Neutral Citation Number: [2020] EWHC 1279 (Admin)

Case No: CO/147/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2020

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

THE QUEEN **on the application of Favio Ortega Flores**	**Claimant**
- and -	
London Borough of Southwark	**Defendant**

- -
- -

Mr Edward Fitzpatrick (instructed by **Osbornes**) for the **Claimant**
Mr Christopher Baker (instructed by **London Borough of Southwark**) for the **Defendant**

Hearing dates: 29 April 2020

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JUDGMENT

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on 20 May 2020.

MR JUSTICE MARTIN SPENCER :

1. By his claim dated 16 January 2020, the Claimant seeks permission to apply for Judicial Review of the Defendant's decision dated 11 October 2019 to assess the Claimant as being in priority band 3 for housing within the Defendant's housing allocation scheme dated November 2013. Pursuant to the order of Mrs Justice Eady dated 19 February 2020, the application for permission was adjourned to be listed as a "rolled-up hearing" for the question of permission and, should permission be granted, the substantive application to be decided together and that hearing took place before me on 29 April 2020.

2. The background facts are as follows. The Claimant was born on 14 November 1975 in Brazil but despite being Brazilian, his first language is Spanish. In 2004 he and his partner Elba Velasquez moved to Spain and they have two children, Ronaldo born on 19 February 2006 and Steven born on 23 December 2008.

3. In November 2013, the Claimant came to the UK in order to look for work having lost his job in a factory making belts near Barcelona earlier that year. He found accommodation in the Defendant's borough and work as a kitchen assistant in a restaurant. Ms Velasquez and the children arrived in the UK in June 2014 and they initially rented a room at 225 Gordon Road, London SE15 from 21 June 2014 to 27 July 2014. Then on 27 July 2014 they moved to their present accommodation at 86 Meeting House Lane, London SE15 which is a one-bedroom property. In his witness statement, the Claimant says that he was unable to afford a two-bedroomed property and the rent at 86 Meeting House Lane was £1,000 per month which included the bills. For the purposes of the Defendant's housing allocation scheme, the accommodation would have been considered to be overcrowded at the time they moved in but not for the purposes of the Housing Act 1985. However, on 19 February 2016 when the older child, Ronaldo, attained the age of 10 the accommodation became statutorily overcrowded for the purposes of s.326 of the Housing Act 1985. There is no evidence or suggestion that the Claimant moved his family into one-bedroomed accommodation deliberately in order to qualify within the overcrowding criteria of the Defendant but rather because that was all he could afford.

4. In September 2018, Elba Velasquez attended a meeting at Housing Action Southwark and Lambeth (HASL) as a result of which they received advice about their housing circumstances and Ms Velasquez met one Elizabeth Wyatt who offered them an appointment to help them complete an on-line application form to join the housing register. At that time the Claimant's and his partner's command of English remained rudimentary and they had been ignorant of their rights to make such an application until so advised at HASL.

5. Having received no response to the application, the Claimant authorised Elizabeth Wyatt to act on his behalf in a document dated 14 February 2019 and on 7 March 2019 the Defendant wrote to the Claimant informing him that he was not entitled to join the housing register as he did not meet the local connection criteria. On 13 March 2019 Mr Flores (presumably with Ms Wyatt's help) wrote to the Defendant asserting that he did qualify because his partner, Ms Velasquez, worked in the borough and the family were statutorily overcrowded. On 17 May 2019 the

Defendant reviewed its decision and decided that Ms Velasquez did not meet the borough's criteria because she did not work for 16 hours per week within the borough. However it was agreed that the family was statutorily overcrowded, the letter stating:

> "At the outset you were overcrowded in your accommodation, lacking one bedroom. It cannot be therefore be said that your current overcrowding has come about as a result of natural increase. As a result your household does not qualify for band 1 priority or the associated priority star …"

The letter confirmed that the family would be registered on the Borough's housing register under band 4.

