HOUSE OF LORDS SESSION 2008–09

**[2009] UKHL 14**

*on appeal from:[2008]EWCA Civ 140*

# OPINIONS

# OF THE LORDS OF APPEAL

# FOR JUDGMENT IN THE CAUSE

## R (on the application of Ahmad) (Respondent) *v* Mayor and the Burgesses of London Borough of Newham (Appellants)

**Appellate Committee**
**Lord Hope of Craighead**
**Lord Scott of Foscote**
**Lord Walker of Gestingthorpe**
**Baroness Hale of Richmond**
**Lord Neuberger of Abbotsbury**

**Counsel**

*Appellants*:
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Christopher Baker
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*Respondent*:
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Robert Latham

(Instructed by Edwards Duthie)

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19 and 20 JANUARY 2009

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WEDNESDAY 4 MARCH 2009

**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE**

**R (on the application of Ahmad) (Respondent) *v* Mayor and Burgesses of London Borough of Newham (Appellants)**

**[2009] UKHL 14**

## LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the advantage of reading in draft the opinions of my noble and learned friends Baroness Hale of Richmond and Lord Neuberger of Abbotsbury. I am in full agreement with them and for the reasons they give I would allow the appeal and make the order that Lord Neuberger proposes.

## LORD SCOTT OF FOSCOTE

My Lords,

2. I have had the advantage of reading in draft the illuminating opinions on this appeal that have been prepared by my noble and learned friends Baroness Hale of Richmond and Lord Neuberger of Abbotsbury and find myself fully persuaded by the reasons they have given for allowing this appeal and making the order which Lord Neuberger proposes.

3. I was for some time attracted by the submission, addressed to your Lordships by Mr Luba QC, counsel for the respondent, Mr Ahmad, that the appellant Council's section 167(1) scheme for determining priorities in allocating housing accommodation was, in one particular respect, irrational and therefore unlawful. Mr Luba's main criticism was that the scheme, having placed in the same priority band all those housing applicants who satisfied one or more of paragraphs (a) to (e) of

section 167(2), made the selection of the person in that band to whom a dwelling that had become available would be allocated dependent on how long that person had been on the Council's waiting list, awaiting allocation of a suitable dwelling. This "time waiting" criterion, as the determinative factor in the selection from among those in the section 167(2) priority band of the person to whom the dwelling that had become available would be allocated, depends not at all on the relative housing needs of those in the priority band. The dwelling would simply be offered to the person who had been longest on the waiting list. This was Mr Luba's main reason for submitting that the Council's section 167(1) scheme was irrational and unlawful.

4. It would be impossible, in my opinion, to challenge the rationality of including waiting time as one of the factors properly to be taken into account by a housing authority when deciding to whom an available dwelling should be allocated. But why should waiting time be the determinative factor? Why should apparently greater needs of one person in the priority band be subordinated to apparently lesser needs of another person in the band simply because the latter had been longer on the waiting list? This was the question that Mr Luba's submission posed for your Lordships. The question is, I think, best answered by posing a further question. What is the alternative? The formulation of sub-bands within the section 167(2) priority band, with the sub-bands being placed in order of priority, has been suggested as a preferable alternative. A points system, with points allocated for various types of special need and priority accorded to the person having the highest number of points, has been suggested as another. But both these suggested alternatives have their drawbacks.

5. No matter how many priority sub-bands were to be formulated, and the formulations would be far from easy and likely to be contentious, there must always be some basis on which to distinguish between those within the same sub-band who are in competition for the same dwelling. To allow the choice to depend upon the judgment of a Council official, or a committee of officials, no matter how experienced and well trained he, she or they might be, would lack transparency and be likely to lead to a plethora of costly litigation based on allegations of favouritism or discrimination. The waiting time criterion constitutes a basis of selection that has the merit of certainty, the absence of any subjective evaluation and that, therefore, avoids these drawbacks.

6. A points system, too, would be open to much the same objections, leading to endless challenges, based on comparisons between

the points awarded to the complainant and the points awarded to others in the same priority band.

7. The unfortunate fact of the matter is that where a Council is faced, as this appellant Council is faced, with a demand for Council housing that greatly exceeds the available housing stock, there is no allocation system that can be devised to avoid hard cases such as, undoubtedly, Mr Ahmad and his family present. The section 167(1) scheme devised by the appellant Council complies with the statutory requirements of the 1996 Act, as amended, and, insofar as its provisions for the allocation of housing to those in the section 167(2) priority band are concerned, cannot, for the reasons given by my noble and learned friends, which I find cogent and compelling, be described as irrational or unlawful.

**LORD WALKER OF GESTINGTHORPE**

My Lords,

8. I have had the advantage of reading in draft the opinions of my noble and learned friends Baroness Hale of Richmond and Lord Neuberger of Abbotsbury. I am in full agreement with them and for the reasons which they give I too would allow the appeal and make the order that Lord Neuberger proposes.

