Neutral Citation Number: [2022] EWHC 3340 (Admin)

Case No: CO/160/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2022

Before:

Margaret Obi
(sitting as a Deputy High Court Judge)

- -

Between:

The King (on the application of TX)

Claimant

- and -

Adur District Council

Defendant

- -

Lindsay Johnson (instructed by **Hopkin Murray Beskine**) for the **Claimant**
Catherine Rowlands (instructed by **Adur District Council**) for the **Defendant**

Hearing date: 9 November 2022

- -

APPROVED JUDGMENT

Margaret Obi:

Introduction

1. This is an application for judicial review of Adur District Council's ('the Defendant's') housing allocations policy ('the policy'), insofar as it operates to preclude applicants in the Claimant's position, from being placed in the highest bands. The policy was first adopted in 2007. The current version is dated 6 February 2014. In accordance with the policy, those applicants who are permitted to join the housing register, are placed in one of four bands: A, B, C, or D. These bands reflect priority needs. Therefore, those in Band A have priority over those in Band B, and so on.

2. The Claimant has made three judicial review claims in respect of her application to the Defendant for housing. Following the first judicial review claim, ' JR1', the Claimant was accepted on the Defendant's housing register and placed in Band C. The present proceedings emanate from the second judicial review claim, relating to the decision to limit the Claimant to Band C. However, the Claimant was subsequently informed by the Defendant, on 8 July 2022, that she had been placed in Band D, due to outstanding housing-related debt. The Claimant requested a review of that decision, and her reduced banding is currently the subject of a separate judicial review claim - 'JR3'.

3. The Claimant is a survivor of domestic abuse. She asserts that limiting her to Band C amounts to indirect discrimination, contrary to section 19 of the Equality Act 2010. In the alternative, it violates Article 14 of the European Convention on Human Rights ('ECHR'), when read with Article 3 and/or Article 8, as without objective and reasonable justification, it fails to treat differently, persons whose situations are significantly different (see - *Thlimmenos v Greece* (2000) 31 EHRR 12).

4. These proceedings commenced in January 2022. Upper Tribunal Judge Church refused permission on the papers on 25 February 2022. A renewed application was considered by Richard Hermer KC (sitting as Deputy High Court Judge) on 28 April 2022; he also refused permission. However, on 14 July 2022, Popplewell LJ allowed an appeal against that refusal on limited grounds. He concluded that it is arguable that the Defendant's policy, discriminates against those in the Claimant's position, and granted permission on that basis. Permission was granted to pursue other grounds, only to the extent that the policy was discriminatory.

The Relief Sought

5. The Claimant invites the court to:

i. declare that the Defendant's policy unlawfully discriminates against those who are fleeing domestic abuse; and

ii. quash the decision made by the Defendant on 13 October 2021 ('the Decision Letter') and remit it for reconsideration.

Preliminary applications

6. Mr Johnson, on behalf of the Claimant, made two preliminary applications. The first application was to adduce additional witness statements from the Claimant and a trainee solicitor from Hopkin Murray Beskine, in response to points raised by the Defendant, in their evidence and detailed grounds. An application notice had been filed on 8 September 2022. In response to that application, Ms Rowlands invited the court to permit additional evidence from the Defendant's Homelessness Team Leader and the Homelessness Intervention and Prevention Officer. However, her primary submission was that additional evidence was not required from either party, as it is not relevant to the issues to be determined.

7. The application to admit the additional witness statements was provisionally granted, on the basis that I would determine their relevance and weight, if any, as and when the need arises.

8. Mr Johnson's second application was for the Claimant to be granted anonymity, which was opposed by Ms Rowlands.

9. For reasons I gave orally, I granted the anonymity application, notwithstanding the importance of open justice. The application was granted, due to the Claimant's history as a survivor of domestic abuse, and the ongoing risk to her safety as set out in her witness statements. I was satisfied that:

i. Non-disclosure of the identity of the Claimant is necessary (a) to secure the proper administration of justice, and (b) to protect her right to respect for private and family life under Article 8 of the ECHR; and

ii. there is no sufficient countervailing public interest in disclosure (CPR 39.2(4)).

