Neutral Citation Number: [2019] EWHC 3886 (Admin)

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

Case No: CO/248/2019

Cardiff Civil Justice Centre,
2 Park Street, Cardiff, CF10 1ET

3 September 2019

Before:

HIS HONOUR JUDGE KEYSER QC
sitting as a Judge of the High Court

Between:

THE QUEEN on the application of
CAROLINE MCDONAGH

Claimant

and

NEWPORT CITY COUNCIL

Defendant

Mr Zia Nabi (instructed by **The Community Law Partnership**) for the **Claimant**

Mr Adrian Davis (instructed by **Head of Law and Regulation, Newport City Council**) for the **Defendant**

JUDGMENT

HHJ KEYSER QC:

Introduction and Facts

1. This claim for judicial review is brought with permission that I granted on 8 April 2019. The claimant challenges, first, the lawfulness of the defendant's revised Gypsy and Traveller Site Allocations Policy, pursuant to which she has been refused eligibility for a pitch on a gypsy and traveller site on the ground that she does not have a demonstrable aversion to living in bricks and mortar accommodation. She challenges, second, the lawfulness of the defendant's decision that she is ineligible because she did not demonstrate an aversion to living in bricks and mortar accommodation.

2. The claimant was born on 17 November 1994 and is aged 24 years. She is an Irish traveller. It is common ground that she is within the definition of gypsy and traveller under Section 108 of the Housing (Wales) Act 2014 and that she has a protected characteristic, namely race, for the purposes of the Equality Act 2010. The claimant is illiterate. In addition, she has significant mental health issues, for which she is prescribed medication. The defendant council accepts that she is a vulnerable person for the purposes of the "priority need test" under the 2014 Act. The defendant also accepts that it has owed to the claimant the full accommodation duty under the 2014 Act (I shall explain that later), though it contends that it has discharged that duty by making an offer of suitable accommodation, which the claimant has refused. That matter is subject to other proceedings.

3. The claimant was brought up in bricks and mortar accommodation. In 2012, at the age of 17, she left her parents' home and went to live in a caravan. Since then she has permanently lived in a caravan on the roadside or on unauthorised encampments in the Newport area.

4. On 7 September 2012, again while she was aged 17, the claimant made a housing application to the defendant. In that application, she confirmed that she wished to consider various kinds of bricks and mortar accommodation, including "ground floor flat", "upper floor bedsit" and "upper floor flat", as well as "caravan/mobile home" and (so far as I can read the document: there is a holepunch at the critical point on the copy in the bundle) "gypsy and traveller site". However, the claimant continued to reside in a caravan.

5. In late 2016 or early 2017, the claimant made an application for a pitch on the defendant's gypsy and traveller site. That application was refused in January 2017. The refusal recited some material facts, and one of the two grounds of refusal was:

> 'You have not demonstrated that you have an aversion to living in bricks and mortar accommodation. The information above shows that you have a long history of living in bricks and mortar accommodation. You have not supplied any information as to why you would be unable to do so in the future.'

The claimant appealed against that decision on 24 January 2017. The appeal said:

> 'Even though I lived in bricks and mortar for most of my life, for the past five years I have been travelling. I prefer this way of life and being in a close community with my brothers and sisters. I would prefer to live on an authorised site and to continue to travel and be close to my family and feel that culturally this is very important to me.'

6. The appeal was refused. The defendant's reason for refusing the appeal on this particular ground was stated as follows in a letter of 27 February 2017:

> 'You have not demonstrated that you have an aversion to living in bricks and mortar accommodation. You acknowledge that you have a long history of living in bricks and mortar. You state in your appeal that you prefer travelling and feel that it is culturally very important to you. You do not provide any evidence as to why you would be unable to live in bricks and mortar in the future or any supporting information for the council to consider further. As such, the council has considered your application based on the known facts and information submitted, which do not, in the council's opinion, show any aversion to residing in traditional bricks and mortar accommodation.'

7. On 12 April 2017, the claimant's solicitors wrote again to the defendant. The letter set out some of the history and continued:

> 'Though our client was brought up living in a house, she is an Irish traveller. Irish travellers are, of course, an ethnic group under the Equality Act 2010. It is part of the culture of the way of life of Irish travellers to live in caravans, hence our client's need for a pitch for her caravan. We will also be obtaining a medical report with regard to our client's health circumstances.'

The letter asked that the council reconsider its decision. However, that request was refused. The defendant explained its position in a lengthy letter dated 9 June 2017. I shall read some short passages from the second page of the letter.

> 'You also state that Ms McDonagh lived in a house in Newport, but you provide no address, nor do you state how long she lived there. Moreover, you do not provide any evidence of Ms McDonagh's aversion to living in bricks and mortar accommodation despite her living in a house for most of her life. You go on to state that you will be providing a medical report with regard to Ms McDonagh's health circumstances. To date, no such report has been provided to NCC [Newport City Council].'

> 'NCC has responded to every other letter from Ms McDonagh or the Community Law Partnership. In their last letter to the Community Law Partnership on 28 April 2017, NCC stated that they would reconsider their decision if any new information is provided regarding Ms McDonagh's health circumstances. However, to date, NCC has not received any evidence regarding Ms McDonagh's health, nor have NCC received any evidence which supports Ms McDonagh's contention that she was living at Tatton Road since 2012, nor has NCC received any evidence as to why Ms McDonagh cannot live in bricks and mortar.'

8. On 20 July 2017, the claimant made a formal homeless application for housing. The claimant was homeless by reason of section 55(2)(b) of the 2014 Act, in that she had accommodation but 'it consist[ed] of a moveable structure, vehicle or vessel designed or adapted for human habitation and there [was] no place where [she was] entitled or permitted both to place it and to reside in it.' Under section 62, the defendant was under a duty to assess the claimant, and under section 63 it was under a duty to notify her of the outcome of the assessment. Section 73(1) provides:

> ‘A local housing authority must help to secure that suitable accommodation is available for occupation by an applicant. If the authority is satisfied that the application is (a) homeless and (b) eligible for help.’

That duty arose and was time-limited in accordance with section 74, which set-out the circumstances in which the duty under section 73 ended. Section 75(1) provides:

> ‘When the duty in section 73 (duty to help to secure accommodation for homeless applicants) comes to an end in respect of an applicant in the circumstances mentioned in subsection (2) or (3) of section 74, the local housing authority must secure that suitable accommodation is available for occupation by the applicant if subsection (2) or (3) of this section applies.’