**BARONESS HALE OF RICHMOND**

My Lords,

9. In these proceedings, the policy of the London Borough of Newham for allocating the social housing available to them is challenged on two main grounds. First, and most important, it is said that the council are required to have a policy which not only affords people in the groups listed in section 167(2) of the Housing Act 1996 reasonable preference over other groups of people, but also determines priority between the people in those groups in accordance with the relative gravity of their individual needs. The specific problem is how

multiple needs within the same household should be addressed. Second, and less important, it is said that the policy of allocating up to five per cent of the properties which are advertised under the council's choice based lettings scheme to existing tenants, who wish to transfer to another property of the same size, fails to give reasonable preference to the priority groups listed in section 167(2).

10. My noble and learned friend Lord Neuberger of Abbotsbury and I are in complete agreement about the answers to those questions. We have therefore agreed an allocation policy between us. He has been allocated the lion's share of the work, giving a detailed account of the legislation, the allocation policy adopted by Newham, and its application in this case. He has also been allocated the task of supplying our answer to the first and most important of the two challenges. I have been allocated the much simpler tasks of adding emphasis to the main features of our answer to the first challenge, because it is the more important, and of supplying our answer to the second. We are, of course, agreed that the council's appeal should be allowed and the claim for judicial review dismissed in so far as it challenged the legality of their allocation scheme.

11. First, it is important to bear in mind that this is a challenge to the council's allocation policy, not a claim that Mr Ahmad should have been given a house. The principal relief sought was a declaration that the allocation scheme was unlawful; parasitic upon that were claims to quash the decision refusing Mr Ahmad's application for re-housing, for a declaration that the council had failed to assess his application according to law, and for an order directing them to do so. However, the principal relief granted by the Deputy Judge was a declaration that "the case shall be reconsidered according to law and in particular the requirement of a multiple needs policy that accords with the law set out in this judgment". In the judgment he made three detailed criticisms (paras 63 to 65) of the policy which gave additional preference on the grounds of multiple need and concluded (para 66) that "when the claimant's case has to be reconsidered the existing form for multiple needs will need some adjustments in the light of the observations in this judgment". The present policy was deficient, "however difficult it is for the defendant council to formulate *this decision* and without being over-rigid with the application of what is a judgment of need" (emphasis supplied). This strongly suggests that the Deputy Judge was approaching the problem from the point of view of the proper assessment of Mr Ahmad and his needs (which the council conceded had not been done) and not from the point of view of the overall legality of a policy which

would have to apply to everyone who applied to the council for housing accommodation.

12. Secondly, the relief claimed is important because no-one suggests that Mr Ahmad has a right to a house. At most, he has a right to have his application for a house properly considered in accordance with a lawful allocation policy. Part VI of the Housing Act 1996 gives no-one a right to a house. This is not surprising as local housing authorities have no general duty to provide housing accommodation. They have a duty periodically to review housing needs in their area (Housing Act 1985, s 8). They have power to provide housing accommodation by building or acquiring it (1985 Act, s 9). They also have power to nominate prospective tenants to registered social landlords or to others. They are required to have an allocation policy which applies to selecting tenants for their own housing or nominating people for housing held by others (Housing Act 1996, s 159(2)). But this does not mean that they have to have available any particular quantity of housing accommodation, still less that they must have enough of it to meet the demand, even from people in the "reasonable preference" groups identified in section 167(2). In some areas there may be an over-supply of council and social housing. In others there may be a severe under-supply. Newham is one of those others.

13. Thirdly, there is a fundamental difference in public law between a duty to provide benefits or services for a particular individual and a general or target duty which is owed to a whole population. One example of the former is in Part VII of the 1996 Act, which deals with the housing authority's duties towards individual homeless people. If certain conditions are fulfilled, section 193(2) requires that the authority "shall secure that accommodation is available for occupation by the applicant". The individual applicant has the right to challenge a decision that the duty is not owed in the county court. Another example is in section 20 of the Children Act 1989, which requires a local children's services authority to provide accommodation for "any child in need" because, in effect, he has no-one who can look after him properly. An example of a target duty is in section 17 of the 1989 Act, which provides that "it shall be the general duty" of local children's services authorities to provide a range of services to safeguard and promote the welfare of children in need within their area. This does not give any particular child a right to be provided with a particular service: see *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208. In the case of social housing, there is not even a duty to provide it, although there is a duty to have and to operate a lawful allocation policy.

14. Fourthly, such a policy must comply with the statutory requirements and with the general public law requirement of rationality. It must, of course, be lawfully and fairly operated, for example without unlawful discrimination. But, the complaint before us is against the policy itself. As Lord Neuberger demonstrates, it cannot be shown that the policy fails to comply with the statutory requirement in section 167(2) "to secure that reasonable preference is given to" the defined groups. These are not the only groups to whom housing may be allocated. For example, the council clearly have to house what they call "decants", households which "must be rehoused as a result of Council action, such as major repairs, rehabilitation or improvement works or Environmental Health enforcement action". In practice, these account for quite a substantial proportion of new lettings in Newham. Technically, the requirements of Part VI do not apply to them at all, unless they have applied for a transfer: see section 159(5). Newham are also delighted to rehouse any secure tenant who is willing to move from accommodation which is now too large, most of whom will not fall within any of the reasonable preference groups. They also have a policy on transfers to same sized accommodation, of which more anon. And there are some special schemes, for example to enable the council to perform their duties to children in or leaving care, for council workers retiring from tied accommodation, or for key workers who would not otherwise be able to live in the borough. No-one suggests that these are unlawful. Otherwise, the Newham scheme does give preference to the listed groups over everyone else. And within those listed groups, it gives additional preference to some narrowly defined households who are in the greatest possible need. This they are allowed but not required to do by the tailpiece to section 167(2). Section 167(2A) further allows but does not require them to determine priorities as between the people within section 167(2).