10. The Order prevents publication of the name and address of the Claimant, her former home and address, her current location, and any other details which may lead to the identification of the Claimant or members of her family. The Order also restricts access by non-parties, to documents in the court record, other than those which have been anonymised.

Background

11. There are disputes between the parties about some aspects of the complex factual matrix. However, the core background to this claim is not materially in dispute and can be summarised as follows.

12. The Claimant has a long-standing history of mental health illness including a history of suicidal ideation and attempts at suicide via various means. She has been prescribed medication for her mental health and is under the care of a mental health team. The Claimant is originally from the Defendant's area and her family continues to live there. She is the tenant of a property in Brighton, let to her by Brighton & Hove Council. She fled that property in November 2020, following domestic abuse from her partner. She went to live with her mother in the Defendant's area. She applied to the Defendant as homeless and made an application to be placed on the Defendant's housing register for permanent accommodation.

13. On 8 April 2021, the Defendant accepted the initial housing duty towards the Claimant under section 189B of the Housing Act 1996 ('the Act'). In September 2021, the Defendant accepted the main housing duty under section 193(2) of the Act. The Claimant, after her claim was lodged, remained in accommodation arranged by the Defendant until she left, on or around 1 August 2022, citing a fear of violence.

14. As stated above, following JR1, the Claimant was accepted on the Defendant's housing register and placed in Band C. The Defendant in a letter dated 10 August 2021 agreed to treat the Claimant as having requested a review of that banding. The outcome of that review is the Decision Letter dated 13 October 2021. The Decision Letter informed the Claimant that she would meet the criteria for Band C7 (a sub-category within Band C) which states:

> "*Other unsatisfactory housing conditions (eg those with no fixed address, living with family or friends, lacking or sharing facilities, disrepair that cannot be easily remedied*."

The Decision Letter also refers to a medical report and states that:

> "*From the information provided there is no clear evidence that the housing conditions are having any adverse effect on the applicant's medical conditions, therefore no medical priority applies.*"

The Decision Letter concludes as follows:

> *"I would like to point out that under the qualification criteria (section 3.3.3) of the Register of Housing Need and Choice Based Lettings Policy, people who have not lived or worked in the area on a continuous basis for the last*

> *two years, but have a local connection to the area and an overriding need to move to the area will only be assessed as a band C or D. Your address history on your application form states that you were living at [tenancy address] up until 07/04/2021. I do however, believe that you should remain on the Housing Register … as you had to leave your accommodation in Hove due to an abusive partner and you feel that it is not safe for you to return to this property."*

15. In accordance with the pre-action protocol, the Claimant's solicitor sent a letter to the Defendant on 15 December 2021. A reply was received on 21 December 2021, restating that under paragraph 3.3.3(d) of the policy, the Claimant could only qualify for Bands C or D. In the same letter the Defendant also stated:

> "*The fact that [the Claimant] has been accepted onto the register is acknowledgment of the facts that give rise to her exceptional admission to the register and also to the main housing duty. However, that does not dictate that paragraph 3.3.3(d) should be disregarded.*

Further Developments Since the Hearing

16. There have been two further developments following the hearing on 9 November 2022. First, the Claimant has been offered new temporary accommodation in Worthing. Second, the Defendant has completed its review of the Band D decision and upheld that decision.

17. Both parties have provided written post-hearing submissions with regard to these developments. As well as a dispute between the parties as to the reason the Claimant was originally placed in Band C, there is also a dispute concerning the impact of the new developments on the matters with which the court is concerned.

18. I will address these issues below, but first I turn to the allocation policy and the key legal principles relevant to this claim.

The Defendant's Allocation Policy

19. The Defendant operates a "*Choice-based Lettings Policy*" which is intended to make the best use of social housing in the Defendant's area, match available housing to those most in need, and give people a more personal choice about where they wish to live.

20. The Defendant is in the process of consulting on a new allocation policy. The draft allocation policy requires applicants to have a local connection before being permitted access to the housing register, save that those without a local connection, are also entitled to be registered if, amongst other things, they are:

> "*…deemed to have a Reasonable Preference because they are…fleeing domestic abuse, violence or threats of violence that are likely to be carried out and cannot safely reside within any of the council areas where they have a local connection.*"

21. The current policy states that it is "…*open to people who are 16 years of age and over who are eligible and who qualify in accordance with this policy*." (paragraph 3.2).