The defendant acknowledges that the duty under section 75(1) was owed to the claimant.

9. I pick up the chronology again. On 22 August 2017, the claimant’s solicitor wrote a letter to the defendant. In the second paragraph of the letter it was written:

> ‘Firstly, we attach our client’s medical note which indicate that she suffers from psychotic symptoms and depression, including the hearing of voices. Additionally, our client instructs us that she would be panicked if she had to live in a house.’

10. Pursuant to its duties, the defendant carried out an assessment of the claimant. On 26 September 2017, the defendant’s housing officer, Rachel Fry, prepared a Housing Needs Assessment form, resulting in the completion of a personal housing plan. There is a statement from Ms Fry dated 17 May 2019. There is also a statement from the claimant dated 10 July 2019. In her statement, Ms Fry states:

> ‘2. On 26 September 2017, I interviewed Caroline McDonagh in our office at the Information Station. The interview was in respect of her Homelessness application. During this interview I completed the necessary forms, namely the Housing Needs Unit Housing Assessment Form (HAF) and the Personal Housing Plan form (PHP) ... As is the usual practice, no contemporaneous notes were made.
>
> 3. Miss McDonagh gave me a brief history of her past and current accommodation and also details for health as noted on P68 of the HAF. She stated that she was staying in her uncle’s caravan on Tatton Road but he had asked her to leave. She had applied for a pitch on Tatton Road, but this had been declined. Despite this, I specifically recall her saying that she would accept bricks and mortar accommodation and was happy to go into a property. I noted down that she would be happy to consider a bedsit on both forms, as per P72 of the HAF where I noted “Bedsits only” and P73 of the PHP where I have written “Bedsits” as she had agreed to look for bedsits in the private sector.’

11. The Housing Needs Assessment form was dated 26 September 2017 and was signed by the claimant underneath a written confirmation that the information supplied was true to the best of her knowledge and belief. The method of obtaining information from Miss McDonagh was by interview. I am not going to go through all of this. The documentation

in the bundle sets out a narrative which is reflected in Ms Fry's statement. It says: 'She was diagnosed with depression and anxiety. GP sent to Gold Tops around one year ago, but she was discharged back go GP. No convictions, no drug/alcohol issues.' (I cannot read the next bit.) At the bottom of the page, the text continues: 'Would like a support worker.' On the next page, it records, 'Caravan on forbidden site' and then, repeating what is shown on the longer narrative, 'Uncle's caravan. Has been in caravan since age of 16/17 in Newport, all adult life.' Over the page, the box for mental health issues is ticked. Under the question, 'What would be achieved through support?' the answer was, 'Help with applying for DAF/benefits'. (I am informed that 'DAF' refers to a discretionary fund for the acquisition of goods such as white goods.) On the back page of the form, in the top right corner, was written in manuscript: 'Bedsits only. Newport City Council can assist with first month's rent, admin fees up to £200, pay per bond.'

12. I have mentioned the Housing Plan also completed by Ms Fry. On the first page there is a box, 'Actions/reasonable steps to be taken by you'; the fourth bullet point, 'Look for suitable accommodation in the private sector', was ticked, and by it was written in manuscript, 'Bedsits'. On the second page, 'Private renting', the entry 'Actively search for privately rented properties to the value of … pm' was completed by the insertion of '£300', which was ringed.

13. Ms Fry's evidence, which is consistent with the documents, is that the assessment form was completed during the interview: that is, that the information on it was recorded at the time and is therefore contemporaneous with the interview.

14. It is convenient to refer at this stage to the claimant's own witness statement, where she refers to the defendant's case on the interview and then continues:

> '7. I remember this interview, it had been explained to me that before I could be considered for the site waiting list, I had to go on the ordinary housing or homelessness waiting list. It was further explained to me by the council officer at this meeting that I could only do that if I would be willing to have bricks and mortar accommodation. Since I thought this was the only way I could be considered for a pitch on the new site, I felt obliged to say that I would consider having bricks and mortar accommodation. I signed the plan that they drew up, though I would point out that I could not read that plan. I would also like to point out that I had become very stressed and worried because of my mental health problems when I am in formal meetings like this. Once again, I would like to stress that I do have a strong dislike of bricks and mortar accommodation and I do not understand why the council are not accepting that.
>
> '8. I would add that I do not remember any occasion at any such meeting when a council officer offered any support because of my mental health problems or because of the fact that I cannot read and write. Had I been asked whether I had a strong dislike of living in bricks and mortar accommodation, I would have said 'yes', why otherwise would I have lived by the roadside as I have done for all these years, facing fear of eviction and instability?'

15. Pursuant to the assessment, on 11 October 2017 the defendant offered the claimant interim hostel accommodation, which she refused. She subsequently refused further offers of bricks and mortar accommodation.

16. On 22 November 2017, the defendant wrote to the claimant's solicitors. The letter included the following:

> 'I can confirm that your client is on the housing waiting list in line with the criteria in Section 2.1 of the Gypsy and Traveller Site Allocation Policy, as your client is over the age of 16 and meets the definition of a gypsy or traveller within the Housing (Wales) Act. She has also been considered for a pitch on the gypsy and traveller site that is being developed. Her position on the list will be determined once enquiries about her circumstances have been completed. My colleague, Rachel Fry, has sent you a letter dated 17 October 2017 regarding this matter.
>
> The medical records you have supplied do not demonstrate why they need a pitch on a site at present. They make no reference to why your client cannot live in bricks and mortar or any impact this would have on their health. They also do not show how their health problems could be improved by the allocation of a pitch on the authorised gypsy and traveller site as opposed to allocation of bricks and mortar. We have requested specific evidence of your client's aversion to bricks and mortar, but to date none has been forthcoming. They also confirm what we previously believed to be the case which is that your client has spent the majority of her life living in bricks and mortar accommodation …
>
> Whilst your client's ethnicity as an Irish traveller is a protected characteristic under the Equality Act 2010, this does not automatically make them averse to living in bricks and mortar accommodation. As such, they will not be provided with a pitch on this phase of the site development, but their application will remain on the list and they will be able to bid for any pitches that become available through the normal allocations process.'

