Neutral Citation Number: [2023] EWHC 1045 (Admin)

Case No: CO/2044/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2023

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

THE KING ON THE APPLICATION OF SEYYED MOHAMMAD MAHDI JABERI	**Claimant**
- and -	
CITY OF WESTMINSTER	**Defendant**

- -
- -

Lindsay Johnson (instructed by **Hopkin Murray Beskine Solicitors**) for the **Claimant**
Ian Peacock (instructed by **Bi-Borough Legal Services**) for the **Defendant**

Hearing dates: 21 February 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 4 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE :

A. Introduction

1. This claim for judicial review concerns both the homelessness provisions of Part VII of the Housing Act 1996 ('the 1996 Act') and the rules governing the allocation of local authority housing contained in Part VI of that Act.

2. Permission to bring this claim was granted by Margaret Obi, sitting as a Deputy High Court Judge, at an oral hearing on 10 November 2022, to pursue three grounds of judicial review, namely:

> "a. The defendant is in breach of its duty under section 193(2) to provide the claimant with suitable accommodation.
>
> b. The defendant's refusal to place the claimant in the medical Priority Group, and/or section 6.1.2 of the policy which prevents a homeless applicant from entering the medical priority group, denies him a reasonable preference to which he is entitled by statute and is therefore unlawful as both a breach of statutory duty and/or as being unreasonable in the Wednesbury sense.
>
> c. The defendant's failure to provide sufficient information to permit the applicant to determine whether housing accommodation appropriate to his needs is likely to be available to him and, if so, how long it is likely to be before such accommodation becomes available for allocation to him is a breach of the duty under section 166A(9)(a)(ii)."

B. The law

Part VI of the Housing Act 1996

3. Part VI of the 1996 Act is concerned with the process for distributing (or to use the words of the statute, "allocating") tenancies of social housing. Part VI does not impose obligations on local authorities to secure accommodation for applicants: it focuses on the procedure for allocating the available housing stock. There is a duty to have and to operate a lawful allocation policy: *R (Ahmad) v Newham London Borough Council* [2009] UKHL 14, [2009] PTSR 632, Baroness Hale, [13]. In view of the severe shortage of social housing, it is possible for an applicant to remain on the housing register for life without ever succeeding in a bid for accommodation.

4. Section 159 of the 1996 Act provides, so far as relevant:

> " (1) A local housing authority shall comply with the provisions of this Part in allocating housing accommodation.
>
> (2) For the purposes of this Part a local housing authority allocate housing accommodation when they-
>
> > (a) select a person to be a secure or introductory tenant of housing accommodation held by them,

(b) nominate a person to be a secure or introductory tenant of housing accommodation held by another person or,

(c) nominate a person to be an assured tenant of housing accommodation held by a private registered provider of social housing or a registered social landlord.

…

(7) Subject to the provisions of this Part, a local housing authority may allocate housing accommodation in such manner as they consider appropriate."

5. Section 160ZA provides for accommodation to be allocated only to eligible and qualifying persons. Eligibility depends on an applicant's immigration status. The local housing authority has a discretion to decide what classes of persons are, or are not, qualifying persons.

6. The relevant subsections of s.166A provide:

"**Allocation in accordance with allocation scheme: England**

(1) Every local housing authority in England shall have a scheme (their 'allocation scheme') for determining priorities, and as to the procedure to be followed, in allocating housing accommodation. For this purpose 'procedure' includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are to be taken.

(2) The scheme must include a statement of the authority's policy on offering people who are to be allocated housing accommodation –

(a) a choice of housing accommodation; or

(b) the opportunity to express preferences about the housing accommodation to be allocated to them.

(3) As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to -

(a) people who are homeless (within the meaning of Part 7);

(b) people who are owed a duty by any local housing authority under section 190(2), 193(2) or 195(2) (or under section 65(2) or 68(2) of the Housing Act 1985) or who are occupying accommodation secured by any such authority under section 192(3);

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

(d) people who need to move on medical or welfare grounds (including grounds relating to disability); and

(e) people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others).

The scheme may also be framed so as to give additional preference to particular descriptions of people within one or more of paragraphs (a) to (e) (being descriptions of people with urgent housing needs) ...

(5) The scheme may contain provision for determining priorities in allocating housing accommodation to people within subsection (3); …

(6) Subject to subsection (3), the scheme may contain provision about the allocation of particular housing accommodation –

(a) to a person who makes a specific application for that accommodation;

(b) to persons of a particular description (whether or not they are within subsection (3)).

…

(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;...

(11) Subject to the above provisions, and to any regulations made under them, the authority may decide on what principles the scheme is to be framed.

..

(14) A local housing authority in England shall not allocate housing accommodation except in accordance with their allocation scheme."

Part VII of the Housing Act 1996

7. The duties of a local housing authority in England towards those who face the immediate problem of homelessness are found in Part VII of the 1996 Act. This Part contains a graduated series of provisions which, in differing circumstances, impose obligations on a local housing authority to secure temporary accommodation for an applicant. The relevant duty in this case, which is contained in s.193(2) and known as the 'main housing duty', is "*the highest duty which is owed under Part VII*": *Birmingham City Council v Ali* [2009] UKHL 36, [2009] 1 WLR 1506, Baroness Hale, [19].

8. Section 193 provides, so far as relevant:

> "(1) This section applies where the local housing authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally.
>
> (2) Unless the authority refer the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant.
>
> (3) The authority are subject to the duty under this section until it ceases by virtue of any of the following provisions of this section …"

9. Section 206(1) provides:

> "A local housing authority may discharge their housing functions under this Part only in the following ways –
>
> (a) by securing that suitable accommodation provided by them is available,
>
> (b) by securing that he obtains suitable accommodation from some other person, or
>
> (c) by giving him such advice and assistance as will secure that suitable accommodation is available from some other person."

10. In *R (Elkundi) v Birmingham City Council* [2022] EWCA Civ 601, [2022] QB 604 Lewis LJ (with whom Peter Jackson and Underhill LJJ agreed) held:

> "77. Section 193(2) defines the content of the duty. The local authority 'shall secure that accommodation is available' for occupation. 'Shall' in this context means 'must'. 'Secure' in this context means that the housing authority is responsible for ensuring that accommodation 'is available for occupation'. 'Is available' means that suitable accommodation is to be available from the time when the duty is owed, that is from the time when the local housing authority is satisfied that the person meets the criteria so that the duty is owed to him. The natural reading of those words, read in context, is that, once the duty is owed, the

obligation on the housing authority is to ensure that accommodation is available for that person. In that sense, the duty is immediate, arising when the duty is owed. It is non-deferrable and unqualified, in that the duty is to secure that accommodation 'is available for occupation', not that accommodation will become available within a reasonable period of time.

…

81. For those reasons, I consider that the Judge was correct to hold that section 193(2) of the 1996 Act imposed an immediate, non-deferrable and unqualified duty and to make a declaration to that effect. It is, however, important to bear in mind that that decision deals with the time when the duty arises and its nature. The duty itself is a duty to secure that accommodation is available for occupation and, by virtue of section 206, that accommodation must be suitable. The duty will continue until it comes to an end in the circumstances prescribed by section 193. Whilst the duty is owed, it is to be performed by securing that suitable accommodation is available. Suitability is, as the Judge said, a flexible concept. It will include factors such as the nature of the accommodation, the length of time that the homeless person has been in the accommodation and his and his family's needs. The lack of alternative accommodation may also be a factor affecting what is suitable in the short or medium term as may the fact that the housing authority has limited resources available to secure accommodation. There may be other factors which are relevant either generally or in a particular case. This judgment is not intended to suggest any exhaustive list of factors capable of being relevant to the question of suitability.

82. In other words, the duty to secure that suitable accommodation is available does not mean that permanent accommodation suitable for long term occupation must be provided immediately once the duty is owed. Different accommodation may be provided at different times to ensure that the duty is being performed. There may be stages on the way to the offer of secure accommodation under Part VI, or an assured tenancy in the private sector. What is suitable may, therefore, evolve or change over time depending on all the circumstances.