22. The policy includes the following relevant paragraphs:

> ***3.3 Who cannot join the Register of Housing Need?***
>
> *Certain groups of people are ineligible because of their immigration status and the Council may disqualify applicants because of their unacceptable behaviour. In addition, the Localism Act 2011 enables Local Authorities to use their own qualifying criteria and the Statutory Guidance published in December 2013 encourages Councils to include a residency requirement as part of their qualification criteria.*
>
> *…*
>
> ***3.3.3 Qualification criteria***
>
> ***The following categories of people qualify to join the Register of Housing Need****:*
>
> *a) People who are currently residing in Adur and have resided in Adur for at least the last two years on a continuous basis. This residence must be proven and verified.*
>
> *b) People who do not reside in Adur but are employed in Adur …*
>
> *…*
>
> *d) People who do not live in Adur but live in accommodation that is not suitable for their housing needs, and have a local connection to Adur District Council as defined in Section 22 of this Policy, and who have an overriding proven need to move to the Adur area, and there is accommodation likely to become available in Adur that is suitable to meet their housing needs (people who qualify in this category will not take priority over people who already live in the area so will only be assessed in Band C or D and will not qualify to be in Band A or B). People wanting to move to receive or give support to immediate family members must*

demonstrate the levels of support that will be provided and why this cannot be provided in their current accommodation.

…

f) People who are currently living outside of Adur on a temporary basis (who had previously lived in Adur and have a local connection to Adur, or people living in accommodation provided by or arranged by Adur District Council, or other such exceptional circumstances, as approved by the Housing Services Manager (or equivalent).

***The following categories of people do not qualify to join the Register of Housing Need**:*

…

g) People who do not reside in Adur and do not have a local connection to Adur.

…

j) Current tenants (or people who live with current tenants) of Local Authorities or Registered Providers and the tenancy is not in either Adur or Worthing (except those who would qualify under criteria 3.3.3b and 3.3.3d).

5.2 How do the Bands give priority for housing?

Each Band has a number of different categories which reflect housing need. Applicants in Band A are assessed as having the highest levels of housing need and have the highest priority for housing. Applicants in Band D have the lowest priority for housing and are those assessed as having no housing need at the current time or their priority has been reduced.

Priority is given within each Band to applicants living in Adur with a local connection to Adur.

…

23. "*Local connection*" is defined in the policy, as those who are ordinarily resident in the Defendant's area for 6 out of the last 12 months, or 3 years out of the last 5 years, or those who have family members who have lived in the Defendant's area for 5 years.

24. The stated aim of the policy "*…is to house those most in need first*." (paragraph 3.5). Band A (the highest band) is restricted to applicants who currently reside

in the Defendant's area and includes those who are homeless, those with a high medical priority, and social housing tenants who require a priority transfer. Band B is also predominately for those who live in the Defendant's area, save for those with "*medium medical priority or priority on social and welfare grounds."* Band C is for those with *"an identified housing need*," including those with low medical priority, or priority on social and welfare grounds, and those "*who need to move to a particular area in the Adur District where failure to meet that need would cause hardship, e.g. to give or receive support*." Band D includes those with no housing need at the current time, or whose priority has been reduced for reasons such as housing-related debt owed to the Defendant, another local authority, or Registered Provider. Applicants can move from one band to another if their circumstances change, and their new circumstances place them into a different band. They can also move up or down within a band depending on their current situation. For example, from A1 to A2, or C4 to C3.

25. Applicants can "*bid*" for properties that are advertised. Priority, when there are multiple bidders, is given to the bidder in the highest band. Within a band, priority is determined by the length of time an applicant has been in that band (paragraph 3.5).