17. The claimant's solicitors appealed against that decision by a letter of 30 November 2017. It quoted the last passage that I have read from the defendant's letter and continued:

> 'This decision appears to be contrary to your own site allocations policy. Our client, as you are aware, is having to resort to unauthorised encampments in the Newport area. As such, she is statutorily homeless under the Housing (Wales) Act 2014 and should come within Band A. Additionally, she has severe mental health problems and therefore should also come under welfare grounds within Band B. In fact, there is no reference in the different bands to aversion to conventional housing, apart from in Band D, and that reference only relates to gypsies or travellers who are living in bricks and mortar accommodation, which is not the case with our client. Further, our client does come within the definition of gypsy/traveller in the Housing (Wales) Act 2014. Therefore, it would appear that you have not applied the allocations policy correctly when dealing with our client's application and especially her application for a pitch on the site that is under development.'

18. The defendant accepted on 16 March 2018 that it owed the full accommodation duty under section 73 of the 2014 Act.

19. By letter dated 8 May 2018, the defendant rejected the claimant's appeal in respect of the allocation of a pitch. The second and third paragraphs of the letter are important.

> 'As your client has not demonstrated that they have an aversion to bricks and mortar, they will not be considered for a pitch. Your client has a long history of living in bricks and mortar. She is currently 23 years old and accepts that she lived in a house until at least the age of 16, although she was included on her mother's claim for council tax reduction until shortly before her 18th birthday. In an interview with the housing solutions officer on 26 September 2017, your client indicated that she would be willing to accept an offer of bricks and mortar accommodation and agreed for personal housing plan that included seeking housing in the private rented sector. When your client first completed an application for rehousing in 2012, whilst she indicated that she was seeking to live in a caravan or mobile home, she also stated that she would accept a flat or bedsit. It was not until 2015 that your client changed her application to show that she was seeking a place on a gypsy or traveller site.'

20. The claimant's solicitors responded to that letter with a judicial review pre-action protocol letter, dated 17 May 2018. On the second page, the letter says:

> 'The decision that our client, "has not demonstrated that they have an aversion to bricks and mortar" and therefore, "will not be considered for a pitch" is based on her previously living in bricks and mortar accommodation. We accept that our client does not have a complete aversion to conventional housing. Our client has a very strong preference for continuing her way of life of living in a caravan. Our client is, as we mentioned below, a member of an ethnic group in that regard.'

The letter went on to refer to the policy.

21. The claimant commenced judicial review proceedings, challenging the defendant's decision not to consider her for a pitch because she had not demonstrated an aversion to bricks and mortar accommodation. In August 2018, those proceedings were dismissed by consent, with payment of the claimant's costs, upon the defendant agreeing to reconsider her application for a pitch.

22. Meanwhile, however, the defendant had considered, written and, indeed, adopted a revised policy. That is the relevant policy for this claim. The purpose of the new policy was explained in the report of the Cabinet Member for Regeneration and Housing dated 18 June 2018; the summary said,

> 'It has been identified that the current Gypsy Traveller Site Allocations policy is in need of amendment in order to ensure it meets its stated purpose of ensuring pitches are allocated to those in the greatest level of need. This report seeks approval from amended policy to be adopted.'

On the second page, under 'Background', after repeating the purpose of the amendment, the report continued:

> 'It is proposed to amend the policy to make it clear that it only applies to applicants who have a demonstrable aversion to bricks and mortar. Applicants

without such an aversion will have their applications considered under the overarching Common Allocations policy for Newport. This would bring the Gypsy Traveller Site Allocations policy into line with other allocation schemes such as those for older persons' accommodation. Gypsies and Irish travellers living in housing or with a history of living in bricks and mortar, would not be precluded from making an application for a pitch. They would, however, be expected to demonstrate that their cultural aversion to this type of accommodation necessitates a move onto a gypsy traveller site.'

23. The comments of the monitoring officer were recorded:

> 'The existing Gypsy and Traveller Site Allocations policy is in need to revision to ensure that available patches are allocated on the basis of assessed housing need and that only those eligible applicants with a demonstrable aversion to bricks and mortar will qualify for this type of accommodation. Other qualifying housing applicants with a preference for caravan pitches, as opposed to a demonstrable cultural aversion to bricks and mortar, will be allocated traditional housing under the Common Housing Allocations policy. The revised Gypsy Traveller Site Allocations policy provides a fair and transparent process for ensuring that caravan pitches are allocated to those in the greatest need, while meeting the council's statutory responsibilities towards gypsies and travellers, as a recognised ethnic group under the Equality Act 2010 and the Human Rights Act 1998.'

24. The new policy, which was about 60% of the length of the former policy and was significantly rewritten was, as paragraph 1.1 said, based on a banding system:

> 'It is designed to meet the accommodation needs of Gypsies and Travellers respecting their culture and traditions whilst providing effective management of the sites.'

Paragraph 1.3 reads:

> 'The aim of this policy is to ensure that the allocation of pitches on sites is made in a fair and transparent way and that those in the greatest need are given priority assistance.'

Paragraph 2.1, under the heading, 'Who can apply under this policy?', reads:

> 'Applications for housing are accepted from anyone over the age of 16, and who meet the definition of a Gypsy or Traveller within the Housing (Wales) Act 2014, sec 108 or any subsequent legal definitions. Applicants must also be able to demonstrate an aversion to living in bricks and mortar accommodation.'

Section 3 of the Policy sets out Bands A to D. I need not recite them, because each band begins: "Applicants who have a demonstrable aversion to bricks and mortar accommodation and …" Paragraph 3.4 reads:

> 'The housing situation within the city is such that the Council and its partners need to ensure that Social Housing within the city is allocated to applicants in the greatest need. As such pitches will only be allocated to applicants who are able to

> demonstrate an aversion to living in bricks and mortar accommodation. Applicants who are not able to demonstrate this aversion will have their application considered in line with the provisions of the overarching Common Allocations Policy for Newport only.'

25. Before the policy was put to the council and adopted, the defendant carried out a Fairness and Equalities Impact Assessment, which was dated 21 May 2018. In section 1 it said:

> 'The policy being assessed is a revised Gypsy and Traveller Site Allocations policy. The purpose of the policy is to ensure that pitches on the local authority residential site are allocated in a fair and transparent way to people that need them the most.'