6. On 24 May 2019, the Claimant wrote to the Defendant requesting a review. In that letter, he said:

> "I believe I should qualify for band 3 on the housing register as an overcrowded household and I should not be given reduced priority band 4.
>
> In the decision letter, Ms McFarlane explains that we do not qualify for band 1 for being statutory [sic] overcrowded. We have never requested to be placed into band 1 for statutory overcrowding. …
>
> I believe I should qualify for band 3 for overcrowding for the following reasons: …" [emphasis added]

This led to the Defendant's first review decision in a letter dated 27 June 2019 when the Defendant confirmed its decision to place the Claimant in band 4. However, the letter recognised that, as from 27 July 2019, the Claimant would meet the Defendant's residential criteria and invited the Claimant to contact the Authority again after that date. The letter stated:

> "By your own admission, you do not meet the residential or employment local connection [criteria]. I acknowledge that you should meet the local connection criteria on 27/07/2019 if your circumstances are unchanged however we are not able to permit you to join the register on the basis that you almost meet this criteria. This would not be fair practice for all other applicants who are required to meet the criteria in full.
>
> I therefore invite you to make contact on 27/07/2019 and we will take steps to reassess your application to join the housing register."

7. On 15 July 2019 the Claimant requested a further review through a letter from Elizabeth Wyatt and pending that further review, on 27 July 2019, the Claimant satisfied the five year residential local connection criterion as Ms Velasquez had, by this date, been working within the borough for a period of five years. Again, the terms of the request for a further review are significant. The relevant request was for a review of the Defendant's failure to award band 3 for overcrowding. It was not suggested, or argued, that the Claimant should be placed in band 1.

8. On 11 October 2019 the Defendant made its decision which is the subject matter of this application. By that letter the Defendant confirmed that the Claimant met the local connection criteria and had done as from 27 July 2019. The letter considered

that the Claimant could be assessed in priority band 3 for overcrowding. The letter acknowledged that as a result of both children now being aged 10 years or over, the family would be considered to be statutorily overcrowded, the family comprising four units whilst the maximum capacity for one-bedroomed property with two rooms is three units, but stated:

> "However as natural increase has not occurred, whereby you had moved into overcrowded accommodation at the outset, you do not meet the criteria to be awarded statutory overcrowded priority on the council's home search bidding scheme, nor do you meet the criteria to be awarded any associated priority star, in accordance with the allocations' policy … having considered all of the information above in accordance with our current allocations' scheme I confirm that your application has now been reassessed into priority band 3 for overcrowding. You are able to bid for two-bedroomed properties on account of your household composition. Please note that this decision is final and not open to further review."

9. The author of the decision letter was Quesha Tait, the Defendant's Rehousing Manager. In a witness statement dated 17 March 2020, Ms Tait refers to the first review decision dated 17 May 2019 when the Claimant was registered and assessed in band 4. She says in her witness statement:

> "I explained that I did not consider that the band 1 priority or the associated priority star was appropriate because the Claimant confirmed that his present accommodation was overcrowded (though not statutorily overcrowded) when he first moved into it and therefore it could not be said that the current overcrowding had come about as a result of natural increase in the number of people in the household. As an indication of the general extent of overcrowding among applicants under the scheme, I distinguished his position from that of 2,961 other households in the borough who did meet the local connection criteria and had not deliberately moved into accommodation which was overcrowded at the outset."

In her statement, Ms Tait compares the number of statutory overcrowded applicants registered in band 1 which numbers only 27 at the time she made her statement. She says:

> "The figures accordingly help to illustrate why, as at 17 May 2019, I did not consider that band 1 was appropriate in this case."

In the Claimant's letter of 24 May 2019, seeking further review, the Claimant contended that he should qualify for band 3, not band 4 and have a priority star but stated that:

> "We have never requested to be placed in band 1 for statutory overcrowding."

10. Ms Tait then referred to her decision of 11 October 2019. By that time, the Claimant's circumstances had changed because he now satisfied the five year residential local connection criterion. She says:

> "The main point in my view was to consider how the overcrowding had come about and later become statutory overcrowding. The overcrowding had started from when the Claimant initially moved his family of four into the current one-bedroomed flat. There was nothing to indicate that this was anything other than a voluntary act. The Claimant never suggested otherwise and I considered it to have been a deliberate act."