Key Legal Principles

Allocation of Housing

26. Part VI of the Act ('Part VI') deals with the allocation of permanent social housing. There is no statutory duty on a local housing authority to provide social housing in their area. However, if they do provide social housing, they are obliged to have an allocation scheme for determining priority. Although a local housing authority may allocate accommodation in such a manner as they consider appropriate, that liberty is subject to the provisions of Part VI (see - section 159(7) of the Act). By section 160ZA of the Act, an authority may only allocate housing to eligible and qualifying persons. The power to establish qualification criteria is subject to the duty to provide a "*reasonable preference*" to designated groups of people, as set out in section 166A(3) of the Act, which includes people who are homeless and those owed the main housing duty under section 193(2).

27. The "*reasonable preference*" provisions are long established. Section 166A(3) replaced the Housing Act 1985 provisions which were materially identical and had themselves replaced equivalent provisions dating back many years. In *R (Ahmad) v Newham LBC* [2009] UKHL 14, [2009] PTSR 632, in respect of the predecessor provisions, the lead judgments were delivered by Baroness Hale

and Lord Neuberger, with whom the other Supreme Court Justices agreed. Baroness Hale stated as follows:

> *"15. ... The Act only requires a "reasonable preference" to be given to particular groups of people. It cannot be said that a scheme for identifying which individual households are in greatest need at any particular time is the only way in which a reasonable council might decide to give reasonable preference to those groups. It is the groups rather than the individual households within them which have to be given reasonable preference.*
>
> Lord Neuberger stated:
>
> *"46. ...as a general proposition, it is undesirable for the courts to get involved in questions of how priorities are accorded in housing allocation policies. Of course, there will be cases where the court has a duty to interfere, for instance if a policy does not comply with statutory requirements, or if it is plainly irrational. However, it seems unlikely that the legislature can have intended that Judges should embark on the exercise of telling authorities how to decide on priorities as between applicants in need of rehousing, save in relatively rare and extreme circumstances. Housing allocation policy is a difficult exercise which requires not only social and political sensitivity and judgment, but also local expertise and knowledge."*

28. Therefore, in *R (HA) v Ealing LBC* [2016] PTSR 16 (where the claimant was excluded from the housing register because despite being in a reasonable preference category, she had not been resident in the borough for five years) Goss J held that:

> *"Although a residency requirement is an entirely appropriate and encouraged provision in relation to admission onto a social housing list, it must not preclude the class of people who fulfil the "reasonable preference" criteria. The defendant's policy does not provide for the giving of reasonable preference to prescribed categories of persons as required by section 166A(3) of the Act. In this respect the policy is unlawful."*

29. More recently in *R (Montero) v Lewisham LBC* [2021] EWHC 1359 (Admin) Henshaw J referred to the *HA* case and went on to state that:

> *"47. ...the House's answer to the second question in Ahmad makes clear that, as it is only "reasonable" preference that must be given, it is lawful for a scheme to have the effect that persons outside the reasonable preference categories will sometimes be accommodated in priority to persons within the categories."*

Indirect Discrimination

The Equality Act 2010

30. The Equality Act 2010 prohibits discrimination against persons with prescribed protected characteristics. Discrimination may be direct, where a person is treated less favourably because of a protected characteristic, or indirect (as alleged in this case), where an apparently neutral provision, criterion, or practice (PCP) puts people who share a protected characteristic at a group disadvantage.

31. The Equality Act 2010 provides (as far as is relevant) as follows:

> ***19 Indirect discrimination***
>
> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> > *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> >
> > *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> >
> > *(c) it puts, or would put, B at that disadvantage, and*
> >
> > *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*
>
> *(3) The relevant characteristics are –*
>
> > *…*
> >
> > *sex*
> >
> > *…*

32. "*Disadvantage*" is not defined. However, it includes denial of an opportunity and as stated in paragraph 5.10 EHRC Services Code: "*it is enough that the person can reasonably say that they would have preferred to be treated differently*." To assess whether a protected group is subject to a particular disadvantage by the application of a PCP, pools for comparison can be drawn.

33. In *Essop v Home Office* [2017] 1 WLR 1343 Baroness Hale stated:

> *"41. ...the Statutory Code of Practice 2011, prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006 , at para 4.18, advises that: "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively."*

34. Having identified the pools for comparison, it is necessary to compare the impact of the PCP on each group. Indirect discrimination requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. However, there is no requirement that every member of the group is disadvantaged.