83. If, however, a local authority decides that the accommodation that is currently being occupied is unsuitable, then it follows that it must provide other accommodation which is suitable. …" (Emphasis added.)

C. The defendant's policies

Housing Allocation Scheme

11. In accordance with s.166A of the 1996 Act, the defendant has published an allocation scheme. At the time relevant to this claim the scheme was entitled "Housing Allocation Scheme March 2020" ('the Allocation Scheme'). The Allocation Scheme includes the following:

> "1.1.9 The Director of Housing has discretion to give such additional preference as the Director considers appropriate to any applicant who, in the opinion of the Director, has pressing housing needs.
>
> …
>
> 2.2.5 The Council may make direct offers to ensure best use is made of its house stock for those prioritised according to their mobility category (see section 2.7 for a full definition of mobility categories). Properties for wheelchair users (identified as mobility category 1 and 2) will be excluded from Choice Based Lettings and will be the subject of direct offers to suitable applicants.
>
> 2.4. **Priority Groups and Lists**
>
> 2.4.1. … The purpose of the Priority Groups is to give reasonable preference to those identified within section 167 of the Act and to assist certain other groups of applicants chosen by the Council…
>
> 2.4.3. <u>The Council allocates available properties amongst the Priority Groups in accordance with the projections contained in the annual report</u> (subject to review) <u>and subject to the size of accommodation required</u>. The Council will monitor the outcome of all lettings during the year. <u>If some Priority Groups are not getting the expected proportion of properties, the Council will seek to address any imbalance</u> by, for example, advertising certain properties exclusively to certain Priority Groups.
>
> 2.4.4. Mobility requirements of applicants within Priority Groups are taken into account when matching properties. See section 2.7.
>
> …
>
> 2.4.7. <u>Priority applicants will be registered on one list only (the most appropriate list according to their housing need)</u> and will receive one set of 'priority points' according to that priority group (as set out in section 2.6.33).
>
> …
>
> 2.6. **Points**

> 2.6.1. Applicants are placed into a Priority Group and given points according to their priority need. Applicants requiring family sized accommodation will receive points as set out in section 2.6.33 (table 1) …
>
> 2.6.2. Applicants will be prioritised according to their points and, if equal, their eligible date unless the scheme provides otherwise."

12. Table 1 in §2.6.33 identifies six Priority Groups: "*Renewal Tenants*", "*Under-occupation*", "*Pressing Housing Need*", "*Medical (people who need to move on medical or welfare grounds including grounds relating to disability)*", "*Overcrowding*" and "*Homeless*". The Medical Priority Group is divided into two Priority Lists: those on the Transfer List receive 250 priority points, while those on the Waiting List receive 200 priority points. Those in the Homeless Priority Group receive 150 priority points. Applicants in both the Medical and Homeless Priority Groups may be eligible for additional points as follows: Workers (50), Residence (50), Armed Forces (10).

13. Section 2.7 of the Allocation Scheme states:

> "2.7. **Mobility Criteria**
>
> 2.7.1. All applicants (including household members) eligible to participate in Choice Based Lettings will be assessed to see what type of property matches their mobility and access requirements. All applicants and all properties will be given a Mobility Category.
>
> …
>
> 2.7.3. **Mobility Category Applicants** …

Category 1	Applicants who have been assessed by a NHS doctor as having a diagnosis which requires them permanently to use a wheelchair all the time
Category 2	Applicants who have been assessed by a NHS doctor as having a diagnosis which requires them permanently to need a home which is wheelchair accessible but may not need to use it inside the home
Category 3	Applicants with severe mobility problems who require a ground floor or lifted property with level access and no internal stairs
Category 4	All other applicants

> 2.7.4. **Property Mobility Category**

Category 1	Property is fully wheelchair accessible
Category 2	Property is suitable for a person who needs a wheelchair outside the home but can manage in the home without a wheelchair

Category 3	Property with no more than 3 steps to access property and no internal stairs. May be lifted.
Category 4	All other properties.

2.7.5. Property Mobility Category 1 and 2 properties will not be advertised. They will only be offered to Mobility Category 1 and 2 applicants.

…

2.7.7. Property Mobility Category 3 and 4 properties will be advertised. The property advertisement will identify which priority group may bid.

2.7.8. It is likely that Property Mobility Category 3 properties will be unsuitable for Mobility Category 1 and 2 applicants and that section 2.2.14 will apply. Subject to that, those in Mobility Category 1 will have priority over those in Mobility Category 2 and they will have priority over those in Mobility Category 3 who will have priority over those in Mobility Category 4.

2.7.9. When persons within the same Mobility Category bid for an advertised Mobility Category property, priority will depend upon who has the most points and, if equal, whose application is the earliest in time."

14. Section 6 of the Allocation Scheme states, so far as relevant:

"6. **Medical Priority**

6.1. **People who need to move on Medical, Disability, Welfare or Hardship grounds**

6.1.1. The Housing Act 1996 Section 166A as amended requires the housing authority to give reasonable preference to people who need to move on medical or welfare grounds (including grounds relating to a disability) and to people who need to move to a particular locality in the district where failure to meet that need would cause hardship (to themselves or to others).

6.1.2. <u>Accepted homeless households living in temporary accommodation will not be eligible for this priority. It is the Council's statutory duty to ensure that suitable temporary accommodation is provided</u>. See also section 8.1.13.

…" (Emphasis added.)

15. Section 7 of the Allocation Scheme is headed "*Overcrowding*" and it is concerned with the priority group consisting of "*people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions*". Section 7.7.1, in similar terms to §6.1.2, states:

"Homeless applicants living in temporary accommodation will not be eligible for this priority. It is the Council's statutory duty to ensure suitable temporary accommodation is provided, therefore should it arise that a household has an HHSRS [Housing Health and Safety Rating System] risk rating over 5000 or is statutorily overcrowded, they will be prioritised for a move within the temporary accommodation stock."

16. Section 8 of the Allocation Scheme states, so far as relevant:

"8. **Homeless**

8.1. **Households to whom Westminster City Council has accepted a statutory duty under the Housing Act 1996 as amended**

8.1.1. Households accepted as homeless will be given points as set out in section 2.6.33. …

8.1.13. Homeless applicants with medical grounds for a move will be assessed to see whether they fall into a mobility category as set out in section 2.7.

8.1.14. All homeless households will be registered for the correct size property they are entitled to in line with the Council's bedroom standard (see section 12). For those requiring a larger property on medical grounds, the Council's Medical Advisor will provide advice on whether the person's medical condition means they are unable to share a bedroom, or in the case of a single applicant, whether they would benefit from having a separate bedroom. This advice will be considered by the appropriate Service Manager when deciding if there are sufficient medical reasons to register the household for a larger property. See 8.1.15 if an additional room is required for a carer.

…" (Emphasis added.)

17. Section 14 of the Allocation Scheme provides, so far as relevant:

"**Information and Reviews**

14.1. **Requesting Information and Reviews**

14.1.1. An applicant has the right to request;

a) Such general information as will enable him to assess 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 166A (3) of the Housing Act 1996); and

> b) Such general information as will enable him to assess 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;
>
> c) The Council 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 accommodation to him;
>
> …
>
> 14.1.4. The Council will provide information to applicants on request as to which, if any, Priority Group they are in under Choice Based Lettings; and their points and position in that group; and the estimated number of properties of the size required by the applicant expected to become available for letting during the financial year." (Emphasis added.)

Supply and Allocation of Social and Intermediate Housing 2022/23

18. The current "*projections*" referred to in §2.4.3 of the Allocation Scheme are contained in the Supply and Allocation report for 2022-23 which states:

> "1.1. Social housing lettings 2022/23
>
> In line with the Housing Allocations Scheme, the annual Supply and Allocation of Social Housing Report estimates the proportion of social lettings to be made to each of the priority groups on the council's waiting list, based on available supply (known as projections). The recommended projections for 2022/23 are summarised below and detailed in Appendix B. They take into account competing demands for social housing and the council's statutory duties and strategic priorities and the overall the aim is to achieve a balanced approach to lettings. A similar number of lettings to last year is proposed in advance of a full review of the Allocation Policy." (Emphasis added.)