15. Fifthly, even if the scheme is not unlawful because it fails to comply with section 167(2), is it unlawful because it is irrational? The earlier decisions in the High Court and Court of Appeal, culminating in *R (A) v Lambeth London Borough Council* [2002] EWCA Civ 1084, [2002] HLR 998, concluded that a policy was irrational if it did not contain "a mechanism for identifying those with the greatest need and ensuring that so far as possible and subject to reasonable countervailing factors (for example, past failure to pay rent etc) they are given priority" (para 18). There are numerous problems with that approach. 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. Identifying the individual households in greatest need could only be done through some sort of points based system and experience has shown that these too may be open to attack, either on the ground that they are too rigid and therefore unduly fetter the council's discretion or on the ground that the particular distribution of points is for some reason irrational: see *R v Lambeth London Borough Council, ex p Ashley* (1996) 29 HLR 385; *R v Islington London Borough Council, ex p Reilly and Mannix* (1998) 31 HLR 651; and *R v Tower Hamlets London Borough Council, ex p Uddin* (1999) 32 HLR 391. The trouble is that any judicial decision, based as it is bound to be on the facts of the particular case, that greater weight should be given to one factor, or to a particular accumulation of factors, means that lesser weight will have to be given to other factors. The court is in no position to re-write the whole policy and to weigh the claims of the multitude who are not before the court against the claims of the few who are. Furthermore, relative needs may change over time, so that if the council were really to be assessing the relative needs of individual households, it would have to hold regular reviews of every household on the waiting list in order to identify those in greatest need as vacancies arose. No-one is suggesting that this sort of refinement is required. It would be different, of course, if the most deserving households had a right to be housed, but that is not the law.

16. Sixthly, therefore, the question is how broad the brush can be. One can, of course, imagine policies that would be irrational. It is dangerous to give examples which have not been tested by argument. But one possibility might be a policy which ensured that small families had priority over large ones, or that people coming from outside the borough had priority over those living within it, or that people who had been waiting the shortest time had preference over those waiting the longest. But it is not irrational to have a policy which gives priority to some tightly defined groups in really urgent need and ranks the rest of the "reasonable preference" groups by how long they have been waiting. These definitions are of course open to criticism, and no doubt when the council come to rewrite their policy they will give careful thought to the points which have been made in these proceedings, but it is not for the courts to pick detailed holes in the definitions which the council have chosen. Section 167(6) makes it clear that, subject to the express provisions, it is for the council to decide on what principles the scheme is to be framed.

17. The second criticism is that existing tenants, who do not fall within the reasonable preference groups but who want to transfer to another property of the same size as their present home, are allowed to bid for the properties advertised under the choice based lettings scheme alongside people, whether existing tenants or not, who do fall within the reasonable preference groups. The overall maximum of 5% per year of lettings under the choice based scheme to transfer tenants does not afford a reasonable preference to the listed groups. The argument is that the people in these groups must be given preference in relation to every property which is let under the scheme.

18. The problem with this argument is that section 167(2) only requires that these groups be given a "reasonable preference". It does not require that they should be given absolute priority over everyone else. Still less does it require that an individual household in one of those groups should be given absolute priority over an individual household which wishes to transfer. The decision in *R (A) v Lambeth London Borough Council* [2002] HLR 998, 16–17, 37, appears, in part at least, to have been based on this mistaken premise. The scheme is about the overall policy for allocating the available housing stock between groups.

19. It is accepted that the council are entitled to allocate properties to people who do not fall within the reasonable preference groups. It is accepted that they may take into account wider housing management considerations as well as the needs to which reasonable preference must be given. Thus no-one has suggested that the very favourable treatment given to under-occupation transfers is unlawful. Almost by definition a tenant who is prepared to move from accommodation which is larger than her needs is unlikely to fall within any of the reasonable preference groups. Yet it is obviously good housing management, and to the advantage of households like Mr Ahmad's, to encourage people in larger homes to transfer to smaller ones. It produces an overall increase in the accommodation available.

20. Allowing transfers to same-sized accommodation does not increase the accommodation available, but neither does it decrease it. The property left by the transferring tenant becomes available to others, either under the direct offer scheme or under the choice based letting scheme. It may or may not be less attractive than the property to which the tenant has moved. This is a very subjective matter. Different tenants want different kinds of property in different locations. Within limits, the whole point of the scheme is to allow people some choice about where

to live. This too must be good housing management. It makes sense to allow tenants to move to properties or locations which they prefer. Happy tenants are much more likely to be good tenants.