35. In *Essop* Baroness Hale also stated:

> *"25. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment—the PCP is applied indiscriminately to all—but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."*

Articles 3, 8 and 14

36. Articles 3, 8, and 14 of the European Convention on Human Rights (ECHR) provide as follows:

> "*ARTICLE 3*
>
> *Prohibition of torture*
>
> *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of public health or morals, or for the protection of the rights and freedoms of others.

…

ARTICLE 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Allocations and discrimination

37. The courts have held, in the context of housing allocation schemes, that qualifying criteria in favour of working households, discriminated against disabled people, as they were less likely to be able to satisfy the requirement of being in work than non-disabled people (see – *R (H) v Ealing LBC* [2017] EWCA Civ 1127, [2018] PTSR 541). The courts have also found that a 10- year residence requirement discriminated against non-UK nationals (see - *R (Ward) v Hillingdon LBC* [2019] EWCA Civ 692, [2019] PTSR 1738).

38. The guiding principles that can be drawn from these cases are as follows:

    i. The comparison to be drawn is between groups, not individuals (*Ward* [paragraph 57]).

    ii. A scheme does not need to put every member of the group sharing the protected characteristic at a disadvantage (*H* [paragraph 65], Ward [paragraph 58]).

iii. The comparator groups are those who share the protected characteristic and those who do not; the fact that some in the comparator group are disadvantaged does not negate the discrimination if a higher proportion of the protected group, suffers that disadvantage (*Ward* [paragraph 59]).

iv. In considering justification, the scheme as a whole is to be considered (*H* [paragraph 81]) and it is for the policymaker to justify the PCP (*Ward* [paragraph 76]).

v. The aim is equality of outcome (*Ward* [paragraph 86]).

39. In *Thlimmenos* it was stated that the right not to be discriminated against under Article 14 is violated, when states, without an objective and reasonable justification, fail to treat differently, persons whose situations are significantly different. (See also *R (MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (QB); [2013] P.T.S.R. 1521 at [paragraph 38]).

Submissions

Claimant's Submissions

40. The Claimant submits that she is unable to satisfy the two-year residence rule in 3.3.3(a) and only falls for inclusion in the scheme via paragraph 3.3.3(d).

41. Put simply, the Claimant's case is that:

i. the Defendant's allocation policy amounts to a PCP;

ii. the Claimant has the protected characteristic of sex;

iii. paragraph 3.3.3(d) of the Defendant's allocation policy puts women fleeing domestic abuse at a particular disadvantage when compared with men, as women are overwhelmingly more likely to be the victim of domestic abuse, and have to move to another area as a result;

iv. the disadvantage cannot be justified, and in any event, no evidence of justification has been provided.

42. Therefore, it is submitted that the decision to limit the Claimant to Band C or D, indirectly discriminates against her in breach of section 19 of the 2010 Act, having regard to her protected characteristic of sex.

43. In the alternative, it is submitted that there is discrimination, in the *Thlimmenos* sense, because the policy fails to acknowledge that some people, affected by the policy, may be in different situations. It is submitted that women fleeing

domestic abuse, from a different local authority area, are discriminated against because they are treated the same as all other applicants who are not resident in the Defendant's area.

Defendant's Submissions

44. The Defendant submits that the Claimant is a person who was not resident in its area and was (and still is) the tenant of a property in another local housing authority area. As such, the Claimant is prima facie excluded from the housing register, by reason of paragraph 3.3.3(j) which Ms Rowlands submits is "*part of the whole operation of 3.3.3."* However, the Claimant is "*included back into the register*" by reason of section 3.3.3(d), but that provision expressly limits people coming from outside the Defendant's area to Bands C and D. The reason for this is to ensure that housing in the Defendant's area is allocated to those with the greatest connection to the district.

45. The Defendant accepts that the Decision Letter did not refer to paragraph 3.3.3(j) in terms. However, it is submitted that the Decision Letter did refer to the Claimant's tenancy in Brighton and she would inevitably be caught by that provision if the decision were to be retaken.