19. The "*Projections 2022/23*" show (leaving out the "*studio*", "*1-bed*", "*2-bed*" and "*4+bed*" columns, but including the total number and percentage in respect of such properties together with "*3-bed*" properties):

General Needs	3-Bed	Total	%
Homeless	43	209	45%
Westminster Council Tenants	38	149	32%
Housing Register	6	105	23%

Total General Needs	8 7	46 3	

20. Appendix B gives more granular detail of the projections for 2022/23. This shows that of the 38 three bedroom properties the defendant anticipates allocating to its existing tenants, nine are on the Category A Medical Priority Transfer List. Of the six three bedroom properties the defendant anticipates allocating to the "*Housing Register*" group, three are on the Category A Medical Priority Waiting List.

Temporary accommodation transfers

21. An applicant in temporary accommodation who requires a move to alternative accommodation is placed by the defendant on a spreadsheet which records the reason the transfer is required, the household composition, the number of bedrooms and bed spaces required, the mobility category, the ages of children, the location placement band and any other relevant details.

22. The defendant divides applicants who require a transfer into three categories of urgency: red, amber and green. The red category includes critical repair matters and those at serious risk to life due to violence or medical reasons. The defendant's Head of Temporary Accommodation Supply, Greg Roberts, has explained in his statement dated 22 July 2022:

> "The amber category includes lease ends and those whose accommodation has been accepted as unsuitable whether on review or agreed by officers. The Claimant currently falls within the amber category."

D. <u>The facts</u>

23. The claimant is married with two children aged seven and three. He is a refugee from Iran. The claimant is disabled. He suffers from epilepsy. Although he takes medication for it, his epilepsy is not controlled. He has major tonic clonic seizures during which he loses consciousness two to three times a week, as well as minor seizures about three to six times a night. A side effect of the seizures is chronic muscular pain. The claimant also suffers from severe depression and anxiety. Due to his epilepsy he suffers from mobility difficulties. He requires a walking frame and stick, and he has great difficulty using stairs. His disabilities necessitate support with everyday activities, including cooking, personal care, dressing and mobilising. His wife, Nasim Salehi Shahroodi, is his principal carer.

24. On 6 February 2018, the claimant applied to the defendant for housing assistance under Part VII of the 1996 Act, in circumstances where he and his family had been given notice requiring them to move by the property owner of their private rented accommodation.

25. On 7 June 2018, the defendant notified the claimant that they accepted they owed him the main housing duty under s.193(2) of the Housing Act 1996. The family were initially provided with hotel accommodation and then a one bedroom flat. In October 2018, the defendant provided the claimant with temporary accommodation in a flat in Falkirk House ('the Falkirk House flat'). The Falkirk House flat is a two bedroom maisonette, with an internal flight of stairs, on the sixteenth floor of a block of flats.

26. For the purposes of obtaining temporary accommodation, the claimant is in placement "*Band 1*", meaning that he is prioritised for properties in Westminster and the local area (i.e. within an adjacent borough). He meets the criteria for Band 1 both because of the medical treatment he receives from various consultants at St Mary's Hospital in Westminster and Charing Cross Hospital, and because of the care provided by Ms Salehi Shahroodi to her disabled younger brother who lives in Westminster. On accepting that the claimant was owed the main housing duty, the defendant also placed him on its (Part VI) housing register. He was placed in the "*Homeless priority group*" (so-called, although at the time it consisted only of those owed the main housing duty), and awarded 150 points.

27. On 8 October 2018, the defendant sought a medical opinion in response to the claimant's request for a move to a three bedroom property with no internal stairs. The medical advisor responded the following day:

> "The client is suffering from severe and debilitating conditions that cause him chronic pain issues, restricted mobility, and requiring support with his activities of daily living. I recommend a mobility category 3. In regards to requiring his own room, I cannot see any evidence that he requires extra space for his medical needs, therefore I would not support the allocation of an extra room."

28. The defendant accepted this recommendation and placed the claimant in "*mobility category 3*". It is implicit in the medical advisor's recommendation that he (and the defendant) accepted the claimant required accommodation with level access and no internal stairs as mobility category 3 applicants are defined as:

> "Applicants with severe mobility problems who require a ground or lifted property with level access and no internal stairs." (Housing Allocation Scheme, §2.7.3.)

In the Falkirk House flat the claimant is effectively "*confined to the top floor*", and unable to access the kitchen and living area, as he cannot use the stairs without support.

29. On 5 January 2021, the claimant was awarded an additional 50 points as a result of Ms Salehi Shahroodi's employment. Consequently, from January 2021, for the purposes of bidding for Part VI accommodation, the claimant had a total of 200 points, and the degree of prioritisation afforded by being in mobility category 3 (Allocation Scheme, 2.7.8: see paragraph 13 above).

30. The claimant reiterated his request for a three bedroom property. Ms Salehi Shahroodi has explained that (in the Falkirk House flat) she sleeps on the floor in the bedroom occupied by her two children, while the claimant sleeps in the only other bedroom. The reason she does not share a bedroom with the claimant is that due to his nocturnal seizures he shakes and moves around uncontrollably, and makes groaning noises, to an extent that makes it impossible for her to sleep in the same bedroom. There is no other bedroom for her, and if she sleeps on the sofa in the downstairs living room Ms Salehi Shahroodi fears that, given she is deaf in one ear, she would not be able to hear any calls for assistance from the claimant or her younger child.

31. On 7 April 2021, the defendant decided that the claimant should be registered as needing three bedroom accommodation, on account of the impact of his health problems. Accordingly, he has been eligible since then to bid for three bedroom Part VI accommodation.

32. The claimant sent a letter of claim in accordance with the pre-action protocol on 18 March 2022, to which the defendant responded on 8 April 2022.

33. An offer of temporary accommodation in a three bedroom, second floor flat (Flat 5 Oldbury House) was made by the defendant on 19 May 2022. But that offer was swiftly withdrawn as the property had internal stairs and the defendant recognised it was unsuitable for the claimant.

34. This claim was issued on 9 June 2022.

35. An offer of temporary accommodation in a three bedroom mobility category 3 property (17 Crompton House) was made by the defendant on 17 June 2022. In order to consider the suitability of this offer, the claimant obtained a report from an independent occupational therapist, Pauline Hilton. The claimant's solicitor provided the defendant with a summary of Ms Hilton's opinion in an email dated 23 June 2022, and a copy of the report on receiving it in early July.

36. Ms Hilton made the following recommendations:

> "• Due to his mobility difficulties and use of a walking frame Mr Jaberi needs to live in level access accommodation. He is unsafe navigating stairs.
>
> • Mr Jaberi and family need an additional bedroom (3 bedrooms in total) due to the disturbance of his sleep and the impact on Ms Salehi.
>
> • … Mr Jaberi needs a level access shower/wet room …
>
> • The doors of smaller rooms (e.g. toilet and bathroom) need to be able to open outwards …
>
> • Smaller rooms need to be of a sufficient size to avoid the risk of entrapment
>
> • The bathroom needs to be sufficient size to allow a second person as Mr Jaberi regularly needs support with personal care and again to allow for the doors to be closed to allow privacy whilst toileting/bathing
>
> • If Mr Jaberi is reliant on a lift for access, it needs to be of sufficient size to allow stretcher access plus 2 people.
>
> • If Mr Jaberi is reliant on lift access, there needs to be at least two reliable lifts in case of the breakdown of one.

> - If Mr Jaberi is living above ground floor level, he needs to have a PEEP [Personal Emergency Evacuation Plan] in place with all appropriate equipment provided.
>
> - Hazards such as low walls, balconies which present a falling risk must be avoided or made safe."