In section 3, dealing with evidence on stakeholders, it said:

> 'There are currently 21 active applications on the overarching housing waiting list from people that identify as a gypsy or traveller, of which 15 had indicated that they were seeking a pitch on a gypsy traveller site. A significant number of applicants reported difficulty with reading and writing. Applicants were also likely to have health problems and live in households with defendant dependant children.'

There then followed an analysis by reference to the respective protected characteristics showing in the central column whether the impact of the policy was positive, negative or neither and in the right column further details about the nature of the impact. The material section on page four of the assessment was for race. The impact was assessed as being positive and the further particulars were as follows:

> 'Gypsies and Irish Travellers are both recognised ethnic minorities. The policy will have a differential impact on them as it is limited to people who meet the definition of a Gypsy or Traveller within the Housing (Wales) Act 2014 or any subsequent legal definitions. People who do not meet this definition or are [supply 'not'] able to demonstrate an aversion to bricks and mortar will have their applications dealt with under the overarching common allocations policy for Newport. The reason for this is that pitches are in such short supply we need to ensure they are allocated to those that need them most. The policy considers cohesion and compatibility issues on site. The nature of Gypsy and Traveller sites means that compatibility between residents is a paramount. The council will undertake reasonable checks with its partners in order to establish if there are likely to be compatibility issues amongst residents. As priority for pitches is given to Gypsies and Travellers with an aversion to bricks and mortar and not legal pitch it could be expected that the number of unauthorized encampments by Gypsies and Travellers in Newport will decrease once the site is open. Unauthorised encampments are frequently a cause for conflict between Gypsies and Travellers and the settled community.'

26. The claimant's solicitors challenged the new policy by letter dated 13 August 2018. The letter argued that the claimant's application should be considered under the old policy (that was not done and the point has not been pursued), but in paragraphs 5, 6 and 7 it also contained a challenge to the legality of the new policy:

> ‘5. Moreover, the policy is flawed in that it would appear to be very difficult if not impossible for applicants to prove that they have a demonstrable aversion to bricks and mortar accommodation. The leading Court of Appeal authority is on the question of the suitability of offers of accommodation to gypsies and travellers and the question of aversion to conventional housing are … [some of the authorities were mentioned]. In all of these cases the Court of Appeal indicated that a psychiatric report would be required in order to show whether or not there was aversion to conventional housing. Is it suggested that applicants will have to obtain an extremely expensive psychiatric report? This will not be possible, in the very least, in financial terms for many applicants. Alternatively, who is it in the council who has the necessary expertise to decide whether there is such a demonstrable aversion?
>
> ‘6. To get into any of the four Bands in the new policy, an applicant is required to show that they have a demonstrable aversion to bricks and mortar accommodation. Therefore, any applicant who is a Romany Gypsy or Irish Traveller, ethnic groups under the Equality Act 2010, but who cannot show that they have such a demonstrable aversion will not be included on the waiting list at all. This is clearly unfair, unreasonable and disproportionate.
>
> ‘7. There is no indication whatsoever that the council have taken account of their public sector equality duty under Section 149 of the Equality Act 2010 when putting together and introducing this new policy.’

27. The following day, the claimant’s solicitors sent a letter that strictly related to housing, rather than the pitch, though the points overlap. The letter began by speaking of the claimant in the third person, but the fourth paragraph said:

> ‘If I was forced to live in conventional bricks and mortar accommodation, I would get very depressed because I would not be with my family. I need my family’s support and I need to continue my traditional way of life, living in a caravan.’

28. The defendant wrote back on 10 September 2018. In respect of the challenge to the legality of the new policy, the letter picked up the paragraph numbers of the letter of 13 August 2018:

> ‘5 & 6. The Claimant claims that it would be difficult if not impossible for applicants to show a demonstrable aversion to bricks and mortar and that to do so would involve applicants obtaining expensive psychiatric reports. The Claimant also claims that the requirement to show a demonstrable aversion to bricks and mortar is unfair, unreasonable and disproportionate. The Defendant rejects these claims. It is not suggested that the psychiatric report is required. The test can be applied by the Defendant’s officers based on evidence supplied by the applicant and through the Defendant’s own enquiries. The Defendant has limited resources available for the accommodation of gypsies and travellers by way of pitches for caravans. The requirement for applicants to show a demonstrable aversion to bricks and mortar ensures that the Defendant is allocating pitches to those applicants in the greatest need who have a cultural aversion to living in bricks and mortar accommodation rather than a preference for living in caravans.

> ‘7. The Claimant claims that the Defendant has not taken into account the Public Sector Equality Duty when introducing the new Gypsy and Traveller Site Allocation Policy. The Defendant rejects this claim. The Public Sector Equality Duty is part of virtually all of the decisions that the Defendant makes. The Defendant would refer the Claimant to Fairness and Equality Impact Assessment which was completed on 21 May 2018 in relation to adoption of the new policy.’

29. The claimant’s solicitors made a further response on 15 November 2018. That letter raised, in particular, the question of the meaning of ‘demonstrable aversion’. Having quoted from the defendant’s letter, it said:

> ‘We note therefore you will not be relying on the Court of Appeal authorities, which insist that a psychiatric report should be obtained and that you are not therefore referring to a psychiatric aversion. Obviously, a psychiatric aversion could only be assessed properly by a psychiatrist. This leads us to reference the Oxford Dictionary definition of “aversion”, which is as follows, “A strong dislike or disinclination”. We have had to resort to Oxford Dictionary definition since you provide no definition yourself. In light of the Oxford Dictionary definition, our client states that she does have a demonstrable aversion to bricks and mortar accommodation, especially since she has been resorting for a long time now to roadside encampments and has recently refused the offer by yourselves of a room in a hotel. Please, therefore, confirm within 14 days of the date of this letter that our client will now be placed in Band A under the new allocation policy.’

I shall not read out the rest of the letter.

30. This elicited a further response from the defendant by letter of 29 November 2018. Under the heading ‘New Issues’, it said:

> ‘1. It appears that you have misinterpreted our position in that we are not suggesting that a psychiatric report is not the best evidence to demonstrate a genuine aversion to living in bricks and mortar accommodation, but rather we are not being prescriptive and are giving your client the opportunity to demonstrate an aversion in other ways, as opposed to simply stating that she has a preference for living in a caravan.
>
> As you are aware, your client lived at 58 Liscombe Street for a period of 17 years until 2012 and, by her own admission, indicated to NCC officers during a meeting on 26 September 2017, that she had no aversion to living in bricks and mortar accommodation and your client has yet to provide any evidence to the contrary…
>
> 2. As stated above, we do not accept your client’s assertion that she has an aversion to living in bricks and mortar accommodation and in the circumstances, she will not be placed in Band A under the allocation policy.’