46. The Defendant further submits that limiting the Claimant to Band C is not discriminatory treatment that arises from her status. Her status as a victim of domestic abuse is the reason for her preferential treatment; i.e. being allowed onto the register. However, even if limiting the Claimant to Band C was discriminatory by virtue of section 19 of the Equality Act 2010, or in the *Thlimmenos* sense, such discrimination would be proportionate and justified.

Discussion

Are the additional witness statements relevant?

47. It is fundamentally important to bear in mind, that permission was granted to challenge the legality of the Defendant's allocation policy, which would have to apply to everyone who applies for social housing. Therefore, I am not determining this case from the point of view of the Claimant's housing needs, save for her right to have her housing application considered in accordance with a lawful allocation policy.

48. For these reasons, there is no need for the court to delve into the disputed facts as they do not affect the key issues in this case. As a consequence, the additional

witness statements are of no assistance in respect of the discrete issues that the court is required to determine. To that extent, I agree with the primary submission made by Ms Rowlands, at the outset of the hearing, that this case is not fact-dependent, and there is no need for the court to consider the additional witness statements from either party.

Is this claim academic?

49. For the same reasons referred to in paragraph 47 above, I reject Ms Rowlands' submission, that the recent banding review renders this claim academic, on the basis that: (i) regardless of the outcome of these proceedings the Claimant will be placed in Band D, and (ii) this claim will be superseded by JR3.

50. The Claimant, as a person with standing, has been granted permission to request the court to review whether the Defendant's allocation policy discriminates against those fleeing domestic abuse, because they are less likely to satisfy the residency requirement, and are more likely to be caught by the banding restriction imposed by paragraph 3.3.3(d). I accept Mr Johnson's post-hearing written submission that this issue affects people in the Claimant's position across the Defendant's area and is not limited to her personal circumstances. Therefore, I am satisfied that there is no proper basis for concluding that the claim has become academic.

51. Furthermore, in the event that the original banding decision is quashed and remitted for reconsideration, this court cannot pre-empt what the outcome would be, as it will depend on the circumstances that prevail at the time. Nor can the court pre-empt the outcome of JR3. In any event, the provision of temporary accommodation under Part VII of the Act does not impact these proceedings, which are concerned with the Defendant's allocation policy adopted under Part VI. It is my understanding, that the JR3 claim is to be amended to reflect the allegation that there has been a breach of the requirement in the Equality Act 2010 to make reasonable adjustments. I am satisfied that there is no proper basis for concluding that this claim will be superseded by JR3.

52. In these circumstances, although the post-hearing developments have an impact on JR3, I conclude that they have no bearing on the issues with which this court is concerned.

Does the Defendant's policy breach the Equality Act 2010?

53. There is no dispute between the parties that the Defendant's allocation policy is a PCP. Nor is there any dispute that the Claimant has the protected characteristic

of sex. Therefore, during the hearing, the focus was on the design and application of paragraph 3.3.3(d) of the policy and the critical question as to whether the operation of the scheme amounted to discrimination against women fleeing domestic abuse or violence.

54. I accept that paragraph 3.3.3(j) is part of the whole operation of paragraph 3.3.3. However, the Defendant's submission that the Claimant is prima facie excluded from the housing register, but then accepted onto the register as an exception, unnecessarily complicates the issue and does not work on the face of the policy itself. Put simply, paragraphs 3.3.3(d) and 3.3.3(f) allow applicants to qualify if they have a local connection and meet the additional criteria, whilst 3.3.3(j) confirms those who are excluded. Once an applicant qualifies, they are placed in one of the four bands. A natural reading of the Decision Letter is that the Claimant had been accepted on the Defendant's register under 3.3.3(d) because it is not reasonable for her to occupy her tenancy in Brighton. The Decision Letter does not refer to 3.3.3(j). Nor is there any reference to the Claimant being excluded. As submitted by Mr Johnson, the Defendant's reliance on 3.3.3(j) bears the hallmarks of retrospective justification which is not supported by any evidence. However, even if the Claimant surrendered her tenancy, she would still fall within paragraph 3.3.3(d) and would remain limited to Band C and D. For these reasons, I am satisfied that the tenancy issue is irrelevant to the operation of paragraph 3.3.3(d) and does not advance this aspect of the Defendant's case.

