest of the section goes on to explain the different ways by which that duty may be discharged.

The Defendant's scheme

17. The Defendant does not now bother to register people who would very much like to rent social housing but do not fall into the five categories under section 166A(3) - who must be given reasonable preference in the allocation of social housing. (Although I am told that there may be a handful of exceptions involving special cases, such as retiring employees who have been living in tied accommodation.) The Defendant's Scheme registers those to whom they accept a duty onto a priority group, it gives them a number of 'points' reflecting factors to which the Defendant has chosen to give differential weight (employment, length of residency in the district, etc.) and it records the date upon which they were accepted onto the register.

18. I hope I do no injustice by briefly stating how I understand it to allocate the majority of its social housing to those on its register. It undertakes a periodical assessment of the likely volume of housing units that are expected to become free in various categories (e.g. based on their number of bedrooms or relevant features for such as those with mobility difficulties). It then makes a decision as to what proportions of that predicted volume it should make available to each of the different priority groups. The priority groups are then notified that they may bid for the properties which are expected to become free. However, the waiting lists are so vast that on average people have a 7 – 10 year wait before they reach a point high enough up on the register to have any realistic prospect of being successful in a bid. An applicant's position on the register is based on their number of priority points coupled with how long they have been registered.

The Defendant's arguments as to why its amended Scheme is lawful

19. There were practical and rational reasons for the Defendant amending its Scheme in the fashion which it did. The only question is as to whether the law in section 166A(3) permitted it to do so. The Defendant puts its arguments in three ways.

20. First, it says that in its amended Scheme the Claimant and those in her position are still being given a current 'reasonable preference' in the allocation of social housing notwithstanding they are suspended from bidding for any social housing for 12 months after being accepted as beneficiaries of the main housing duty.

21. Mr Peacock argues: (i) she has a letter declaring that she has been accepted as being owed the main housing duty; (ii) she has been put in a housing priority group; (iii) she has been given her priority weighting points; and (iv) the date of her acceptance for registration has been recorded so that her time on the waiting list has begun to run. These are all tangible differences in treatment for those in the Claimant's sub-group of the unintentionally homeless compared with someone who has not achieved each of these advantages and, therefore, she has been accorded a reasonable preference over all those others who are outside the section 166A(3) reasonable preference groups. Being given a reasonable preference does not equate with being given an immediate opportunity to bid for social housing - note that section 166A(2) requires a Scheme only to set out a policy on offering choice/preference, it does not require an LHA to offer an immediate choice/preference to everyone.

22. Mr Peacock's second argument is that even if the Claimant's sub-group has no current reasonable preference in its first 12 months on the register, such a Scheme is nonetheless permitted under section 166A(3) because case law supports the proposition that the reasonable preference is not to be assessed at a finite 'snapshot' moment in time, but that it is sufficient for the reasonable preference to be measured over a reasonable period of time. For this he relies upon the case of R (Babakandi) v Westminster CC [2011] EWHC 1756 (Admin) and a passage in the judgment of Nicol, J. at paragraph 22:-

> "…I do not interpret this obligation as meaning that such preference must be given at all times and in relation to all properties. It is sufficient if such preference is given over the course of a reasonable period…"

23. Although the facts as reported in that judgment do not support the example Mr Peacock used, he urged upon me that it would be entirely legitimate for a LHA to suspend the bidding rights for a period of time of a reasonable preference group that had been securing a greater proportion of a tranche of available properties than planned, so as to allow another reasonable preference group to catch up. Therefore, he argued, the Defendant was doing nothing unlawful when it decided to delay the Claimant's sub-group from bidding for 12 months. This was perhaps what was being more focussed upon at a hearing where Babakandi sought permission to appeal the decision of Nicol, J. In the transcript of the refusal of permission by Sullivan, L.J. at [2011] EWCA Civ 1397 paragraph 3 it was said:

> "…While of course the obligation to give reasonable preference is a continuing one and in that sense is absolute and required to be complied with at all times, it would be wrong to assess whether or not it is being complied with by simply taking a snapshot of the operation of the scheme on a particular day or a particular week…"

24. Mr Peacock's third submission is that section 166A(3) looks at a general target duty towards groups of people and does not give individual rights – "It is the groups rather than the individual households within them which have to be given reasonable preference" (see Baroness Hale in R (Ahmad) v Newham LBC (supra) at paragraphs 13 & 15). He argues that the fact that the Defendant's scheme does not allow a relatively small proportion to bid for a 12 month period (almost certainly less than