21. It could be argued that, because a transfer is accommodation-neutral, it has no effect upon the overall allocation scheme. There will still be exactly the same amount of accommodation available for the reasonable preference groups. But that would be going too far. The requirements of Part VI used not to apply to most existing tenants of social housing, but now they do apply to tenants who apply for a transfer (as opposed to those who have a transfer thrust upon them by the council's action): see section 159(5), substituted by section 13 of the Homelessness Act 2002. This must mean that some preference has to be given to the reasonable preference groups over existing tenants who want to transfer. The council have sought to do this by allocating 95% of the properties which become available for choice based letting to people, whether or not they are existing tenants, in the reasonable preference groups and only 5% to voluntary transfers. Once it is accepted that reasonable preference does not mean absolute priority, and that it is reasonable for a housing authority to take wider housing management considerations into account, it is difficult to say that Newham were not entitled to strike the balance which they have struck.

22. It is fitting to conclude by endorsing these words of the Deputy Judge (para 49 of his judgment):

> "It is apparent that all judges considering this problem have stressed that it is for the local authority to provide an allocation scheme according to its Part VI duty, and the merits as to who, how and when priority should be afforded is a matter for the local authority subject to its special duties. Judges must be particularly slow in entering the politically sensitive area of allocations policy by over-broad use of the doctrine of irrationality. A particular scheme cannot be castigated as irrational simply because it is not a familiar one to the court or is not considered to be the perfect solution to a difficult, if not impossible, question to resolve."

Castigating a scheme as irrational is of little help to anyone unless a rational alternative can be suggested. Sometimes it may be possible to do this. But where the question is one of overall policy, as opposed to individual entitlement, it is very unlikely that judges will have the tools

available to make the choices which Parliament has required a housing authority to make.

23. For these reasons, in addition to those given by Lord Neuberger, I would allow this appeal and dismiss the claim for judicial review in so far as it challenged the legality of the Council's housing allocation scheme.

**LORD NEUBERGER OF ABBOTSBURY**

My Lords,

*Introductory*

24. This is an appeal brought by the London Borough of Newham against a decision of the Court of Appeal, [2008] EWCA Civ 140, upholding the first instance decision of Mr Nicholas Blake QC (as he then was) sitting as a Deputy Judge in the Administrative Court, [2007] EWHC 2332 (Admin). By that decision, the Deputy Judge declared that the policy adopted by Newham pursuant to section 167 of the Housing Act 1996 for determining priorities in allocating their social housing accommodation was unlawful.

25. The allocation of social housing is a difficult and potentially controversial matter, which gives rise to very hard choices, at all levels of decision making, whether strategic, policy or specific. Social housing is an increasingly scarce (and correspondingly valuable) resource, for which demand considerably outstrips supply, in some areas (such as Newham) by an enormous margin, even if one restricts one's assessment of demand to those whose claims would be characterised by most people as very pressing.

26. While allowing local housing authorities considerable discretion as to the policy they adopt towards allocation, the legislature has, since 1935, intervened to the extent of laying down some principles which have to be complied with. The current statutory principles are to be found in Part 6 of the Housing Act 1996, which has been amended, most

importantly for present purposes, by the Homelessness Act 2002 and the Housing Act 2004.

*The statutory provisions*

27. Section 159(1) of the Housing Act 1996 requires a local housing authority to comply with Part 6 of the Act (sections 159 to 174) in allocating housing accommodation. Section 159(7) provides that "[s]ubject to the provisions of this Part, a local housing authority may allocate housing accommodation in such manner as they consider appropriate." Section 169 provides that, when exercising their functions under Part 6 of the 1996 Act, local housing authorities "shall have regard to such guidance as may …be given by the Secretary of State".

28. Section 166 is concerned with applications for housing accommodation. The centrally relevant provision for present purposes is section 167, which in its current form provides:

> "(1) Every local housing authority shall have a scheme … for determining priorities, and as to the procedure to be followed, in allocating housing accommodation.
>
> … .
>
> (1A) The scheme shall include a statement of the authority's policy …
>
> … .
>
> (2) As regards priorities, the scheme shall 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 a 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 this subsection (being descriptions of people with urgent housing needs).

…

(2A) The scheme may contain provision for determining priorities in allocating housing accommodation to people within subsection (2); and the factors which the scheme may allow to be taken into account include –

(a) the financial resources available to a person to meet his housing costs;

(b) any behaviour of a person (or of a member of his household) which affects his suitability to be a tenant;

(c) any local connection (within the meaning of section 199) which exists between a person and the authority's district.

…

(4) The Secretary of State may by regulations specify factors which a local housing authority shall not take into account in allocating housing accommodation.

….

(6) 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.

…..