55. One of the arguments put forward, on behalf of the Defendant, is that in considering whether 3.3.3(d) amounted to indirect discrimination, it is necessary to consider the policy "*as a whole*." This is the same argument that was advanced by the local authority in ***R (H) v Ealing London Borough Council (Equality and Human Rights Commission intervening)*** [2018] PTSR 541, which the Court of Appeal had "*no hesitation in rejecting*". Sir Terence Etherton MR stated:

> *"59. In short, it is contradictory of Ealing to concede, on the one hand, that for the purposes of section 19(2) of the EA 2010 the WHPS is a PCP, and, on the other hand, to seek to rely on Ealing's housing policy as a whole to rebut the PCP's discriminatory impact on the relevant protected groups. What this highlights is that the matters on which Ealing relies, the so-called safety valves, are matters which properly are relevant to justification under section 19(2)(d) of the EA 2010 rather than the existence of indirect discrimination under section 19(2)(a)–(c) of the EA 2010."*

The same applies to this case. Therefore, it is clear that it is necessary to consider paragraph 3.3.3(d) separately.

56. Another argument relied upon by the Defendant is that the Claimant has been given preferential treatment. According to this line of argument, the Claimant has been treated preferentially as she has been exempted from the residency requirement and has been allowed on to the register as an exception to the normal rule. She has also been treated preferentially when compared to others, who currently live outside the Defendant's district, but wish to move to the area. In other words, rather than being at a disadvantage, the Claimant has an advantage over others.

57. I reject this argument. I accept the submission, made by Mr Johnson, that advantage in some other respect, does not remedy indirect discrimination. All allocation policies are unequal and as observed by Garnham J in R v *XC* Southwark [2017] EWHC 736 (Admin): "*Every tweak to the scheme to benefit one individual or one class of applicant is likely to have an adverse effect on another…*". At most the 'advantage' argument might go to justification.

58. In my judgment, it is perfectly plain that the effect of 3.3.3(d) is to indirectly discriminate against women fleeing to the Defendant's area, due to domestic abuse. Paragraph 3.3.3(d) appears to be a neutral provision, in that it applies to everyone, but women are put at a disadvantage when compared to men, as they are significantly more likely to be the victims of domestic abuse and, as a result, have to move to another area. The Claimant returned to live in the Defendant's area because she was fleeing domestic abuse from another local authority area. This leads to a particular disadvantage because the Claimant, notwithstanding that she is entitled to a reasonable preference because she is owed the main housing duty under section 193(2) of the Act, is limited to Bands C or D and therefore less likely to obtain an allocation of social housing. I am satisfied that the Claimant has established a sufficient causal link between her protected characteristic of sex and the application of the qualification criteria.

59. The Equality Act 2010 does not require the Claimant to show why paragraph 3.3.3(d) puts her at a particular disadvantage when compared with others; it is enough that there *is* a disadvantage. Nor is there any requirement for the Claimant to produce statistical evidence, or evidence of the actual effect of the PCP. Nonetheless, statistical evidence was provided in the 2015 *HA* case where it was stated that:*"[d]ata reveals that 89% of victims who experience four or more incidents of domestic violence are women and all available data shows that those experiencing domestic violence are overwhelmingly likely to be women.*" These statistics are unlikely to have changed significantly.

60. The draft allocation policy is of limited assistance, not least because the existence of another potential scheme, does not mean that the current scheme is discriminatory. However, the draft allocation policy appears to recognise that there is a disadvantage to those fleeing domestic abuse from another area, as it provides that those who are homeless in such circumstances are qualified to join

any band under the scheme. Similarly, the statutory guidance issued by the Secretary of State for Housing, Communities, and Local Government (and updated on 25 January 2022) also appears to recognise that those fleeing domestic abuse are at a disadvantage. Paragraph 20 of the guidance states:

> "*The Secretary of State…strongly encourages all local authorities to exempt from their residency requirements those who are living in a refuge or other form of safe temporary accommodation in their district having escaped domestic abuse in another local authority area.*"

61. In any event, I am satisfied that the disadvantage of paragraph 3.3.3(d) to those fleeing domestic abuse is obvious; it is equally obvious that the effect of this provision is significantly more disadvantageous to women for the reasons stated above. To the extent that it is suggested that paragraph 3.3.3(j) operates on the basis that the mere fact that the Claimant already has a tenancy, is a sound basis for reducing her reasonable preference, it is itself discriminatory. This is because it disadvantages those with a social housing tenancy, who have been compelled to flee that tenancy, as a result of domestic abuse. Once again, this puts women at a particular disadvantage when compared with men for the same reasons as stated above.