37. The defendant obtained its own report from an occupational therapist, Intisar Osman of Able2, on 20 July 2022. Ms Osman advised that the "*minimum requirements*" for accommodation for the claimant were:

> "Level or lift access to property door – step-free property with a level interior.
>
> Level access shower facilities with outwardly opening door. Outwardly opening door to WC if separate from bathroom and raised-height WC pan.
>
> 2 lifts are not essential if the property is located up to the second floor however if the property is above the second floor two lifts would be ideal as the manual handling risk to all, including hospital transport staff become greater the higher the level if a single lift is out of action and Mr Jaberi required assistance with stair mobility.
>
> Mr Jaberi's current lift is 1350mm x 1100mm with an 800mm door-opening and has sufficient space for assistance of 2 hospital staff using an evacuation chair. Following his last visit to A&E, this was the method used. Mr Jaberi is unlikely to be evacuated during a seizure therefore an Emergency Evacuation Plan is not essential as his family are experienced with his needs and paramedics have had specific training."

38. Following these assessments, and discussion with the property owner regarding possible adaptations, the defendant concluded that it was not suitable for the claimant and the offer of 17 Crompton House was withdrawn.

39. On 9 November 2022, the defendant made the claimant an offer of temporary accommodation in a flat in Braithwaite Tower ('the Braithwaite Tower flat'). The letter stated:

> "This is a 3-bedroom property, on the eighteenth floor, with two lifts and it is suitable for up to 5 people. There is level access into the block and to access the property (via the lifts) and there are no internal steps inside the flat. …
>
> With regards to your assessed needs, I note that you suffer from epilepsy, a bad back and anxiety and that you use a walking frame and stick due to your back and previous falls. The City Council has previously arranged for an Occupation Therapist (Able2 who are contracted to provide such services on behalf of

> the City Council) to assess your rehousing requirements. This specified that you required a level access shower and doors opening outwards to the bathroom and toilet. Your own Occupation Therapist (OT) also specified that you required a lift large enough to accommodate a stretcher and two-man ambulance crew as, due to your epilepsy, you have on occasion required evacuation to hospital when unconscious. However, the City Council's assessment noted that it would be unlikely that you would be evacuated during a seizure and that the more likely scenario is that any transportation to hospital would take place afterwards by using a specialist chair.
>
> In light of the Occupational Therapist's recommendations, we arranged for Able2 to carry out an inspection of the property offered, [the] Braithwaite Tower [flat], to assess its suitability prior to offer. They have advised that the property with the recommended adaptations, is suitable for your assessed needs and that it should be feasible to install a level access shower, sliding doors to the bathroom and toilet and grab rails in the toilet can be fitted if required. …"

40. The inspection of the Braithwaite Tower flat referred to in the passage quoted above was conducted by another occupational therapist instructed by the defendant, Ruth Pink of Able2, on 7 November 2022. Ms Pink reported the same day that, from her perspective, and subject to adaptations, the property was suitable for the claimant. The necessary adaptations that she identified were:

> "[Bathroom:] Client requires a level access shower facility due to risks associated with epilepsy. It appears feasible to remove bath & create a level access / low level shower area approx. 760 x 1400 mm which would accommodate a fixed wall mounted folding shower seat with back & arms & grab rails on wall. … The door needs to be changed from inward opening to minimise risks. Outward opening into hallway not recommended, however it appears feasible to replace door with a sliding door installed to the left of the bathroom. Removal of door frames would maximise clear width into bathroom.
>
> [WC:] The door needs to be changed from inward opening to minimise risks. Outward opening onto hallway not recommended, however it appears feasible to replace door with a sliding door installed to the right of the WC. This would block access to the in-built storage cupboard when open, however part of the cupboard can be accessed from the kitchen. Removal of door frames would maximise clear door width into WC. Grab rails can be fitted on wall by WC if required."

41. Ms Pink's report also stated:

> "Previous OT report reported that client advised he has required evacuation to hospital at times when unconscious & therefore

> needs a lift to be large enough to accommodate a stretcher & 2-man ambulance crew to enable him to lie prone to keep his airway open.
>
> OT has contacted LAS [London Ambulance Service] for advice on how they evacuate unconscious patients from upper floor properties where the lifts are too small to accommodate a full-length stretcher as this must be a not uncommon scenario that they manage. LAS response will be forwarded when available.
>
> OT considers this property is suitable pending confirmation that proposed adaptations are feasible & that issue of evacuation can be addressed by LAS."

At the hearing the defendant maintained that the London Ambulance Service had not yet responded to the request for advice, but upon circulation of the draft judgment I was informed that a response had in fact been received on 11 November 2022.

42. On 22 November 2022, the claimant accepted the offer of the Braithwaite Tower flat, subject to conditions, while at the same time requesting a review of its suitability. The email from the claimant's solicitor to the defendant stated:

> "My client wishes to accept the offer of temporary accommodation at [the] Braithwaite Tower [flat]. However, my client's acceptance is conditional on the following:
>
> – The authority agreeing that Mr Jaberi is not required to move into the property until the adaptations to the bathroom and toilet have been completed and he is not liable for rent until the works are complete and the property is ready for him to move into.
>
> – The lift maintenance records demonstrate that the lifts are mostly in working order and that defects are remedied within a reasonable period of time.
>
> – There is a satisfactory fire risk safety assessment and evacuation plan in the event of a fire.
>
> My client wishes to request a review of the suitability of the offer of accommodation at [the] Braithwaite Tower [flat]. Please treat this email as a request for a suitability review under section 202 of the Housing Act 1996."

43. Ms Salehi Shahroodi has explained that the family do not want to move to the Braithwaite Tower flat as they are very anxious about living in a property on the eighteenth floor. However, they felt they had no choice but to accept the offer.

44. The claimant and his family are still living in the Falkirk House flat. By the time of the hearing on 21 February 2023, the adaptations to the Braithwaite Tower flat were not yet complete but the defendant anticipated they would be completed within a few days. At the date of this judgment, the defendant takes the view that the Braithwaite Tower flat is

now ready for the claimant's occupation. A viewing of the property has been provisionally arranged to take place on 15 May 2023.

45. The defendant acknowledged receipt of the claimant's request for a review of suitability of the Braithwaite Tower flat, indicating that as the defendant had *received* the request for a review on 28 November 2022, the defendant was bound to complete the review within 56 days of that date. On 2 December 2022, the defendant provided the claimant with a Fire Risk Assessment dated 28 October 2022, and lift maintenance records, for the Braithwaite Tower flat. The defendant stated that it had requested that a Personal Emergency Evacuation Plan be arranged for the claimant.

46. On 11 January 2023, in circumstances where the works to adapt the Braithwaite Tower flat had not yet begun, the claimant suggested the time for completion of the suitability review should be extended. In the absence of a response from the defendant, on 2 February 2023 the claimant issued a protective appeal in the County Court at Central London. On 9 March 2023, the defendant made a review decision upholding the suitability of the Braithwaite Tower flat. However, it transpired that the review officer had sent a 'minded to' letter prior to that review decision, inviting representations, to which the claimant had not responded because the letter (sent by email) had (unnoticed) gone into the claimant's solicitor's spam email folder. Consequently, the defendant agreed to withdraw the 9 March decision. The claimant made representations in response to the 'minded to' decision on 17 April 2023. It is anticipated that the review of the suitability of the Braithwaite Tower flat will be completed by 9 May 2023. The parties have agreed that, provided a new decision on review is received, the existing appeal in the County Court will be withdrawn with no order as to costs.

E. <u>Ground 1: Breach of the main housing duty</u>

The parties' submissions

47. It is common ground that the suitability of the Braithwaite Tower flat is not a matter for me. The claimant has a suitable alternative remedy in that regard, which he is pursuing, in the form of a review and, if the suitability is upheld, a statutory appeal.

48. However, at the date of the hearing, the Braithwaite Tower flat was still not available for the claimant's use. The claimant's submission was that this is a clear-cut case of a historic and continuing breach of the main housing duty, in circumstances where the s.193(2) duty was owed, and the defendant had accepted in October 2018 that the claimant required a property without internal stairs, and in April 2021 that he required a three bedroom property. The defendant had put the claimant on the transfer list in the amber category. It was plain from Mr Robert's evidence (see paragraph 22 above) that the defendant's officers did so because they accepted that the Falkirk House flat, with its two bedrooms and internal stairs, is unsuitable for the claimant. In his evidence, the claimant describes the Falkirk House flat as "*profoundly unsuitable*" and explains the "*terrible impact*" it is having on his and his wife's health. Ms Salehi Shahroodi's evidence was to the same effect.