This is a reference to the Defendant's priority needs bands contained within s.6.2 of the Housing Allocation Scheme which includes within band 1 the following:

> "Applicants who are statutorily overcrowded as defined by Part X of the Housing Act 1985 and have not caused this statutory overcrowding by a deliberate act."

11. In her witness statement, Ms Tait goes on to say as follows:

> "The operation of the scheme involves knowledge, experience and sensitivity in relation to the varied, competing, widespread and demanding housing needs across the borough. It is widely recognised that in Southwark, as in London generally and other parts of the country, housing need and demand for housing vastly exceed the available supply. There is a wealth of data widely available to demonstrate this. A consequence is that in taking decisions on housing applications, in particular about the relative priority to be given to differing situations, we need to address very carefully the particular circumstances in each case in order to ensure fairness between applicants and that the more pressing needs and priorities are met before others. One of the categories of case we have been aware of for a very long time in Southwark concerns people who apply for rehousing having moved from outside the borough into statutorily overcrowded accommodation in the borough. The wording in paragraph 6.2 of the scheme, which limits band 1 priority in cases of statutory overcrowding to applicants who have not themselves deliberately caused that state of affairs, helps us to confine this priority group to the most needy and deserving cases. It also helps to prevent or reduce other applicants, particularly those who have been waiting longest with relatively lower priority, being leap-frogged by those who have deliberately caused their statutory overcrowding; and it is a disincentive for people to seek to move into the borough and occupy statutory overcrowded housing."

12. Following the decision on 11 October 2019, the Claimant consulted Public Interest Law Centre who, on 18 December 2019, wrote a judicial review pre-action protocol letter to the Defendant challenging the decision not to place the Claimant in priority band 1 on the basis that the decision was made contrary to the Defendant's housing allocations scheme. The letter challenges the suggestion that the statutory overcrowding was caused by a deliberate act because, at the time that the family moved into the flat at 86 Meeting House Lane, there was no statutory overcrowding as both boys were aged under 10. The letter states:

> "In the Claimant's case the statutory overcrowding was caused when his oldest son turned 10 years old. Their statutory overcrowding cannot, therefore, be said to have been caused by a deliberate act. However the

> Defendant fails to apply this test and instead applies an unwritten test for overcrowding (and not statutory overcrowding)."

The letter criticises the Defendant for applying a test to determine eligibility for band 1 which is whether the overcrowding was caused "as a result of natural increase, this not being a criterion contained within the housing allocations policy for band 1.

13. On 2 January 2020, the Defendant responded to the pre-action protocol letter as follows:

> "It was not reasonable for your client to move into a one-bedroomed property and then put in a request to be placed in band 1 on the ground that the family are statutorily overcrowded. The fact that his older son turned 10 is not a 'natural increase'. Everyone gets older every year. If your client had had another child after he moved into the property, that would have constituted a 'natural increase'. It is a fact that Southwark's allocation policy permits applicants to bid for properties smaller than their bed need. The 'natural increase' clause in the allocations policy would also be applied to those who do so. They cannot request band 1 on the ground that they are statutorily overcrowded because they made a voluntary choice to move into a property smaller than their bed need. … if applicants are allowed to jump the queue by claiming an eligibility for band 1 on the basis of statutory overcrowding which has been caused by their moving into properties which were clearly unsuitable right from the start of the tenancies, that is manifestly unfair to other applicants on the waiting list. … he had a choice to secure suitable accommodation for the size of his family …"