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

*Newham's housing allocation scheme*

29. Newham introduced their current allocation scheme ("the Scheme") in September 2002, and described it as involving a move from a "needs based points scheme" to a "choice based scheme". Since its introduction in 2002, the Scheme has been changed from time to time, most notably in February 2005, pursuant to an undertaking following a

judicial review challenge in 2003. The detailed terms of the Scheme in its current form run to over 110 pages together with appendices, but its essential features, at least for present purposes are as follows.

30. The Scheme involves two different methods of offering properties, which are intended to reflect two different types of need. There is the choice based letting arrangement (known as "CBL"), which accounts for around 75% of all properties let, and there is the direct offer arrangement (known as "Direct Offers"), which accounts for the remaining 25% or so. Applicants subject to Direct Offers effectively take priority over those subject to CBL, so that, when a property becomes vacant, it is only if it is not wanted by any applicant in the Direct Offers group that it will be offered under the CBL.

31. Applicants admitted to the CBL are placed in one of three categories. They are

> (1) "Priority Homeseekers", being those whose households contain at least one person who satisfies one or more of the criteria in section 167(2); this category accounts for the great majority of CBL applicants;
>
> (2) "Tenants Seeking a Transfer" being those who are already Newham tenants, and are applying for a transfer, but do not fall within category (1); and
>
> (3) "Homeseekers", being those who do not fall within category (1) or (2), i.e. they are not tenants of Newham and do not satisfy any of the section 167(2) criteria.

32. Once a property is available to be let on the CBL, it is offered to those registered on that part of the Scheme, and they are free to bid. The CBL provides that no more than 5% of lettings can be to Tenants seeking a Transfer, and in practice it appears that CBL lettings to such applicants account for a total of between 4 and 5% of the total CBL lettings every year. The number of lettings to those applicants in the Homeseekers group is tiny. Accordingly, around 95% of the CBL properties are allocated to applicants who are Priority Homeseekers. When (as almost always happens) more than one applicant in the Priority Homeseekers group bids for a property, the property is awarded to the applicant who has been a Priority Homeseeker for the longest –

i.e. Priority Homeseekers are effectively ranked by reference to the date on which they were registered as such.

33. So far as the Direct Offers are concerned, it includes a number of categories of applicant, namely "Additional Preference", "Multiple Needs", "Under Occupation Transfers", "Decants" and "Special Schemes". The first two categories, which are the relevant ones for present purposes, are intended to include applicants who would be Priority Homeseekers under the CBL, but who have especially pressing needs for rehousing. The Additional Preference group consist of those who are judged by Newham's housing officers to represent particularly acute cases under some of the paragraphs of section 167(2). Its criteria are very stringent. For example, a medical condition will not assist unless it renders it "impossible" for the sufferer to continue to occupy his or her present accommodation. Similarly, although a person can also qualify if subject to harassment or "social/welfare need", the harassment or the need must be severe, such as physical or sexual abuse, or a need for residential care. The Multiple Needs group includes those who can attain a specified score, by reference to the number of people in the applicant's household requiring to move on the ground of statutory overcrowding, or Environmental Health abatement action or medical grounds: if 2 or 3 points are scored, one offer will be made; if 4 or more points, then there will be more offers. The criteria for qualifying for Multiple Needs are also very tight: the statutory test for overcrowding or abatement action requires exceptional facts; and medical reasons only count if they are very serious and apply to more than one member of the household.

34. For completeness, I should add that the Scheme also contains a provision whereby housing officers can allocate housing in "special cases not covered by normal allocation rules, which warrant special priority". This sensible provision was (rightly in my opinion) not relied on by either party as having any relevance to this appeal, and I say no more about it.

*The view of the courts below*

35. There were two reasons why the courts below considered that the Scheme was unlawful. The first, and principal, reason was well summarised in the Court of Appeal by Richards LJ (who gave the only reasoned judgment), at [2008] EWCA Civ 140, para 69. He said that the CBL "places all those who qualify for reasonable preference under

section 167(2) in a single group, that of Priority Homeseeker, and … their relative priority in bidding for available accommodation is determined not by relative need, but by the length of time they have been registered on the housing list". In agreement with the Deputy Judge, he said that this was "plainly an insufficient mechanism for identifying those in greatest need and giving them priority". At [2008] EWCA Civ 140, para 70, again in line with the views expressed by the Deputy Judge, he rejected the argument that the existence of the Additional Preference and Multiple Needs groups within the Direct Offers "ma[d]e good the deficiency of the [CBL]", because of the "highly restrictive" criteria which have to be satisfied in order to qualify for those groups.

36. The second reason why the Scheme was held to be unlawful was due to the fact that the CBL involved allocating a significant (if small) proportion of housing to a class of applicants who did not satisfy any of the requirements in paras (a) to (e) of section 167(2), namely the Tenants Seeking a Transfer. As Baroness Hale explains, this opinion deals with the first issue, whereas her opinion concentrates on the second issue.

*The statutory requirements*

37. It is clear from section 167(6) that, subject to complying with the other provisions of section 167, and subject to rationality and compliance with any other relevant legislation, the terms of any allocation scheme are a matter for the local housing authority ("the authority"). Paras (a) to (e) of section 167(2) requires every scheme to give "reasonable preference" to those applicants whose households include at least one person falling within one or more of those paragraphs. The primary issue on this appeal is whether, as the courts below held, section 167 requires an authority to go further and accord priority as between reasonable preference applicants by reference to the relative gravity of their needs, and, if so, the extent to which such according of priority is required.