49. The defendant accepts that the Falkirk House flat "*plainly cannot be considered suitable in the long term*". The defendant submitted that it did not follow that the Falkirk House flat could not be considered suitable in the short term whilst alternative accommodation was identified and made available. The defendant did not submit that the Falkirk House

was in fact suitable, in the short term or otherwise, but made the point that the claimant had not requested a review of its suitability and so the defendant had not made a decision as to whether it remained suitable in the short or medium term.

50. The defendant contended that the claimant had a suitable alternative remedy in the form of a request for a suitability review in respect of the Falkirk House flat. Although the time for requesting such a review has passed (see *R (B) v Redbridge LBC* [2019] EWHC 250 (Admin), [2019] PTSR 1525), the defendant has a discretion whether to extend time (and any refusal could be challenged in this court) and the claimant would have been able to point to the change of circumstances as a result of the defendant's acceptance that he needs a three bedroom property.

51. The defendant also submitted that this aspect of the claim is academic in circumstances where the claimant had accepted an offer of the Braithwaite Tower flat, which the defendant considered to be suitable. The court should not engage in considering whether there has been any historic breach of the main housing duty. In the alternative, the defendant submitted that the claimant would have to show that no reasonable authority could rationally consider the Falkirk House flat remained suitable even in the short term while adaptations were completed on the Braithwaite Tower flat.

52. The claimant responded that the defendant did not allege in its summary or detailed grounds that the claimant should pursue an alternative remedy of seeking a review of the suitability of the Falkirk House flat. The claimant had understood the defendant accepted the Falkirk House flat was unsuitable and it was too late to raise such an alternative remedy point in its skeleton argument and oral submissions. The claim was not academic given that the claimant was still living in the Falkirk House flat and, at the time of the hearing, it remained the position that the claimant still did not have suitable accommodation as he could not move into the Braithwaite Tower flat.

Analysis and decision

53. The current position is that the defendant has now made the Braithwaite Tower flat available for the claimant. That is a property which (subject to the ongoing review) the defendant has assessed is suitable for the claimant. In respect of the suitability of that property, the claimant accepts he has a suitable alternative remedy. In these circumstances, the claimant has not demonstrated an *ongoing* breach of s.193(2) by the defendant.

54. However, in the particular circumstances of this case, I reject the defendant's contention that I should not consider whether there *has been* a breach of s.193(2). First, at the date of the hearing the Braithwaite Tower flat was still not available. Secondly, the claimant is still living in the Falkirk House flat and, if the result of the ongoing review of the Braithwaite Tower flat (or any subsequent appeal) were to be a decision that that property is unsuitable, it would be important to know whether the continuing provision of temporary accommodation for the claimant in the Falkirk House flat puts the defendant in breach of s.193(2).

55. Although I accept that the claimant could have sought a suitability review in respect of the Falkirk House flat, and potentially obtained a decision as to whether the defendant considered that property suitable temporary accommodation (whether in the short,

medium or long-term), I agree with the claimant that the defendant has raised this point too late to be permitted to pursue it.

56. The only decisions the defendant appears to have taken regarding the suitability of the Falkirk House flat were the initial decision in October 2018 that, at that stage, it was considered suitable; and the decision that it was not suitable (at least for the long term) which was made when the claimant was put on the transfer list, in or about April 2021. No decision regarding its suitability appears to have been taken following the decision in October 2018 that the claimant requires a mobility category 3 property, although the Falkirk House flat is not a mobility category 3 property. In these circumstances, I agree with the defendant that it can only be shown to have breached the main housing duty if it would have been irrational for the defendant to conclude that the Falkirk House flat was suitable, even in the short term.

57. In my judgment, the claimant has shown that a conclusion that the Falkirk House flat was suitable for the claimant, even only in the short-term while alternative suitable temporary accommodation was identified, would have been irrational at least by the time the claim was issued on 9 June 2022. By then, the claimant had been in a property with internal stairs for 3 years 8 months, despite the defendant's recognition throughout that time that he needed a property with level access internally. This has had the serious consequence of effectively confining the claimant to the top floor, as it is very difficult for him to access the kitchen and living area. In addition, by the time the claim was issued, the claimant had been in a two bedroom property for a period of 14 months since the defendant had accepted that, for health reasons, the family required a three bedroom property. The main consequence has been that Ms Salehi Shahroodi, who is the primary carer for their two children, as well as a carer for the claimant and for her disabled brother, and a part-time dental assistant, has been sleeping on the floor of her children's bedroom and is exhausted due to inadequate sleep over a very extended period. At the time of the hearing, the breach remained ongoing as no alternative suitable accommodation was available for the claimant.

58. I recognise that suitability is a flexible concept and accommodation which is unsuitable in the long-term may be regarded as suitable in the medium term, or for a brief period, while suitable alternative accommodation is identified. However, by the time the claim was filed, the medium and short term periods for which the Falkirk House flat could rationally have been regarded as remaining suitable while alternative temporary accommodation was identified had been exhausted.

59. Accordingly, I conclude that the defendant has breached the main housing duty owed to the claimant but I am not satisfied that the defendant is in ongoing breach of that duty. In the circumstances, as I have not found that the defendant is currently in breach of s.193(2) of the 1996 Act, it inevitably follows that the claimant is not entitled to a mandatory order requiring the provision of alternative suitable accommodation. It is therefore unnecessary to address the parties' submissions on that issue.

F. Ground 2: Denial of a reasonable preference on medical grounds

The parties' submissions

60. The claimant contends that §6.1.2 of the Allocation Scheme (see paragraph 14 above), and/or the defendant's refusal to place him in the medical priority group, denies him a

reasonable preference to which he is entitled pursuant to s.166A(3) of the 1996 Act and is both a breach of statutory duty and *Wednesbury* unreasonable.

61. The claimant acknowledges that a local authority has a wide discretion as to how it allocates accommodation. The manner in which an allocation policy accords priority between applicants is a matter for the local authority, such that an allocation scheme will only be unlawful if the basis on which it accords priority between applicants is irrational: *Ahmad*, Lord Neuberger, [37]. The courts will not interfere at the micro-level: see *Ahmad*, Lord Neuberger, [46].

62. Nonetheless, the claimant submits that any allocation scheme must ensure that a "*reasonable preference*" is afforded to certain categories of person, specified by statute. Those categories include those who are homeless and owed the main housing duty (s.166A(3)(a) and (b)) and those who need to move on medical or welfare grounds (s.166A(3)(d)). "*Reasonable preference*" in this context means "*a reasonable head start*": *R v Wolverhampton MBC, ex p Watters* (1997) 29 HLR 931, Judge LJ.

63. The claimant contends that, although the Allocation Scheme makes provision for affording a reasonable preference to the homeless and to those with a medical priority, the effect of §6.1.2 of the Allocation Scheme – which prevents a person such as the claimant who needs to move on medical grounds being awarded medical priority, if he is living in temporary accommodation – is to deny the claimant a reasonable preference to which he is entitled. The claimant submits this aspect of the Allocation Scheme is in breach of s.166A(3).

64. The claimant's alternative argument is that the Allocation Scheme is irrational to the extent that the structure of the "*choice-based*" policy denies the claimant the opportunity to elect the priority category in which he is placed. The claimant would be entitled to 200 priority points if he were able to choose to be placed in the medical priority group, whereas he is only entitled to 150 priority points as a homeless applicant. So there is a potential benefit to the claimant if he were able to choose to be placed in the medical priority group. On the face of it, the claimant should be entitled to be in the medical group because the defendant has found he needs to move, and the reasons he needs to move are medical. It is irrational to give him fewer priority points, and deny him a reasonable preference on medical grounds, just because he is also homeless and in temporary accommodation. He is not demanding that he be given additional preference by reason of falling within both priority groups, only that he should be able to choose the priority group from which he is able to make bids.