Permission to Apply for Judicial Review

14. The first question to be decided is whether permission to apply for Judicial Review should be granted. In this regard, Mr Baker, who has appeared for the Defendant, points out that the Claimant never suggested that he should be given priority under Band 1 of the Scheme until after the decision under challenge dated 11 October 2019, even though he had twice previously requested a review of his priority by letters dated 24 May 2019 and 15 July 2019. To the contrary, he had asked on both occasions to be placed in Band 3, which the Defendant latterly agreed was appropriate. He refers to the letter dated 24 May 2019 in which the Claimant specifically stated: "We have never requested to be placed into band 1 for statutory overcrowding." In those circumstances, he submits that the court should not entertain a claim for Judicial Review of a decision on the basis that the Defendant failed to make a decision for which the Claimant was not even contending. In addition, Mr Baker points out that by the time the Claimant challenged the decision of 11 October 2019 on the basis that he had not been placed in priority band 1, he had exhausted his right to request a review. Thus, the Defendant's decision was expressed to be "final and not open to further review" and this was consistent with their Scheme which provided at para. 3.15.2 for only one review ordinarily "unless the customer's circumstances change". The last relevant change of circumstances had been on 27 July 2019 when, as reflected in the decision, Southwark decided that the Claimant satisfied the local connection criteria in the Scheme. As there has subsequently been no relevant change of circumstances, the Claimant had no right to request a further review of his priority.

In those circumstances, he contends that the court should not entertain this application for Judicial Review where:

(i) It is put on a basis which was never put to the decision-maker at the time;
(ii) he has twice sought and obtained a review of his priority on a different basis; and
(iii) he has exhausted the Scheme's mechanism for review.

He submits that it was incumbent on the Claimant to bring forward at the time all matters relevant to the review and, having failed to do so, he should not now be allowed to ask the court to review the decision.

15. For the Claimant, Mr Fitzpatrick submits that, whether or not the Claimant was seeking to be placed within band 1, it is clear from the contents of the decision letter that the Defendant was considering into which band the Claimant was entitled to be placed, and that consideration included whether he should be in band 1. He says that this is to be derived from the witness statement of Ms Tait who actually made the decision on the Defendant's behalf where she says:

> "13. I then considered the matter afresh, having regard to the previous decisions and review requests made by the Claimant. My resulting decision was notified in my letter dated 11 October 2019. …
>
> 14. By this time, it was apparent that circumstances had changed because, on the information provided by the Claimant, he had satisfied the 5-year residential local connection criteria as from 27 July 2019. Accordingly, the Claimant was qualified to join the housing register without more, and it was therefore no longer the case of admitting him to the register with band 4 priority under paragraph 5.23.5(a) of the Scheme.
>
> 15. In other respects, however the circumstances had not changed and the earlier decision letters, particularly mine dated 17 May 2019, explained why band 1 priority had not been awarded.
>
> 16. The main point in my view was to consider how the overcrowding had come about and had later become statutory overcrowding. The overcrowding had started from when the Claimant initially moved his family of four into the current one-bedroom flat. There was nothing to indicate this was anything other than a voluntary act. The Claimant never suggested otherwise and I considered it to have been a deliberate act. The flat was overcrowded from the outset by reference to the bedroom standard set out at Appendix B in the Scheme which required two bedrooms. This was therefore different from the situation where a family's current accommodation had once met the family's needs but those needs had naturally increased as a result of the birth or adoption of children so that the accommodation no longer met their needs. In the present case, given the size of the household, this accommodation was never going to be suitable for the Claimant's family in the long or medium term. The statutory overcrowding then came about simply because, as mentioned above, the Claimant's younger son reached the age of 10 years, which meant that the space standard under s326 Housing Act was

> contravened. Again. This was not a case of natural increase in the size of the household and there was no other change of circumstances to break the chain of causation which led back to the Claimant's action in moving his family into the accommodation. …
>
> 18. It was therefore my view that band 1 did not apply, because the Claimant had caused the statutory overcrowding by a deliberate act."

16. In the light of this witness statement, and also the correspondence between the parties, Mr Fitzpatrick argues that, given the way in which the priority bands are formulated and the significance of being found to be "statutorily overcrowded" it was incumbent on the Defendant to consider fully the level of priority to be afforded on this application and in fact did so. The fact that the Claimant did not explicitly refer to exclusion from band 1 until after the 11th October 2019 should not, he argues, preclude the decision from being challenged; particularly where from the correspondence the viewpoint expressed by the Defendant following the decision of the 11th October 2019 was to say that this issue had been addressed and no further review or assessment as to it could take place.