15% of the register) does not mean that the classes specified in section 166A(3) as a whole are not accorded reasonable preference. In R (Jakimaviciute) v Hammersmith & Fulham LBC [2015] HLR 5 (CA) a Scheme used section 160ZA(7) to disqualify 87% of those owed the section 193(2) main housing duty from appearing on the LHA's register. Mr Peacock argues that it was really that statistic which persuaded the Court of Appeal that it had to be struck down, because they acknowledged (at the end of paragraph 45 of that judgment) that a LHA could adopt a rule to exclude individual applicants by reference to factors of general application such as a lack of local connection or being in rent arrears (see section 166A(5)(a)&(c)). Further, paragraph 47 includes: "It is the exclusion of a large proportion of one of those classes that causes the problem". Furthermore, at paragraph 50 Richards, L.J. said that a LHA may wish to consider whether it would be possible to achieve a similar outcome, not by carving out a sub-group from the section 166A(3) classes by disqualifying them under section 160ZA(7), but by according them lesser weight in a differential banding structure if they did indeed have a lesser housing need.

The Claimant's arguments

25. Mr Luba QC for the Claimant made a number of propositions. They included: "section 166A(3) contains a mandatory, absolute and fundamental requirement that a scheme must be framed so as to afford reasonable preference to persons in the specified groups at all times" and "it is impermissible to treat those who are entitled to a reasonable preference as not qualifying for an allocation whether you do it: (i) directly as a non-qualifying class (R (Jakimaviciute) v Hammersmith & Fulham LBC), or (ii) by a different form of words - more subtly designed, but achieving the same effect". He quoted passages from the limited corpus of case law on these sections in order to substantiate those propositions as definitive statements of the law.

26. Although very attractively presented, I am somewhat cautious about the methodology of splicing together different passages from different reported cases. The danger is obvious – the dicta in question were crafted to address different factual matrices. By selecting pieces here and there one may overlook differences of significance to the current case which were never being considered or foreseen by the earlier judgments. I prefer to come to the interpretation of the statute afresh in the light of the current factual issues.

My conclusions

27. I accept that Mr Peacock is right in saying that what is legally impermissible by using section 160ZA(7) to disqualify a sub-group of persons might possibly be achievable through a different route in a LHA's Scheme – paragraph 50 of R (Jakimaviciute) v Hammersmith & Fulham LBC.

28. However, in my judgment his arguments break down for this particular amended Scheme because they overlook the point that section 166A(3) is about the 'allocation' of social housing to statutorily defined groups which must be given reasonable preference. The differentiation which is permitted by the legislation (and which the Courts should leave to the wide discretion afforded to a LHA and the democratic process) is restricted to adjusting the relative priority of sub-groups by reference to features which do nonetheless afford them some opportunity to be allocated social housing within the LHA's current cycle, however remote that possibility might be.

29. Thus, the examples set out in section 166A(5) reflect the legislative intention to recognise features of the circumstances of applicants for whom, as a sub-group, a LHA may justify a differentiation in the priority they are given within a larger group which must be given a reasonable preference in the allocation of social housing (section 166A(3)). What those examples in section 166A(5) do not do is to altogether remove them from the potential of being allocated social housing. In a time where there is a paucity of social housing it may be an entirely theoretical potential, but it is nonetheless a potential.

30. Mr Peacock's first argument therefore fails because, although the Claimant and her sub-class undoubtedly do have tangible differences with (and advantages over) those who are not accepted onto the Defendant's register, nonetheless for 12 months those differences/advantages do not amount to a reasonable preference in the allocation of social housing.

31. Mr Peacock's second argument fails because in the Claimant's sub-group the reasonable period of time over which he says the reasonable preference can lawfully be assessed is a totally arbitrary one. It is unrelated to the statutory purpose of allocating social housing and does not pretend to be designed so as to manage relative priorities within the group(s). The example he gave, which I have summarised in paragraph 23 above, is one which may very well be justifiable under the legislation if a Scheme is designed in that way and for a purpose which seeks to distribute the limited stock of available housing on rational grounds of relative priority, but that example is not this case. In that example the sub-group could have a reasonable preference in the allocation of social housing for some part of the LHA's annual distribution cycle. In the Claimant's case she had no reasonable preference in the allocation of social housing in the Defendant's then current annual cycle which she entered on 1st July 2014.

32. His third argument is disposed of for the same reasons. This amended Scheme carves out a whole sub-group which is altogether excluded from the potential of being allocated social housing for 12 months. They have no preference. Part VI of the Act does not permit the removal of a whole sub-group from a group which section 166A(3) requires be given reasonable preference in the allocation of social housing, when that sub-group is not defined by reference to differentiating features related to the allocation of housing, but applies a simple time bar to all who otherwise qualify. It is unlawful.

33. Accordingly, I will grant the declarations of unlawfulness sought by the Claimant in respect of the paragraphs of the Defendant's Scheme which incorporate this provision.