65. The claimant contends that it is no answer to say, as the defendant does, that those owed the main housing duty have an alternative route to move because the authority owes them a duty to secure suitable accommodation. As the defendant itself has submitted, the flexibility of the term suitable is such that even if an applicant needs to move on medical grounds, nevertheless it may be open to the defendant to assess that the property from which he needs to move remains suitable in the medium or short-term. The facts of his own case show, the claimant submits, that the duty to provide suitable temporary accommodation does not mean that an applicant who is owed that duty will be in accommodation that is suitable to meet his medical needs.

66. The defendant submits the court should not entertain this ground because it is of no consequence to the claimant. Once the claimant moves to the Braithwaite Tower flat, he

will no longer have a need to move for medical reasons. He will have no credible case for being within the medical priority group.

67. In any event, the defendant submits the ground is misconceived. The duty under s.166A(3) is to frame an allocation scheme so as to secure that reasonable preference is given to the people in the reasonable preference classes identified in subsection (3). At least so far as relevant to this claim, the Allocation Scheme plainly does so. It provides for reasonable preference to be given to those owed the main housing duty and to those who need to move on medical grounds. Section 166A(3) does not require that an applicant who falls within more than one reasonable preference class - as many will given, not least, that those in s.166A(3)(b), (c) and (d) would also be homeless and so within (a) - be given a choice as to which reasonable preference class should form the basis of the consideration of their housing application.

68. Section 6.1.2 of the Allocation Scheme does not give rise to any breach of statutory duty and nor is it irrational. Section 6.1.2 explains why homeless households living in temporary accommodation will not be eligible for the medical priority group: for those households it is the defendant's statutory duty to ensure that suitable temporary accommodation is secured. For a homeless applicant whose temporary accommodation is such that they need to move on medical grounds, that accommodation will not be considered suitable, except perhaps in the short term. In due course, they will have to be moved to temporary accommodation which is suitable to meet their medical needs. As a result homeless households in temporary accommodation should not generally need to be accorded medical priority to ensure that they are provided with accommodation which is suitable for them on medical grounds.

69. The defendant accepts there may be rare cases where nothing other than Part VI accommodation could be considered suitable under Part VII. In such cases it would be expected that the defendant would reach that conclusion as part of its decision making under Part VII and would then make a case for the exercise of the Director of Housing's exceptional discretion under §1.1.9 of the Allocation Scheme (paragraph 11 above) so that additional priority would be provided to the applicant to ensure that they would obtain Part VI accommodation more quickly.

70. Section 6.1.2 ensures that the medical priority group is reserved for those who have no other route to move to suitable accommodation on medical grounds.

71. A further factor to be considered in assessing the rationality of §6.1.2 of the Allocation Scheme is the additional administrative burden for the defendant if homeless applicants in temporary accommodation could opt to be placed in the medical priority group. As soon as such an applicant is given temporary accommodation that is suitable to meet their medical needs, they would fall out of the medical priority group and have to switch back to the homeless group.

Analysis and decision

72. I reject the contention that this ground is academic. The claimant is currently still living in the Falkirk House flat and, in any event, the issue is one that is likely to affect other applicants. However, in my judgment, this ground must fail for the substantive reasons given by the defendant, with which I agree.

73. An allocation scheme must be framed so as to give reasonable preference to applicants who fall within the categories set out in s.166A(3), over those who do not: *Ahmad*, Lord Neuberger, [39]. As the House of Lords made clear in *Ahmad*, s.166A(3) only requires that the people encompassed within that section are given "*reasonable preference*"; it "*does not require that they should be given absolute priority over everyone else*" ([18]). As the claimant acknowledges, there is no requirement for local authorities to frame their scheme to afford greater priority to applicants who fall within more than one reasonable preference category over those who have reasonable preference on a single basis.

74. Section 6.1.2 of the Allocation Scheme does not deny any person who falls within one of the classes identified in s.166A(3) a "*reasonable preference*" over those who are not within that section. Those, like the claimant, who fall within s.166A(3)(b) by reason of being owed the main housing duty are given a reasonable preference by being placed in the homeless priority group and given 150 priority points. Those who fall within s.166A(3)(d) by reason of having a need to move on medical or welfare grounds, and who are not owed any of the Part VII duties specified in s.166A(3)(b), are given a reasonable preference by being placed in the medical priority group and given 200 priority points. This approach does not result in any breach of statutory duty.

75. At first glance, it may appear incongruous that a person who has a medical need to move will be given fewer priority points if they have the *additional* misfortune of being homeless and in temporary accommodation. However, on analysis, the approach taken by the defendant is clearly a rational one. It is proper for the defendant to proceed on the basis that if it owes an applicant a duty to secure suitable temporary accommodation, it will comply with that duty. If an applicant in temporary accommodation is identified as needing to move on medical grounds, the defendant will put them on the transfer list with a view to identifying alternative suitable accommodation. It is true that the flexibility of the term "*suitable*" is such that the temporary accommodation from which an applicant needs to move for medical reasons may remain suitable in the short or possibly medium term. Nonetheless, the applicant's need to move will be identified and I accept that, given the well known shortage of social housing, they are likely to be provided with suitable temporary accommodation considerably earlier than suitable Part VI accommodation would be made available to them.

76. The purpose of §6.1.2 of the Allocation Scheme is to ensure that those who fall within s.166A(3)(d), and have no other way to secure a move into accommodation that can meet their medical or welfare needs than by obtaining Part VI accommodation, are given a reasonable degree of priority.

77. If the defendant were to give applicants who fall within more than one of the classes identified in s.166A(3) the choice as to which priority group they should be placed in, I accept that would add considerably to the administrative burden on the defendant. Allowing such choices would result in a regular flow of applicants being switched between priority groups. The increased movement between priority groups would also make it harder for the defendant to determine the proportion of properties that should be advertised to particular priority groups, in order to ensure a fair balance is achieved. As Lord Neuberger observed in *Ahmad* at [46],

> "Housing allocation policy is a difficult exercise which requires not only social and political sensitivity and judgment, but also local expertise and knowledge."

That being so, the court should be astute to avoid making a difficult exercise still more complicated and burdensome.

78. Accordingly, even if the effect of the Allocation Scheme is to give a person in the claimant's position lesser priority than he would have if he were not in temporary accommodation, that would not be irrational. However, it would be overly simplistic to suggest that because the claimant has 50 points fewer by being in the homeless priority group than he would have if he were eligible for the medical priority group, his prospects of successfully bidding for accommodation are necessarily lower than they would be if he were in the medical priority group. The way that the defendant "*allocates available properties amongst the Priority Groups*" in accordance with its projections (Allocation Scheme, 2.4.3: paragraph 11 above) means this is not necessarily the case. Although the claimant contends there is a lack of transparency (an allegation which is the subject of Ground 3), the claimant accepts that it "*may well be the case that it is better for me to remain in the homeless priority group*".

79. Between 1 April 2021 and 20 March 2022, 82 three bedroom properties were available for letting. Of these, only three (4% of the total) were let to those on the medical priority group waiting list, compared to 41 (50% of the total) let to applicants on the homeless priority group waiting list, albeit most of those properties were mobility category 4.

80. Ms Salehi Shahroodi expresses concern that "*none of the disability standard properties we need will be offered to us, ever, because they will usually be targeted at people with medical priority, the priority we have been denied*"; and that "*if such properties are targeted at homeless applicants, there is nothing to indicate that I would have any more priority for such a property than others without any particular need for limited steps and adapted or adaptable sanitary facilities*". However, the evidence is clear that while medical priority 1 and 2 properties (essentially, accommodation for wheelchair users) will not be offered to the claimant (Allocation Scheme, 2.7.5: paragraph 13 above), the defendant seeks to ensure that medical priority 3 properties (for which he is eligible) are advertised to the homeless priority group, not just to the medical priority group (albeit individual properties may only be advertised to one group). Medical priority 3 applicants have priority over medical priority 4 applicants when bidding for medical priority 3 properties (Allocation Scheme, 2.7.8: paragraph 13 above). So when such properties are advertised to the homeless priority group, the claimant will have priority over those who have no particular need for the type of property the claimant requires.