38. In my view, there are a number of reasons for doubting whether there is such a requirement on an authority. The first three reasons turn on the wording of the section; the fourth and fifth reasons rely on policy considerations.

39. First, the opening words of section 167(2), when read together with the ensuing five paragraphs, as a matter of ordinary language, require an authority to accord reasonable priority to people who fall within one or more of those paragraphs over people who do not. To read the opening words as additionally requiring an authority to assess the degree to which a particular person or household satisfies the requirements of any of the five paragraphs, and to accord priority accordingly, involves those opening words performing, as it were, a double duty, and therefore places more weight on those words than, in my view, they naturally bear.

40. Secondly, there is the closing sentence of section 167(2). By using the word "may", it gives a discretion to authorities, as opposed to imposing a duty on them. The closing sentence appears to me to permit, and therefore impliedly not to require, an authority to carry out the very exercise which, on the respondent's case, it is their duty to do. In this connection, it was suggested by Mr Jan Luba QC, in the course of his characteristically clear and impressive argument, that the reference to "urgent housing needs" meant that the closing sentence had very limited application, and therefore was not inconsistent with the conclusion reached by the Court of Appeal at [2008] EWCA Civ 140, para 69 (namely, that it is "plainly an insufficient mechanism" if all those applicants who satisfy at least one of paras (a) to (e) of section 167(2) are ranked equally, and are then selected by reference to the time they have been on the authority's waiting list.)

41. I do not agree. First, as my noble and learned friend Lord Walker of Gestingthorpe pointed out, the whole exercise with which section 167 is concerned involves applicants who wish to be rehoused as quickly as possible: the stronger the case under the paragraphs of section 167(2), the more urgent the housing need. Secondly, even if the closing words only apply to some applicants falling within paras (a) to (e), the notion that an authority *may* accord such urgent cases extra priority over other reasonable preference applicants seems quite inconsistent with the notion that the authority is statutorily obliged to rank all reasonable preference applicants by reference to the strength of their respective cases.

42. Thirdly, there is the first phrase of section 167(2A): it states that a scheme "may contain provision for determining priorities … to people within subsection (2)". As a matter of language, it appears to me that perhaps even more clearly than the closing words of section 167(2), this provision is again inconsistent with the conclusion expressed by

Richards LJ at [2008] EWCA Civ 140, para 69. The opening part of section 167(2A), again by using the crucial word "may", makes it clear that authorities can have priority rules as between reasonable preference applicants, which strongly suggests that they are not required to do so. The subsection then goes on to permit authorities, which take such a course, to take certain factors into account. Mr Luba argued that the opening words of the subsection were directed only to those factors, but that does not attribute their natural meaning to them, and the only reason for departing from the natural meaning is because it might add nothing to the closing sentence of section 167(2), in which case that closing sentence is clearly inconsistent with an argument that there is a statutory duty to do that which the courts below held that the Scheme should have done.

43. (It should be pointed out that it is not illegitimate to invoke section 167(2A), which was obviously added by way of amendment to the 1996 Act, as an aid to interpreting section 167(2). This is because the present section 167(2) was inserted by way of replacement for the original subsection by section 16 of the 2002 Act, which also introduced section 167(2A) into the 1996 Act.)

44. Fourthly, the Green Paper which introduced the 2002 Act, "Quality and Choice: A Decent Home for All" (April 2000), contains some relevant observations. At para 9.18, it expresses the view that "points-based assessment systems" are not "an ideal way of ensuring that social housing lettings meet need in a sustainable way", and suggests moving away from such systems to "more broad-brush 'banding' systems". It then says that

> "The banding could be as simple as:
>
> people with an urgent need for social housing;
>
> those in non-urgent need of social housing; and
>
> those with no particular need for it."

In para 9.23, the Green Paper states that particularly "in areas of high demand", authorities "may decide to introduce additional bands to differentiate between demand priorities". (The Government paper published in December 2000 replying to responses to the Green Paper contains nothing to add to or detract from these observations).

45. A points-based assessment system is one which ranks each applicant by the number of points he is awarded, the points being attributed to various categories of need on the basis of gravity. Once one departs from a points system, it is difficult to conceive of a scheme which is very subtle in terms of assessing relative need as between applicants who establish urgent need, or as between those who establish a real, albeit not urgent, need. Even more significantly, the specific example of the "simple" banding system in para 9.18 seems very close to that adopted by the Scheme. As I see it, the Scheme has a top band within Direct Offers of Additional Preference and Multiple Need (i.e. urgent need), a second band within CBL of Priority Homeseeker (i.e. non-urgent need) and a third band within CBL of Homeseeker (i.e. no particular need). The use of the word "may" in para 9.23 speaks for itself.