62. In these circumstances, I am satisfied that the policy and its application to the Claimant, amounts to a breach of section 19(2) of the Equality Act 2010 by being indirectly discriminatory.

Justification

63. It is for the Defendant to show that the discriminatory PCP is justified as a proportionate means of achieving a legitimate aim.

64. Although Ms Rowlands strongly resisted the contention that the effect of paragraph 3.3.3(d) is discriminatory, a significant proportion of her submissions went to the issue of justification. She addressed the court with regards to the absence of a right to a house and "*absolute access*" to the scheme, the severe shortage of social housing in the Defendant's area, the Claimant's tenancy, and the power to include localism provisions to ensure that housing goes primarily to those with the greatest connection to the district. In support of her submission, Ms Rowlands relied on the statistics in the witness statement of Ms Miranda Butler - Accommodation Team Leader for Housing Needs for the Defendant's area and Worthing Borough Council, dated 17 August 2022. Ms Butler stated that as of 16 August 2022, on the Defendant's register, there were 369 applicants for a one-bedroom property and in 2021-2022 only 13 such properties were let through the register, other than sheltered housing. Ms Rowlands also submitted

that the Claimant's entitlement to a reasonable preference does not mean that she must have priority. To prioritise the Claimant, would potentially have a huge impact on the other people on the waiting list for housing. In addition, the court should be slow to intervene as the Defendant is best placed to prioritise housing needs in its area.

65. However, no evidence was led to demonstrate that the Defendant had specifically considered the effect of the reduction in banding on women fleeing domestic abuse and had conducted a proportionality exercise. It is not for the court to fill in the gaps. I accept the submission made by Mr Johnson that the localism point does not assist the Defendant, as the Claimant has a local connection. But for that local connection, she could not fall within paragraph 3.3.3(d). Furthermore, there can be little doubt that removing the limitation to Bands C and D, for people in the Claimant's circumstances, is likely to have a knock-on effect on other people on the housing register. But there was no evidence before the court that the Defendant had addressed whether the effect of 3.3.3(d) on women fleeing domestic abuse from outside the area was proportionate; and if so, why.

66. For these reasons, I conclude that the PCP has not yet been justified.

The alleged violation of Article 14 in respect of Article 3 and/or Article 8

67. The above conclusions are sufficient to resolve the claim in favour of the Claimant. Therefore, there is no need to determine the alternative argument based on Articles 3, 8, and 14 of the ECHR.

Relief

68. Although the Defendant has not yet justified the indirect discrimination, it is still open to them to do so, by providing evidence that specifically addresses the impact of paragraph 3.3.3(d) on women fleeing domestic abuse or violence.

69. I was invited by Mr Johnson, at the close of his oral submissions, to quash the decision made by the Defendant on 13 October 2021 and make a different declaration from that sought in the claim form, to the effect that the PCP discriminates unlawfully and has not been justified. I am prepared to grant relief in those terms. It reflects the findings I have made and provides the Defendant with the opportunity to re-make the decision and justify the discriminatory effect, if appropriate.

Conclusion

70. I am grateful to counsel and those instructing them. The parties are invited to draw up a draft order which reflects my conclusions and agree on the terms of any consequential matters including costs.

Post-script

71. After this judgment was sent to the parties in draft for the usual typographical corrections etc, I received further submissions from the Defendant with regard to costs and relief. The purpose of this post-script is to solely address the issue of relief.

72. In essence, the Defendant invites the court to refuse relief because it will be of no benefit to the Claimant. In other words, the Defendant repeated the submissions made at length during the oral hearing and in post-hearing submissions. Those submissions were considered and rejected by the court and there is no proper basis for attempting to have yet another bite of the cherry. For the avoidance of doubt, I reiterate paragraphs 50 and 51 above.