81. For these reasons, I reject Ground 2.

G. Ground 3: Breach of s.166A(9) of the 1996 Act

82. The claimant alleges that the information which the defendant is required to publish pursuant to s.166A(9)(a)(ii) of the 1996 Act has not been published or provided to him. He contends that the defendant is in breach of s.166A(9)(a)(ii) and seeks "*an order requiring the defendant to publish as part of their allocation policy the information required by section 166A(9)(a)(ii)*".

83. The claimant's statement of facts and grounds said:

> "The claimant has requested the relevant information under section 166A(9) to enable him to understand how long it is likely

> to be before accommodation is allocated to him. That has a particular significance when he is choosing between whether to be in the medical priority group or the homeless priority group. He has not been provided with that information and it is not publicly available.
>
> The defendant is accordingly in breach of the duty under section 166A(9)(a)(ii)."

84. The claimant's statement of facts and grounds did not identify what information the claimant contended was required to be published as part of the Allocation Scheme (save to the extent that he relied on s.166A(9)(a)(ii)), or what information the claimant had requested, or when he had done so. However, in his statement dated 8 June 2022, filed with his claim, the claimant stated:

> "I do not know which band would give me better prospects of successfully bidding for accommodation as the council does not publish information about:
>
> a. how many properties have been allocated to each band;
>
> b. how many properties will be allocated to each band in the future;
>
> c. how many properties within each band have already been allocated to successful applicants (or alternatively, how many properties are left in each band to be allocated).
>
> Therefore without this information I do not even know if it would be in my interest to be placed in the medical priority group. As even if I had the additional 50 points awarded to applicants with medical priority, if there is a disproportionately small number of properties allocated to this group then it would be in my family's best interest to remain in the homeless band. The point is though that without this information I simply do not know."

85. It therefore appeared that the information sought was that identified in (a), (b) and (c) above. This is broadly consistent with the letter before claim of 18 March 2022, which counsel for the claimant, Mr Lindsay Johnson, indicated in his oral submissions is where the request for information was made. In that letter the claimant's solicitor stated:

> "Even if our client has been assessed for medical priority and awarded 200 points he has no way of knowing which priority group (homeless or medical) is preferable as he has not been given information pursuant to section 166A(9)(ii) [sic] which will enable him to understand 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. It does not appear to us that this information is available on the authority's home connections website.

> Of course, the authority are required to provide information to enable our client to assess whether housing 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 pursuant to the section 166A(9)(a)(ii) duty.
>
> There is some information available on the outcomes of previous bidding cycles however the information is insufficient. For example, we cannot tell from the published information which priority group each successful applicant had been allocated to, we can only see the number of points they had. This is important information given that allocation to exclusive priority groups is a key determinant in the prospects of success of an applicant.
>
> We need to know how many properties have been allocated to each group, how many properties within each group have been let and how many properties are going to be allocated." (Emphasis added.)

86. In his skeleton argument, and oral submissions, the claimant appeared to be seeking different information, namely:

    i) how properties are assessed to determine the medical category of the property – a question which was refined orally to ask how, and at what stage, a property is identified as falling within mobility category 3; and

    ii) how the defendant identifies to which priority group it will offer any mobility category 3 property that becomes available.

87. The claimant submits that such information ought to be contained within the scheme itself. Understanding how mobility category 3 properties are allocated and to which priority groups is essential to enable the claimant to determine whether his prospects of successfully bidding for accommodation are better in the homeless or the medical priority group.

88. The claimant acknowledges that in *R (Babakandi) v Westminster City Council* [2011] EWHC 1756 (Admin), when considering the statutory predecessor to s.166A(9), Nicol J rejected an allegation that the scheme operated by this defendant lacked transparency because an applicant could not know when he was likely to be successful. The defendant operated a choice based lettings scheme in accordance with which applicants were placed into priority bands, in the same way as it does now. Properties which became available were allocated to bands in accordance with an annual projection of need in each band; and applicants could only bid for properties in the band for which they qualified. However, the defendant retained the ability to move a sub-group within a band into another band and to make an additional allocation to that band in order to ensure that the sub-group were housed. On the facts, 44 households who were in overcrowded accommodation were moved temporarily to Band A and 44 additional units of accommodation were allocated to Band A.

89. Dismissing the claim, Nicol J said at [20]:

> "First, the statute requires a Housing Authority to publish its scheme for allocating accommodation. It does not follow from this that an applicant is entitled to be able to predict when and if he will actually be accorded accommodation. There are many uncertainties, thus, for instance, the Authority cannot know for certain which of its properties will become vacant or what size they will be. Some people who were on the list may leave the area or, for other reasons, no longer be eligible to bid. Other people may move into the area or join one of the categories to whom reasonable preference must be given. The two Codes of Guidance specifically contemplate that an Authority may use quotas and confine bidding for specific properties to particular groups on its list. I recognise, as did Mr Peacock on behalf of the Defendant, that this will mean that the operation of the Scheme is not as transparent as it might otherwise be, but the Authority was entitled to decide that this disadvantage was outweighed by the advantage of a more equitable distribution of its scarce accommodation."

(Sullivan LJ refused permission to appeal to the Court of Appeal.)

90. However, the claimant submits that the information he seeks is "*not a mere matter of detail*" but rather is "*central to the operation of this part of the scheme*". In this regard he relies on *R (Lin) v Barnet LBC* [2007] EWCA Civ 132, [2007] HLR 30 in which the local authority adopted a scheme which awarded additional points for those homeless persons in leased property where the lease was about to end. The claimant contended that the policy was unlawful as it provided inadequate explanation as to how the lease-end points were awarded, merely providing, "*300 points if living in leased homeless accommodation provided by Barnet Council about to be returned to the landlord*". Allowing this ground of appeal, Dyson LJ held at [48]:

> "This is a short point not capable of much elaboration. In my judgment, <u>information as to when and for how long the 300 points are available is not a mere matter of detail. It is central to the operation of this part of the scheme</u>. I consider that it is an important 'aspect of the allocation process' which s.167(1) [the predecessor to s.166A(1)] required to be included in the scheme, and that, because it was not so included, to that limited extent the scheme is invalid." (Emphasis added.)

91. The claimant also relies on *R (Cali) v Waltham Forest LBC* [2006] EWHC 302 (Admins), [2007] HLR 1, where it was held that the allocation scheme was unlawful as it failed to define the criteria for awarding reasonable preference or indicate when they would be applied. However, I note that in reaching this conclusion the court applied *R (A) v Lambeth LBC* [2002] HLR 998 which, subsequently, the House of Lords did not follow in *Ahmad*.

92. Counsel for the defendant, Mr Ian Peacock, submits that s.166A(9) of the 1996 Act does not create a statutory right pursuant to which applicants may seek information. Rather, it imposes an obligation on the local authority to frame its allocation scheme in such a way so as to secure that the *scheme* gives an applicant "*the right to request to request such*

general information as will enable him to assess … 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". Section 14.1.1(b) of the Allocation Scheme (see paragraph 17 above) plainly gives an applicant the right to request precisely such information. So the contention that the defendant has breached s.166A(9) is misconceived. Any contention that the defendant has failed to *provide* information in response to a request would have to be cast as a breach of policy (specifically, a breach of §14 of the Allocation Scheme), not a breach of statutory duty.

93. As I understood him, Mr Johnson accepted in his oral submissions in reply that this ground should have been framed as an allegation of breach of policy rather than statute. In any event, the submissions that I have summarised in paragraph 92 above are obviously correct. It follows that I reject the contention that the defendant has breached s.166A(9)(a)(ii) of the 1996 Act. The claimant is not entitled to the relief that he seeks (see paragraph 82 above).

94. I shall nevertheless consider whether the claimant has any grounds for complaint that the defendant has failed to comply with §14.1.1(b) of the Allocation Scheme.