31. The claimant’s solicitor replied to that letter on 10 December 2018. The defendant gave a further response on 17 December 2018, which read in part:

> ‘As you are aware, your client stated that she had no aversion to living in bricks and mortar accommodation to a council officer during a meeting in

September 2017 and, of course, she lived in a house for at least 17 years until 2012. Further, your client has not demonstrated an aversion to bricks and mortar accommodation in any way, despite being given the opportunity to do so.'

32. At this point, I can draw the chronology to a close and turn to the claim.

The Issues

33. As I have said, the claimant challenges both the policy and the decision made under it in respect of her. I propose to deal with the grounds in a rather different order and style from the way that they have been advanced. There are four main questions:

    1) Is the policy unlawful because it does not contain a definition of 'aversion'?

    2) If the policy is not unlawful for that reason, did the defendant misdirect itself by applying an incorrect construction of the policy?

    3) Was the decision in respect of this claimant unlawful because (a) the defendant failed to have regard to relevant matters or (b) the decision is irrational?

    4) Is the policy unlawful because (a) it was reached in breach of the duty under section 149 of the Equality Act 2010 or (b) it is irrational?

Discussion

The First Issue

34. Is the policy unlawful because it does not contain a definition of 'aversion'? The problem here arises from the cases on the provision of public sector housing to the homeless and the approach taken in that context. I have been referred to two main decisions of the Court of Appeal: *Codona v Mid-Bedfordshire Council* [2015] EWCA Civ 925 2005 HLR 1; and *Sheridan v Basildon Borough Council* [2012] EWCA Civ 335 2012 HLR 29. It suffices to discuss the later case. The appellants were Irish Travellers living on an unauthorised caravan site pending applications for assistance under the Housing Act 1996. Two of the appellants temporarily moved their caravans onto a neighbouring authorised site and the third stationed her caravan on the site's entrance road. The respondent authority accepted that it owed a duty under section 193(2) of the Housing Act 1996 and made offers of bricks and mortar accommodation. The appellants refused the offers and requested review of the suitability of their accommodation. There were psychiatric reports in respect of the first and second appellants; these indicated that there was a significant risk of the first appellant suffering psychiatric harm if he had to accept the offer of accommodation, and that it was difficult to predict what effect living in conventional accommodation would have on the second appellant. The council decided that the accommodation was suitable. The decision letters all recorded that the panel had considered the appellants' strong cultural aversion to conventional accommodation; that there were no pitches available on any of the caravan sites in the area; that, if a site became available, the authority would inform the appellant. The panel referred to the psychiatrist's reports and concluded that if either the first or the

second appellants' mental health deteriorated, assistance could be obtained from local NHS services. The first part of the holding in the headnote states:

> 'The psychiatrist's report showed that the risk of harm to both the first and second appellants arose from loss of support from their families and the traveller community. The risk, therefore, was not a consequence of the respondent authority's offers of accommodation, but rather of the appellant's removal from the unauthorised traveller's site and would not be avoided by any offer of accommodation. It was reasonable for the panel to proceed on the basis that the first and second appellants' psychiatric problems should be dealt with by the use of local NHS services.'

35. At paragraph 49 in the judgment of Patten LJ, he said this:

> 'It seems to me that there are no absolute standards to be applied to this issue. There will obviously be exceptional cases where the degree of impairment to the physical or mental wellbeing of the applicant consequent on their being housed in the accommodation will be so serious that nothing can justify it being treated as suitable. *R v Brent London Borough Council, ex p Omar* (1991) 23 HLR 446 was just such a case involving, as it did, the accommodation of a Somalian refugee who had been imprisoned and tortured in her own country in a filthy, cockroach infested basement flat with high windows and soaking walls. But at the other end of the scale the risk (e.g.) of depression may be slight and the consequences easily contained. It is clear that in *Lee* Longmore LJ (albeit obiter) did not regard the possibility of psychiatric harm as sufficient to take the accommodation below the *Wednesbury* line. In principle, I agree with this. If the local authority has no available accommodation in the form of a caravan site it is not, in my view, required to acquire land as part of its duty to provide accommodation for the applicants. As Longmore LJ explains in paragraph 16 of his judgment in *Lee*, the provisions of s.193 contemplate the performance of the duty using the housing authority's existing resources within a limited timescale. A cultural aversion to bricks and mortar is not enough to make the offer of such accommodation *Wednesbury* unreasonable even if (as in Mrs Sheridan's case) it may risk bouts of depression. It is reasonable for those to be treated if they occur in just the same way as she has sought and obtained treatment for depression in the past.'

That is indicative of the restrictive approach taken to cultural aversion in the context of homelessness.

36. In the present case, it is the defendant's contention that the Oxford Dictionary meaning of 'strong dislike or disinclination' is the correct understanding of 'aversion'. The claimant's argument is that the policy is unfair because the word 'aversion' is unclear and could mean different things to different people. In my judgment, that is not a sound point: cf. *First Secretary of State v Sainsburys Supermarkets Limited* [2005] EWCA Civ 520. As de Smith, *Judicial Review* (8th edition), states in paragraph 5-089, when policies fall to be interpreted by the court their ordinary meaning should prevail. It seems to me, therefore, the absence of a definition is not capable of constituting unfairness.

37. In my judgment, as a matter of construction, the defendant's policy bears the meaning contended for by the defendant in the summary and the detailed grounds of defence and

proposed by Mr Davis, which is consistent with the ordinary meaning of 'aversion'. I see no good reason to imply a meaning that is drawn, somewhat indirectly, from decisions in a quite different context of homelessness. In the homelessness cases, there is a mandatory non-deferrable duty to provide housing; accordingly it is appropriate to construe narrowly the circumstances in which offered accommodation may be considered unsuitable. Here, by contrast, the issue concerns eligibility for a pitch, not an absolute entitlement pursuant to a mandatory duty to provide accommodation there.