Discussion

17. In my judgment, as Mr Fitzpatrick has submitted, it is clear that, whether or not this had been sought by the Claimant, the decision of 11 October did in fact consider whether the Claimant qualified to be placed within band 1 of the Defendant's scheme for priority housing. That is clear from Ms Tait's witness statement. Furthermore, in my view, the Defendant was right to do so. This was the first time that the Claimant's application to be placed on the Defendant's housing register had been considered since the Claimant qualified for such consideration by virtue of fulfilling the Defendant's 5-year residential local connection criteria. In his letter of 27 June 2019, Ricky Bellot, the Defendant's Housing Choice and Supply Manager, had explicitly invited the Claimant to reapply on 27 July 2019 having fulfilled the residential local connection criteria, stating: "I therefore invite you to make contact on 27/07/2019 and we will take steps to reassess your application to join the housing register." The decision of 11 October 2019 was thus not, in reality, a review decision at all but a new decision made in respect of an Applicant who, for the first time, qualified for substantive consideration of his application because he now fulfilled the residential local connection criteria. Ms Tait makes it clear that she regarded her function to be to consider the application *de novo* and this included which priority band the Claimant fitted into, regardless of whether he was actually seeking to be placed into band 1. From the terms of her decision, there can be no doubt that she did positively consider whether to place the Claimant into band 1, as whether the Claimant "had caused the statutory overcrowding by a deliberate act" is the very question which band 1 raises. Having indicated in the letter that the decision of the Authority was final, and they would not entertain any further review, the only further recourse was for the Claimant to apply for Judicial Review.

18. In those circumstances, despite the submissions of Mr Baker, in my judgment the court can and should entertain this application and permission to apply for Judicial Review is granted.

The Substantive Application for Judicial Review

19. In considering the substantive issue, it is first appropriate to set out the relevant legislation and the Defendant's priority housing scheme pursuant to the legislation.

20. Section 166A of the Housing Act 1996 provides for allocation of housing within a local authority's housing scheme. The relevant provisions are as follows:

    (i) By subsection (1), every local authority must have a scheme for determining priorities, and as to the procedure to be followed, in allocating housing accommodation. The procedure includes all aspects of the allocation process including the person or descriptions of persons by whom decisions are taken.

    (ii) By subsection (3) as regard priorities, the scheme shall, subject to secure that a "reasonable preference" is given to a number of categories of persons. This includes:

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

    (iii) By subsection (9), the scheme must be framed so as to secure that an applicant for an allocation of housing accommodation—

        (a) has the right to request such general information as will enable him to assess—

            (i) how his application is likely to be treated under the scheme (including in particular whether he is likely to be regarded as a member of a group of people who are to be given preference by virtue of subsection (3)); and
            (ii) whether housing accommodation appropriate to his needs is likely to be made available to him and, if so, how long it is likely to be before such accommodation becomes available for allocation to him;

        (b) has the right to request the authority to inform him of any decision about the facts of his case which is likely to be, or
        has been, taken into account in considering whether to allocate housing accommodation to him; and

        (c) has the right to request a review of a decision mentioned in paragraph (b), or in section 160ZA(9), and to be informed
        of the decision on the review and the grounds for it.

    (iv) By subsection (14) a local authority shall not allocate housing accommodation except in accordance with their allocations scheme.

21. Southwark's scheme at the relevant time included the following:

"***Deliberately worsening housing circumstances***

3.5.20 where there is clear evidence and a conclusion can properly be drawn that an applicant has deliberately worsened their circumstances in order to qualify to join the housing register, then that applicant will not qualify to join the housing register. The group services manager for homelessness and housing options will make this decision.

Examples of this include:
(a) Selling a property that is affordable and suitable for the applicant's needs.

(b) Moving from a secure tenancy or suitable private rented tenancy which variable to maintain to insecure or less settled or overcrowded accommodation creating a situation of overcrowding and sharing of bathroom/kitchen.