95. The defendant submits that neither s.166A(9)(a)(ii) nor §14 of the Allocation Scheme require the defendant to provide information based upon hypothetical scenarios which would arise only if the scheme were different to that which has been adopted. In accordance with the actual Allocation Scheme he is not in the medical priority group, and cannot opt to be placed in that group. Accordingly, the defendant was not required to provide information as to what the claimant's position would be if, hypothetically, he were placed in the medical priority group. I agree. For the reasons I have given in respect of Ground 2, the defendant has not acted unlawfully in placing the claimant in the homeless priority group and declining to give him an option to move into the medical priority group. The Allocation Scheme does not require the defendant to give him information to enable him to assess how long it would take for a property to be made available to him in a counterfactual scenario where the defendant did not owe him the main housing duty.

96. The defendant has sought to respond to the claimant's various requests and Mr Peacock submits there has been no failure to comply with §14 of the Allocation Scheme. In the response to the pre-action protocol letter dated 8 April 2022, the defendant stated:

> "When your client was added to the register he will have received a letter confirming which priority group he was registered in and giving the information required under s166A(9)(a)(ii) and Mr Jaberi is able to obtain updates on the Home Connections site.
>
> The allocation scheme gives reasonable preference to the groups specified in the Act and applicants are placed into the appropriate priority group with the associated point allocation. The scheme provides:
>
> '2.4.7. Priority applicants will be registered on one list only (the most appropriate list according to their housing need) and will

receive one set of 'priority points' according to that priority group (as set out in section 2.6.33).'

The scheme does not provide for additional points for composite need and this is in accordance with established case law: *Ahmad v Newham, 2009*. The Council's allocation scheme is lawful and properly applied.

Mr Jaberi's particular needs are recognised in the operation of the allocation scheme by virtue of his registration for a mobility category 3 property. Of allocation of 3-bed properties in 2020/2021 31 of 77 lettings were to this mobility category group ie 40% of lettings in this category."

97. The defendant's summary grounds of defence provided the following information:

> "He is currently number 306 on the three bedroom list in the homeless priority group (including all mobility categories). The quotas for each priority group are still being finalised but, on the basis of lettings during the 2021/22 financial year, it is expected that there will be around 29 three bedroom properties made available to the homeless priority group during the 2022/23 financial year.
>
> The Claimant is currently number 50 on the three bedroom list in the homeless priority group for those with mobility category 3. The Defendant is unable to predict how many of the 29 three bedroom properties which it is anticipated will be made available to the homeless priority group will be in mobility category 3." (Emphasis added.)

98. Mr Robert's statement provides the following information:

> "On the Defendant's main housing register (Part 6 Housing Act 1996) there are 1281 (includes all priority groups) households waiting for an allocation of a 3-bedroom property. The longest waiting time in this category is currently 27 years, having been accepted onto the register as at 20th February 1995.
>
> The Claimant was accepted onto the housing register as at 7th June 2018 and is currently at position 305 in the homeless priority group, for an allocation of a 3-bed property. Taking into account all priority applicants approved for a three bedroom property he is in position 543.
>
> Each year the Council sets out how many lettings we will aim to achieve to all priority need groups across all bed sizes, known as 'Projections'. The Projections are set out in the annual Supply & Allocation Report which is published on the council's website. We would expect lettings to be in line with previous years

> projections, at 40% of available three beds for homeless households.
>
> …
>
> Between 1st April 2021 to 30th March 2022, 82 three bedroom properties were available for letting. Of which 3 (4% of overall lets) were let to households registered on the Category A Medical Priority waiting list, compared to 41 (50% overall lets) let to homeless waiting list."

99. In my judgment, the defendant has sought to provide all the information that the claimant has requested, and in particular all the information that had been requested when this claim was filed. At that stage, the information sought concerned the number of properties that had been, and that would in the future, be allocated to each priority group. The Supply and Allocation report for 2022-23 provides answers to this question, giving a detailed breakdown of the allocations made in 2021/22 and the projections for 2022/23 based on those allocations. In its summary grounds, the defendant also answered the question, so far as it was able to at that stage, how many *three bedroom* properties it was anticipated would be allocated to the homeless group in 2022/23, as well as providing further information that the claimant had not specifically requested as to his placement on the three bedroom list in the homeless priority group and (within that list and group) his placement on the subgroup of mobility category 3 applicants.

100. To the extent that the defendant has not answered questions raised in the claimant's skeleton argument (filed two clear working days prior to the hearing), or oral submissions, such an omission does not amount to a breach of paragraph 14.1.1(b) or 14.1.4 of the Allocation Scheme as the defendant had no reasonable opportunity to respond to the request prior to the hearing. Moreover, failure to answer such late requests is not part of the pleaded claim. In any event, the question how properties are assessed to determine the medical category of the property is sufficiently answered by §2.7.4 of the Allocation Scheme (see paragraph 13 above). It seems to me that §§2.4.3 and 2.4.4 of the Allocation Scheme (see paragraph 11 above) sufficiently answer the question how the defendant identifies to which priority group any mobility category 3 property will be offered, namely in accordance with the projections and seeking to ensure the allocation is proportionate and balanced having regard to the mobility requirements of the applicants within each priority group. The answer to the claimant's question as to the stage at which a property is identified as falling within mobility category 3 is sufficiently clear from §§2.7.1, 2.7.5, 2.7.7 and 2.7.8 of the Allocation Scheme (see paragraph 13 above), as any property has to be given a mobility category before a decision can be taken whether it should be offered (as a mobility category 1 or 2 property) or advertised (as a mobility category 3 or 4 property), and so that the prioritisation by reference to an applicant's mobility categorisation can be applied.

101. As the defendant has explained, it has not been able to predict how many three bedroom properties in mobility category 3 are likely to become available. Mr Peacock accepted that ideally the defendant would be able to provide this information. But it cannot give an accurate prediction because the projected numbers depend on a combination of new build properties and social or local authority housing becoming vacant. The defendant knows how many newly built properties there will be, and the mobility category of those properties, but it cannot make a reliable prediction as to the number of three bedroom

mobility category 3 properties that will become vacant. The defendant stated that in the previous year about half of the 43 three bedroom properties allocated to the homeless priority group were mobility category 3 properties. Whether the number would be similar this year was impossible to predict with any accuracy. The defendant cannot fairly be criticised, still less held to have breached its policy, for not making a forecast in circumstances where it has rationally taken the view that the uncertainties are too great for any prediction to be dependable.

102. In its detailed grounds the defendant also sought to provide the counterfactual information that the claimant had sought, while maintaining that it had no obligation to provide such information. The detailed grounds state:

> "It is not straightforward to say how the Claimant would be treated if he were placed in the medical priority group as the allocation scheme does not make provision for applicants accommodated pursuant to section 193 who are accorded medical priority. However, if the Claimant were placed in the medical priority group, he would be likely to be on the waiting list for those who are not existing tenants of Part 6 accommodation with 250 points (including 50 employment points). He would be number 12 on the three bedroom waiting list. Although the quotas are still being finalised, it is expected that there will be 3 three bedroom properties made available to that list during the 2022/23 financial year. The Defendant is unable to predict how many of those properties will be in mobility category 3 …
>
> The result of the above is that the Claimant could be waiting around 4 years before obtaining accommodation if placed in the medical priority group. It is highly unlikely that he will not have been transferred to alternative temporary accommodation before then." (Emphasis added.)

103. I note that in stating that the claimant would be number 12 on the three bedroom medical priority group waiting list, the defendant has estimated where he would be if he alone was able to shift to that group from the homeless group. If all those in the homeless priority group with a medical need to move had the option to switch, it is highly likely that would have an impact on the claimant's placement. It would, of course, be impossible for the defendant to predict how many applicants would choose each priority group.

104. For the reasons I have given, this ground of claim also fails.

H. Conclusions

105. For the reasons that I have given I find the defendant has breached the duty owed to the claimant pursuant to s.193(2) of the 1996 Act, but in circumstances where the Braithwaite Tower flat (the suitability of which is not a matter for me) is now available, I am not satisfied that breach is ongoing. The remainder of the claim is dismissed.

106. I am not satisfied that it is "*highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of*", namely breach of

s.193(2) of the 1996 Act, had not occurred. Accordingly, this is not a case in which I must refuse to grant relief pursuant to s.31(2A) of the Senior Courts Act 1981. However, in view of the conclusions I have reached, the only relief which it is appropriate to grant the claimant is a declaration.