46. Fifthly, 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.

47. In relation to the provision of accommodation under the National Assistance Act 1948, my noble and learned friend, Baroness Hale of Richmond, then Hale LJ, said in *R (Wahid) v Tower Hamlets London Borough Council* [2002] EWCA Civ 287 [2003] HLR 13, para 33, "[n]eed is a relative concept, which trained and experienced social workers are much better equipped to assess than are lawyers and courts, provided that they act rationally". Precisely the same is true of relative housing needs under Part 6 of the 1996 Act, and trained and experienced local authority housing officers.

48. If section 167 carries with it the sort of requirements which can be said to be implied by the decisions of the Court of Appeal and the Deputy Judge in this case, then Judges would become involved in considering details of housing allocation schemes in a way which would be both unrealistic and undesirable. Because of the multifarious factors involved, the large number of applicants, and the relatively small

number of available properties at any one time, any scheme would be open to attack, and it would be a difficult and very time-consuming exercise for a Judge to decide whether the scheme before him was acceptable. If it was not, then the consequences would also often be unsatisfactory: either the authority would be in a state of some uncertainty as to how to reformulate the scheme, or the Judge would have to carry out the even more difficult and time-consuming (and indeed inappropriate) exercise of deciding how the scheme should be reformulated to render it acceptable. As Baroness Hale said, that point is well made by looking at the Deputy Judge's order in this case, which requires the Scheme to be reconsidered "in accordance with the law set out in this judgment".

*The irrationality argument*

49. Accordingly, particularly in the light of the discretion accorded to housing authorities under section 159(7), it seems to me to be impossible to argue that an authority's allocation scheme is unlawful unless the basis on which it accords priority as between those applicants who satisfy one or more of paras (a) to (e) of section 167(2) is irrational. In particular, it appears to me that it could only be said that a scheme must have more than one band for those applicants who satisfy one or more of paras (a) to (e) of section 167(2), if it would be irrational not to have more than one band. Irrationality is indeed at least part of the basis of the respondent's attack on Newham's Scheme.

50. Given the five statutory and policy factors discussed above, I find it very difficult to accept that the Scheme can be characterised as irrational on the grounds given by Richards LJ at [2008] EWCA Civ 140, paras 69 and 70. It is worth briefly re-emphasising the point that the Scheme plainly satisfies the express statutory requirements. Indeed, in the light of the preference given to the Additional Preference and Multiple Needs groups, the Scheme exceeds the minimum statutory requirements when it comes to banding those applicants falling within section 167(2)(a) to (e). Further, if an authority is statutorily entitled, but not bound, to have, as it were, "additional preference" sub-bands, according to the closing sentence of section 167(2), the Scheme cannot be statutorily required to do so, and anyway, with the Additional Preference and Multiple Needs groups, it does so. Also, in accordance with the first phrase of section 167(2A), the Scheme makes "provision for determining priorities" between the Priority Homeseekers, namely by reference to the time they have been in that category. It is also worth adding that the Scheme appears to satisfy what was envisaged in para

9.18 of the Green Paper. In addition, if the Scheme distinguished between the Priority Homeseekers with any degree of subtlety, it would come close to adopting a points-based assessment system, which was rather deprecated in the Green Paper.

51. The main argument for the respondent is that it is indeed irrational to include every applicant who satisfies one or more of paras (a) to (e) of section 167(2) in the same band, and then to select successful applicants by how long they have satisfied this criterion. It is undoubtedly a rough and ready system. However, it has many advantages over a more nuanced system. Thus, it is very clear, relatively simple to administer, and highly transparent. Once an authority has a number of different bands based on degree of need, or the degree to which the section 167(2) factors are satisfied, the banding exercise will be much more expensive, much more time consuming, much more based on value judgment, much more open to argument, much more opaque, and, as Baroness Hale pointed out, it would require much more monitoring, as applicants' circumstances will inevitably be liable to change.

52. Further, the period a household has been waiting for accommodation is, to put it at its lowest, a factor which a reasonable authority could take into account; indeed, a scheme providing that it could never be a relevant factor would, I suspect, be susceptible to judicial review. It is not as if it was a factor which had been excluded by an order under section 167(4). Indeed, I find it impossible to see why an authority should not take the view that it is an important factor. The fact that an applicant whose household includes someone who satisfies one or more of the section 167(2) factors has had to wait in his present unsatisfactory accommodation for a long time appears to me to be a factor which a reasonable authority could regard as very significant. It also has the advantage of being quantifiable, transparent and hard to manipulate.

53. Quite apart from this, it should not be overlooked that there are two privileged groups who occupy a small higher band, namely applicants whose households not only include people who satisfy one or more of paras (a) to (e) of section 167(2), but who do so to the extent of meeting the criteria of the Additional Preference or Multiple Needs groups.