38. I think it convenient to make a declaration as to the true construction of the policy.

The Second Issue

39. Did the defendant misdirect itself by applying an incorrect construction of the policy?

40. For the claimant, Mr Nabi argues strongly that either (a) it did or (b) one cannot be sure that it did not. He relies on a number of matters, of which these are the main ones.

1) First, he relies on the existence of significant evidence that the claimant had an aversion (in the normal, straightforward sense) to bricks and mortar. (I shall mention that evidence later.) Therefore, it is said, the finding that she had no aversion indicates that the defendant was applying a more restrictive test.

2) Second, the course of the correspondence is said to indicate that the defendant was using a more restrictive test. Thus the letter of 10 January 2017 contains the sentence, 'You have not supplied any information as to why you would be unable to do so [that is, live in bricks and mortar accommodation,] in the future.' This is said to rely on the notion of 'inability', indicative of more than a strong dislike or disinclination. Again, the letter of 27 February 2017 contains the sentence, 'You do not provide any evidence as to why you would be unable to live in bricks and mortar in the future or any supporting information from the council to consider.' Again, in the letter dated 9 June 2017, the following text appears on the second page: 'Nor has NCC received any evidence as to why Ms McDonagh cannot live in bricks and mortar'. Again, in the letter of 22 November 2017, referring to the medical records, it states, 'They make no reference as to why your client cannot live in bricks and mortar or any impact this would have on their health'.

3) Third, Mr Nabi relies on the lack of any witness evidence as to how the policy actually was applied. He says that one might have expected a statement saying, 'We understood the policy in the following sense and applied it in that sense'; but there is nothing of that sort.

4) Fourth, Mr Nabi points to two recent letters, both of them from the defendant though from different sources within the defendant: first, the letter of 14 June 2019 from the Housing and Assets Manager, in respect of the Community Law Partnership's client, Patrick McDonagh, the brother of the present claimant, where, the bottom of the first page it says,

> 'You have also referred to the pending judicial review application for your client's sister, Caroline, which is being dealt with by one of my colleagues. I have checked the position and understand that the court has given permission for

> the judicial review of the council's decision to proceed but the case has not yet been determined. In addition, whilst the judge indicated at the permission hearing that in his opinion "aversion" meant a strong dislike or disinclination, this point has not been determined nor conceded by the council.'

This letter is said to show that, even very recently, the defendant has been unwilling to accept the definition of 'aversion' now being contended for. (Perhaps I ought to say that the reference to this point in my own brief judgment on the permission simply picked up the case in the defendant's summary grounds; it did not state any personal judgment or opinion or determination of my own.) The second letter was written by a solicitor within the defendant council and concerned the present claimant herself. In the second paragraph it said:

> 'We note your assertion in the aforementioned letter and in your letter concerning Patrick McDonagh, that the council have clarified the meaning of the word "aversion" as a strong dislike. It was in fact the judge at the permission hearing in the judicial review proceedings that commented, "The policy appears to adopt the common usage of the word 'aversion', namely, a strong dislike", but that point has yet to be determined.'

(What is there shown as a quote of what the judge said, is not in fact the way it appears in the transcript, but the same point applies.) Mr Nabi says that this is a significant indication that the defendant has not applied the policy according to the meaning for which it now contends in these proceedings and that I have held to be the right one.

41. There is some force in these points, but in my judgment, there are substantial answers to them.

42. First, the position concerning the claimant's alleged 'aversion' in the ordinary sense of the word is not so clear-cut that one can draw any inference as to the meaning that must have been applied by the defendant. I will come on to say more about that later.

43. Second, the text of the letter of 8 May 2018 does not seem to me to be premised upon a psychiatric interpretation of 'aversion'. The three reasons given for holding that the claimant had not demonstrated an aversion to bricks and mortar relate to what one might call a true cultural aversion rather than simply a preference, but there is no indication that the absence of some psychiatric condition was the key or, indeed, that any psychiatric condition or evidence was regarded as necessary to support the conclusion that an aversion existed. Subsequent letters point in the same direction. Thus, I have already referred to the defendant's letter of 10 September 2018 where, in a passage that I have read out dealing with paragraphs 5 and 6 of the pre-action protocol letter, the defendant made clear that it was not suggesting a psychiatric report was required, 'The test can be applied by the defendant's officers based on evidence supplied by the applicant and through the defendant's own enquiries.' That indicates not that there is some psychiatric or quasi-psychiatric hurdle to be surmounted, but that the relevant distinction is between a genuine cultural aversion and a preference, whether it be a strong preference or otherwise.

44. In the letter dated 15 November 2018, already mentioned, the claimant's solicitor asserted for the first time that the claimant did have a demonstrable aversion to bricks and mortar.

That letter elicited the further response of 29 November 2018, which again I have already mentioned. I have pondered whether that latter letter was in effect suggesting that an applicant must show either a psychiatric condition of aversion or something akin to it. But I have concluded that this would not be a reasonable way of looking at the matter. The letter seems to accept, at least by implication, that the strongest kind of evidence is psychiatric. However, in stating that it is not being prescriptive as to how the aversion can be demonstrated and insisting merely that it must go beyond mere preference, the letter seems most naturally to indicate that aversion need not be psychiatric or quasi-psychiatric, but must be, in the normal sense, a genuine aversion.

45. There is a clear difference, despite Mr Nabi's submission to the contrary, between a strong preference and an aversion. To take a trivial example: one might have a strong preference for claret over Rioja, but that does not mean that one has an aversion to Rioja. Examples can be multiplied endlessly. I accept Mr Davis's submission that to assert a preference is not to assert by implication an aversion. Simply to talk of a 'great' preference or a 'strong' preference does not take matters any further.

46. As for the use in the earlier correspondence of words such as 'unable' or 'cannot', there is a real danger of reading correspondence as though it were some kind of legislative provision. These are practical letters being written in a practical way, giving effect to either a policy that existed or to what was clearly being treated as a policy before there was such a policy (because the need for aversion was being used as though it were a policy requirement when, in fact, it was not). In those circumstances, it makes perfectly good sense to say of someone who has a preference for a caravan over bricks and mortar that there is nothing to show why she cannot live in bricks and mortar. That does not imply a requirement that there be some absolute impediment to living in bricks and mortar (as though one would die if one were placed in bricks and mortar? Or be taken ill? Or be very unhappy?). It is simply a practical way of saying that a genuine cultural aversion will be a reason why one cannot live in bricks and mortar.