(c) Requesting or colluding with a landlord or family member to issue them with a notice to quit.

(d) Deliberately overcrowding property by moving in friends and/or other family members who have never lived together previously and/or have not lived together for a long time, then requesting re-housing to large accommodation."

5.2 ***Southwark's banding scheme***

5.2.1 An applicant's circumstances are assessed and his/her application placed in either Band 1, Band 2, Band 3 or Band 4 (the reduced priority band) as explained in section 6.2. Within each band, priority is accorded by:
(1) a priority star system and
(2) the date of registration as explained below.
In broad terms, the greatest priority is awarded to those assessed as having the highest housing need.

5.2.2 ***Priority star system***

Within each band, applicants are prioritised, first by reference to a priority star system. This operates as follows:
One priority star will be awarded for each of the following where applicable
1. People owed a statutory homelessness duty under either s.193(2) or s.195(2) Housing Act 1996,
2. People occupying unsanitary or statutory overcrowded housing (as defined by Part X of the Housing Act 1985) or otherwise living in unsatisfactory housing conditions in accordance with hazards identified through housing health and safety rating scheme as confirmed by the London B

5.24 ***Deliberately worsening housing circumstances***

5.24.1 Where there is clear evidence that a conclusion can properly be drawn that an applicant has deliberately made worse their circumstances in order to achieve higher priority on the register or (in the case of an applicant who has not been disqualified for this reason) to qualify to join the housing register, then reduced priority will be given. The group services manager for homelessness and housing options service will make this decision. Examples of this include:
(a) selling a property that is affordable and suitable for an applicant's needs.
(b) moving from a secure tenancy or settled accommodation to insecure or less settled or overcrowded accommodation.
(c) requesting or colluding with the landlord or family member to issue them with a notice to quit.
(d) deliberately overcrowding properties by moving in friends and/or other family members who have never lived together previously and/or have not lived together for a long time, then requesting re-housing to larger accommodation.

The above list is not exhaustive. This will ensure that households will not be treated as occupying overcrowded accommodation unless the overcrowding has come about by natural increases due to birth/adoption of a child or the addition or other persons to the household with the written consent of the London Borough of Southwark.

6.2 ***Priority needs Bands***

Band 1
…
Applicants who are statutorily overcrowded as defined by Part X of the Housing Act 1985 and have not caused this statutory overcrowding by a deliberate act …".

"*Band 2*
Applicants who have a severe medical, welfare award or disability (including learning disability, where the current accommodation is unsuitable, or it is unreasonable to remain in occupation …

Band 3
Those who are homeless and toward whom the London Borough of Southwark has a statutory duty to accommodate pursuant to Part VII of the Housing Act 1996. …

Overcrowded but not statutorily overcrowded as defined by Part X of the 1985 Housing Act …".

The Claimant's case

22. In his grounds for seeking judicial review, the fundamental matter relied upon by the Claimant is that, when the Defendant decided that the statutory overcrowding had been caused by a "deliberate act" on the part of the Claimant, there was a failure fairly to investigate and assess the circumstances in 2014 when the Claimant obtained his tenancy at 86 Meeting House Lane and a failure properly to consider the question of causation. It is suggested that there should have been detailed consideration of the Claimant's circumstances and in particular his knowledge of the allocations scheme

and any plan with regard to making an application to join the housing register. It is suggested that, in deciding that taking up the tenancy was deliberate, there was a failure on the part of the Defendant to take into account and assess whether or not at the time the Claimant was aware of relevant facts including the terms of the allocations policy.

23. In his submissions, Mr Fitzpatrick concedes that local authorities have a wide discretion regarding the securing of reasonable preference to classes specified under s.166A(3) as was established in *R (Ahmad) v Newham London Borough Council* [2009] UKHL 14; [2009] 3 All E.R. 755. Preference is not the same as success and it is possible for a lawful allocations scheme to give reasonable preference to a person even if the person is never allocated accommodation; whether a preference is reasonable is a decision for the authority *(R (Lin) v Barnet LBC* [2007] HLR 30). In *Ahmad* at paragraph 12 Lady Hale said:

> "No one suggests that [the Claimant] has a right to a house. At most, he has a right to have his application for a house properly considered in accordance with a lawful allocation policy. Part VI of the 1996 Act gives no one a right to a house. This is not surprising as local housing authorities have no general duty to provide housing accommodation".