47. Having reviewed the evidence, I reach the conclusion that the defendant was using aversion in its normal sense, not in a restrictive sense that would have been apt for homelessness context but not here. That makes the best sense of the contemporaneous evidence and of the reasons that were actually given in the letters that I have read out for the decision that the claimant did not qualify under the policy.

The Third Issue

48. In considering the third issue, there are two important matters to bear in mind at the outset. First, this was a question of fact, falling to the decision of the defendant and only to be interfered with on public law grounds. It is not open to the court to sift the evidence and decide whether it thinks that there is a better factual decision to be made. Second, the fact that a decision-maker does not refer to every matter when giving reasons for a decision does not of itself justify the inference that factors not mentioned have not been taken into account. It is normally to be assumed that material factors within the knowledge of the decision-maker have indeed been taken into account, unless one has a good reason to infer that the matters have not, in fact, been taken into account.

49. The defendant points to a number of matters as showing that it was entitled to reach the decision it did in respect of the claimant. The main matters are these.

50. First, the claimant resided in bricks and mortar accommodation until she was 17 years old. That is not put forward as proof that, if she could do it for 17 years, she could do it for the rest of her life and that is an end of story. The claimant suggests that she is victim of a blanket ban, but nothing that I have seen in the decisions or the explanations of the decisions justifies the supposition that the defendant has imposed a blanket ban on eligibility upon the claimant. In particular, there is nothing to show that the defendant has assumed that, because the claimant lived with her parents until the age of 17 in bricks and mortar, she cannot now or at any other point have an aversion to bricks and mortar. Nevertheless, the fact that she did live in bricks and mortar for 17 of her currently 24 years is in my judgment a factor that the defendant was entitled to take into account when considering the evidence and reaching its conclusion. One would have thought that its relevance, even if it might be overridden by other matters, was pretty obvious.

51. Second, when the claimant first completed an application for housing in September 2012, although she said that she was seeking to live in a caravan or mobile home, she also stated that she would accept a flat or a bedsit. Again, this does not prove that she cannot at any stage thereafter have had an aversion to such accommodation, but it is a material factor that the council was entitled to take into account.

52. Third, the defendant has said (I refer to the letter of 8 May 2018), and it has not been contradicted, that it was not until 2015 that the claimant changed her application to show that she was seeking a place on a gypsy or traveller site, that is, that from then on she was not considering bricks and mortar accommodation.

53. Fourth, there is the interview with Ms Fry on 26 September 2017. The correspondence that followed the letter of 8 May 2018 did not allege that the defendant was wrong to say that the claimant would be willing to accept an offer of bricks and mortar. Nor, significantly, did it raise the matters that are now raised in paragraphs 7 and 8 of the claimant's statement dated 10 July 2019. It is, of course, entirely possible that the claimant, having a significant preference for a caravan over bricks and mortar, was willing to contemplate bricks and mortar as being very much a second best. But that does not mean that she was not indeed willing to contemplate bricks and mortar, or that some suspicious explanation must be sought for her decision to do so, or that any particular weight should be placed on the matters that she now raises in her statement. Indeed, the pre-action protocol letter (which, of course, postdates the decision under challenge) says, 'Our client does not have a complete aversion to conventional housing'. By itself, that might be construed as referring to 'aversion' in the more psychiatric sense in the homelessness cases. However, the letter continues, 'Our client has a very strong preference for continuing her way of life of living in a caravan'. That indicates a 'very strong preference' but by no means an aversion. Also written after the decision under challenge is the witness statement of Parminder Sanghera, which states at paragraph 4:

> 'The defendant has previously and subsequently stated that the claimant does not have a demonstrable aversion to bricks and mortar accommodation and the claimant accepts that she cannot say she has an aversion, though she has a very strong preference for obtaining a pitch for her caravan in order that she can continue to follow her traditional cultural way of life as a member of an ethnic traveller group.'

It might be said that this passage assumes the meaning of 'aversion' adopted in

homelessness cases. However, in its substance it does no more than express a strong preference for the use of a caravan. It is right to note that the case put forward in the letter of 14 August 2018 puts the matter in this way:

> 'If I was forced to live in conventional bricks and mortar accommodation, I would get very depressed because I would not be with my family. I need my family support and I need to continue my traditional way of life living in a caravan.'

The second part of this passage refers to a cultural attachment. But this has to be weighed against other evidence, in particular the matters that I have referred to. Further, to speak of 'my traditional way of life living in a caravan' might, in the circumstances, be thought to be true of the claimant only in a very particular and limited sense. The reference to depression because not being with one's family appears to have not to do with the nature of the accommodation but with the anticipated removal of support mechanisms, including familial support mechanisms. As Mr Davis points out, this is a distinction noted in the *Sheridan v Basildon Borough Council* case.

54. It is true, of course, that the claimant has lived for several years in a state of homelessness, in that she has been in caravans on unauthorised sites, vulnerable to being moved on. To say that this fact requires a finding that she has an aversion to bricks and mortar is, however, greatly to overstate the case. The most that it shows is that she has a preference, whether cultural or otherwise, for a certain form of accommodation; and, given that it was a state of affairs that obtained at the same time that she had stated both in 2012 and 2017 that she was willing to consider bricks and mortar accommodation, it cannot be said that the state of affairs compelled a finding of an aversion.

55. What of the suggestion that the defendant failed to refer to numerous matters relied on by the claimant in support of her claim to have an aversion (such as the reference to panic in the letter of 22 August 2017)? The short point is that the defendant's obligation was to state reasons sufficient to enable the claimant to understand why it had reached its decision. It was not bound to record every matter to which it had had regard, and in the absence of strong evidence to the contrary it is to be presumed that it had taken into account the information that was before it. I see no reason to suppose that it had not done so and there is nothing indicated in the papers that shows there were things that ought to have been mentioned that were not mentioned.

The Fourth Issue

56. I come, finally, to the question whether the policy is unlawful because it was reached in breach of the duty under section 149 of the Equality Act or is irrational. The concept of irrationality seems to me to add nothing, in the circumstances of the present case, to the Equality Act argument.