24. In this case the challenge is not as to the formulation of the 2013 allocations policy but with respect to the way it was applied in this particular case. It is submitted that the words "by a deliberate act" imply and import that there must be evidence of culpable behaviour on the part of the Claimant which must go back to the time of the obtaining of the tenancy. It is submitted that, in deciding whether there was a deliberate act, it is appropriate for the Court to look at the way in which "deliberate acts" are interpreted under section 191 of the Act in respect of becoming homeless "intentionally". The approach there is to consider whether a person has acted deliberately "after consideration of all the relevant facts" (see *Davenport v Salford City Council* [1983] 8 HLR 54, CA).

25. In the light of the above, the Claimant submits that whether there has been culpable behaviour requires careful analysis of all the circumstances at the relevant time, and in order to make such findings there would have to be a fair assessment and evaluation as to the circumstances when the Claimant took up the tenancy of the premises. Consideration would have to be given as to:

    (i) Whether they were able to afford larger accommodation, for example two-bedroom accommodation.
    (ii) Whether or not they were aware of the Council's allocations scheme.
    (iii) Whether or not larger accommodation was affordable to them in the context where the Cl was in fact working and therefore would not want to lose his employment.
    (iv) The extent of any advice they received at the time.
    (v) Their needs in terms of locality to maintain employment and or family support. Other options open to them at the time.
    (vi) Whether or not there was an intention to queue jump in the way alleged.

(vii) Consideration of the local housing allowance in the area and the question of whether or not someone on a low income could ever afford a two-bedroom property.

(viii) Consideration as to whether persons in like circumstances to the Claimant would ever be put in such accommodation by the local authority when applying as homeless. It is often the case that families are put into accommodation that will within a short time span result in statutory overcrowding, due to the shortage of larger affordable accommodation.

However, this did not happen and there was no detailed interview with the Claimant or his partner to ascertain the circumstances as to his housing when he arrived in the UK and how they ended up in this one-bedroom property. It is submitted that no account was taken, but should have been, as to the fact that at the outset the premises were not statutorily overcrowded.

26. In addition, criticism is levelled at the Defendant for the way in which a contrast was drawn between a family who have an additional child which is termed a natural increase in the family, and the fact that children grow older and require their own bedrooms ("natural growth"): it is submitted that the aging of children is as much a natural increase as the addition of further children and that the distinction is illogical and arbitrary.

The Defendant's case

27. The Defendant correctly identifies the critical question being whether, for the purposes of paragraph 6.2 of the scheme, the Claimant had "caused this statutory overcrowding by a deliberate act". The Defendant points out that although the Claimant's accommodation did not become statutorily overcrowded until 19 February 2016 when Ronaldo attained the age of 10, it was considered to be overcrowded from the outset for the purposes of Southwark's scheme which provided that two bedrooms were needed for a family with two children of the same sex under the age of 16. It is therefore asserted that the Defendant's rehousing manager, Ms Tait, was correct to decide that the Claimant had moved into overcrowded accommodation at the outset. It is pleaded:

> "It was the family's occupation of the flat which was necessary to and underlay it being statutorily overcrowded. The effective cause of that occupation was the Claimant's action in obtaining the tenancy of it and moving his family into it in 2014. Further there was never any suggestion by the Claimant that his action in moving into the flat in 2014 had not been deliberate. Accordingly the requirements for band 1 priority were not satisfied because the Claimant <u>had</u> 'caused this statutory overcrowding by a deliberate act'. The rehousing manager contrasted the position in the present case with the situation where a family household has grown in size by 'natural increase' which will include the birth or adoption of a further child."

It is further pleaded that the distinction between natural increase and natural growth is consistent with the statutory scheme under Part X of the Housing Act 1985. The Defendant disputes any obligation on its part to 'investigate' matters in relation to an application for an allocation for social housing under Part VI of the Housing Act

1996. They say that the onus was on the Claimant to put any relevant information before the borough.

28. The Defendant points to the fact that "a consistent theme in the Claimant's argument … is that the review decision depended upon a finding of 'culpability'". However, the Defendant submits that the decision did not require and was not based upon any finding of culpability: in so far as band 1 was ruled out, this required no more than a finding of a deliberate act. The Defendant disputes the Claimant's assertion that the words "deliberate act" in para 6.2 of the Scheme should be interpreted in the same way, or analogously with, the way in which s191 is interpreted for the purposes of homelessness assistance under Pt 7 of the Act. It is submitted that this is misplaced. Section 191 involves a particular statutory test, involving a number of elements (including "good faith"), for determining whether a person became homeless intentionally. There is no necessary or sufficient reason why the s191 test should be applied to the Scheme. The Scheme is concerned with the allocation of longer-term social housing, not with homelessness assistance.

29. In the circumstances, the Defendant submits that the scope of the matters requiring consideration for the purposes of determining whether an applicant has "caused … statutory overcrowding by a deliberate act" under para 6.2 of the Scheme depends on no more than a common sense reading of the words and the circumstances in an individual case. Accordingly, the range of factors alleged by the Claimant to be required to be assessed is in general misplaced. It is a question of fact and context whether any of them may require consideration in any specific case

Discussion

30. It seems to me that the fundamental premise for this application by the Claimant is that, where the Defendant's policy refers to "a deliberate act" on the part of the Claimant, this is intended to apply to an act which is culpable in the sense that it is deliberately intended to promote the interests of the applicant in relation to the borough's housing allocations policy. In my judgment, this is incorrect and an unnecessary gloss on the wording of the Scheme. In my judgment, the Defendant intended, and properly intended, to mean that the act was deliberate in the sense that the Claimant voluntarily, in this case, entered into the tenancy in question. Suppose the Claimant, informed that, under the Statute, there is statutory overcrowding once Ronaldo attains the age of 10, had been asked: "do you appreciate that, by taking this tenancy and not moving, it is inevitable that, barring some tragic accident, there will be statutory overcrowding as a result of your taking this tenancy?" he would inevitably have had to have answered: "yes, of course". Whether the Claimant was aware of the terms of the statute or of the Defendant's Scheme cannot, in my judgment, make any difference. Here, the applicant entered into a tenancy for a one-bedroomed flat in the knowledge that he would be occupying the flat with his partner and their two children, four people thus occupying a one-bedroomed property. In my judgment that is sufficient for the Defendant to conclude that this was a deliberate act within the meaning of its policy whereby the Claimant does not come within band 1.

31. In my judgment Ms Tait, considering the circumstances of this case, adopted a sensible and lawful approach in finding that a family of four which moves into a

one-bedroomed flat where statutory overcrowding will become inevitable when the children grow older is fairly to be contrasted with a family which moves into accommodation which is appropriate for the number of family members at the time, but where the accommodation then becomes overcrowded because the family increases in size. She was entitled to consider whether it was fair on the other families on the waiting list that this family should be able to "jump the queue" where the accommodation was effectively unsuitable from the start. There is sufficient uncertainty as to whether additional children will be born for the Defendant reasonably to contrast and distinguish that situation with the inevitability that existing children will grow older.

32. Nor, in my judgment, was the Defendant under any obligation to carry out the kind of investigation suggested by the Claimant. In any case, there is a discretion on the Housing Officer as to how far it is necessary to investigate in order to reach a lawful decision, and, given her interpretation of the words in section 6.2 of the Scheme – an interpretation which I find to be lawful – Ms Tait rightly considered that no further investigation was required. The Claimant's submissions on this aspect depend on an interpretation of the Scheme which entails a finding of culpability, and thus fall when that interpretation is found to be incorrect.

33. For these reasons I consider that the Claimant's application for judicial review fails and the claim must be dismissed.