57. Section 149 of the 2010 Act provides in part as follows:

> '(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (b) advance equality of opportunity between persons who share a relevant

protected characteristic and persons who do not share it;

…

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

…'

The relevant protected characteristics identified in subsection (7) include disability and race. It is common ground that the claimant has those two protected characteristics.

58. The duty under section 149 ('the public sector equality duty') has been considered in a number of authorities. I have been referred to the most important ones. It will suffice now to mention simply to the decision of the Supreme Court in *Hotak v London Borough of Southwark* [2015] UKSC 30. The Court there discussed several other authorities, including *R (on the application of Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, and *R (on the application of Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin).

59. In *Hotak*, Lord Neuberger said:

'74. As Dyson LJ emphasised [in *Baker*], the equality duty is 'not a duty to achieve a result', but a duty "to have due regard to the need" to achieve the goals identified in paras (a) to (c) of section 149(1) of the 2010 Act. Wilson LJ explained [in *Pieretti v Enfield London Borough Council* [2010] EWCA Civ 1104] that the Parliamentary intention behind section 149 was that there should "be a culture of greater awareness of the existence and legal consequences of disability". He went on to say in para 33 that the extent of the "regard" which must be had to the six aspects of the duty (now in subsections (1) and (3) of section 149 of the 2010 Act) must be what is "appropriate in all the circumstances". Lord Clarke suggested in argument that this was not a particularly helpful guide and I agree with him. However, in the light of the word "due" in section 149(1), I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment.

75. As was made clear in a passage quoted in *Bracking*, the duty "must be exercised in substance, with rigour, and with an open mind" (per Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506, para 92. And, as Elias LJ said in *Hurley and Moore*, it is for the decision-maker to determine how much weight to give to the duty: the

> court simply has to be satisfied that "there has been rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said that "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision".'

At [78] he made the following remarks which, though spoken with reference to the kind of case before the court there, is of general assistance:

> 'In cases such as the present, where the issue is whether an applicant is or would be vulnerable under section 189(1)(c) if homeless, an authority's equality duty can fairly be described as complementary to its duty under the 1996 Act. More specifically, each stage of the decision-making exercise as to whether an applicant with an actual or possible disability or other "relevant protected characteristic" falls within section 189(1)(c), must be made with the equality duty well in mind, and "must be exercised in substance, with rigour, and with an open mind". There is a risk that such words can lead to no more than formulaic and high-minded mantras in judgments and in other documents such as section 202 reviews. It is therefore appropriate to emphasise that the equality duty, in the context of an exercise such as a section 202 review, does require the reviewing officer to focus very sharply on (i) whether the applicant is under a disability (or has another relevant protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is as a result "vulnerable".'

60. Mr Nabi's submissions under section 149 may, I think, he summarised under two heads.

61. First, he submitted that the result of the defendant's policy is to create a form of discrimination, when comparing the positions of persons preferring caravan over bricks and mortar (let us, for simplicity, say 'Travellers') as compared with the rest of the population who (let us assume) prefer bricks and mortar. Someone who prefers bricks and mortar simply applies and gets put on the waiting list and, unless he or she has a priority, will simply take a place in the queue. The applicant may never be given accommodation, but he or she is at least on the list. By contrast, in the case of the 'Traveller', the applicant cannot get onto the list in the first place.

62. Second, he made a point that, if it did not originate with me, nevertheless was latched on to by me when I gave permission to apply, when I said:

> 'As redrawn, the policy purports to be a policy that respects the culture of gypsies and travellers because it is applicable to them. However, the inclusion of the requirement of demonstrable aversion arguably has the contrary effect. Instead of having due regard to the opportunity to live in accordance with one's own cultural heritage, it substitutes a criterion of practical albeit not clinical harm that has only a contingent relationship to culture. To put it another way, it is not at all clear to me that the policy respects the importance of allowing people to live in accordance with their cultural heritage as a good in itself.'

63. In my judgment, neither of these arguments succeeds.

64. First, the equality duty under section 149 is not a duty to provide a particular outcome. See Lord Neuberger's remarks in *Hotak*. The decision of the Court of Appeal in *London Borough of Hackney v Haque* [2017] EWCA Civ 4, which I have considered though I have not yet referred to it, indicates that the local authority does not have to give reasons in respect of its discharge of the duty. In the present case, however, there was a full assessment, which took into account the impact of the policy on the protected characteristics, including race. The assessment was of course in respect of a policy, not of particular decisions under it, and was therefore at a higher level of generality. But a local authority is entitled to make decisions in accordance with the consistent application of a lawful policy. Whether or not one agrees with the defendant's assessment or thinks that various factors might have been balanced differently, it is clear that the defendant had due regard to the matters specified in section 149(1).

65. Second, as regards the matter I mentioned when granting permission, the critical point is that the valuing of a traveller's culture is actually achieved by the policy itself. The 'demonstrable aversion' requirement is not directed to the question whether the culture is one that is valued or ought to be given respect: that question receives its answer from the policy itself. Rather, the requirement is directed to the scarcity of resources and the need to follow some course in order to allocate scarce resources to those in greatest need. Thus it is not a valid objection to the requirement to say that it fails to afford inherent value to the cultural practice.

66. If and in so far as the submission is that, by dealing with scarcity of resources by creating an exclusionary factor rather than by introducing banding so as to create priorities, the policy is irrational, the submission goes far too far. To say that people without an aversion should be necessarily put on a waiting list is untenable. Of course, ideally they might be put on a waiting list. Indeed, ideally they might be given pitches. However, where resources are very limited (as is indicated by the evidence regarding the adoption of the policy), there may very well be strong grounds for saying that persons who do not have an aversion but merely a strong preference driven by culture, should not be put onto the waiting list at all. For example, an applicant without any aversion to bricks and mortar might be on the waiting list and then given a pitch in circumstances where, despite general pressures on pitches, a vacancy has arisen and the applicant is next in line. If there is not and is unlikely to be an available bank of pitches to accommodate changing circumstances, such an outcome may very well serve only to undermine the policy of allocation to those with greatest need. A pitch that might be needed for those in greatest need next week will have been taken by someone without such need. The short point is that there is no basis for supposing that the failure to use a banding system is irrational.

67. For these reasons I dismiss the claim and shall make a declaration as to the meaning of 'demonstrable aversion' in the policy.

End of Judgment

Transcript from a recording by Ubiqus

291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com