54. I accept that the Scheme distinguishes between those applicants who satisfy one or more of paras (a) to (e) of section 167(2) factors in a relatively crude way, and that the criteria which have to be met to be within the Additional Preference and Multiple Needs groups are very stringent. Indeed, Newham may well think it right to reconsider both the crudeness of the selection method under the CBL and the very strict criteria for admission to the Direct Offers. However, particularly bearing in mind the enormous difficulties faced by Newham because of the yawning chasm between the supply of social housing, and the demand for it from such a large number of households with pressing needs, any scheme for allocating Newham's housing could be criticised. There is nothing inherently absurd or arbitrary about prioritising those who satisfy section 167(2) by reference to time on the waiting list, subject to having a very small preference group, and nothing in the evidence supports a contrary conclusion on the facts in this case.

55. This is not to say that there could never be circumstances in which a scheme, which complies with the statutory requirements, could be susceptible to judicial review on grounds of irrationality. Such a suggestion would be unmaintainable not least because it would represent an abdication of judicial responsibility. However, what is important is to emphasise that once a housing allocation scheme complies with the requirements of section 167 and any other statutory requirements, the courts should be very slow to interfere on the ground of alleged irrationality. In this connection, it is right to say that I am in complete agreement with the views so well expressed by my noble and learned friend, Baroness Hale of Richmond in paras 11 to 16 of her opinion, which I have seen in draft.

*The reasons which persuaded the courts below otherwise*

56. What was it which caused the Deputy Judge and the Court of Appeal to take a different view? I think that there were three main factors. First, there were a number of cases decided in the Administrative Court and the Court of Appeal; secondly, the courts below were, I suspect, influenced by the very sad plight of the respondent and his family; thirdly, there was the Code of Guidance ("the Code") issued by the Secretary of State pursuant to section 169.

57. So far as the previous cases are concerned, courts have held on a number of occasions that authorities were acting irrationally by having schemes which did not effectively prioritise different degrees of need

between applicants who satisfied one or more of paras (a) to (e) of section 167(2). The reasoning in first instance decisions such as *R v Islington London Borough Council, Ex p Reilly and Mannix* (1998) 31 HLR 651 and *R v Westminster City Council, Ex p Al-Khorsan* (1999) 33 HLR 77 (both of which were approved by the Court of Appeal in *R (A) v Lambeth London Borough Council* [2002] EWCA Civ 1084, [2002] HLR 998).

58. However, those cases were decided before the amendments to section 167 made by the 2002 Act took effect. Accordingly, the second, third and fourth of the five points enumerated earlier in this opinion had no application. It would not be profitable to consider whether those cases were nonetheless rightly decided: the 1996 Act has been subsequently amended in highly relevant ways, and, even if it had not been, the issues in those cases were inevitably fact-sensitive. The essential point about those cases for present purposes is that, contrary to the views expressed below, they can no longer be relied on, as the centrally relevant statutory provision, subsection (2) of section 167, has been replaced by new subsections (2) and (2A).

59. The current circumstances of the respondent and his family cannot fail to engage both sympathy and concern. Mr Ahmad (who is chronically depressed) and his wife live with their four children, in a two-bedroom flat. One of the children has serious physical disabilities, and another suffers from various allergies and has a general behaviour disorder and they are each said to need separate bedrooms. On any view, the flat is seriously overcrowded (but not statutorily so). Mr Ahmad has been on Newham's waiting list for housing since August 1999.

60. Both the Deputy Judge and Richards LJ began with a fairly full description of the sad circumstances of Mr Ahmad and his family. It could well be an unfair suspicion on my part, but this may indicate that, when they came to consider the Scheme, the courts below were impressed by the fact that, despite their very unsatisfactory living conditions, Mr Ahmad and his family had still not been provided with Council accommodation after eight years. However, save in the most exceptional circumstances, it would be wrong in principle to have any regard to the housing circumstances and requirements of an individual applicant when considering the validity of a housing allocation scheme under Part 6 of the 1996 Act.

61. Mr Andrew Arden QC, for Newham, told your Lordships that, though the need of the Ahmad family for alternative accommodation is undoubtedly pressing, indeed urgent, there are a great number of other applicants whose housing needs would be regarded by most people as even more pressing or urgent. Unfortunately, I have no difficulty in accepting that submission, which was (very properly) not challenged by Mr Luba. Indeed, Mr Luba accepted that he was not relying on Mr Ahmad's particular circumstances: the present application is an attack on the Scheme in principle, and not an attack on Newham's failure to provide Mr Ahmad and his family with accommodation under Part 6 of the 1996 Act.

62. This point also highlights how inapt it is for the courts to interfere with housing allocation schemes, save in clear and exceptional circumstances. This follows from the striking imbalance between supply and demand for housing, the very large number of families with an urgent need to be housed under Part 6 of the 1996 Act, and the almost infinite number of different permutations of circumstances giving rise to the urgency. Knowledge of the circumstances of applicants generally, long term strategy considerations, expertise, political and social awareness, and local knowledge all have a part to play when it comes to formulating and implementing a housing allocation scheme. With information essentially consisting of the Scheme itself, the circumstances of the particular applicant and a few statistics (of questionable mutual consistency), the court should be very slow indeed to second guess Newham.

63. As to the Code, the original version, issued in 1996, has been amended from time to time. The version in force at the time Mr Ahmad's application was made followed the decision of the Court of Appeal in *Lambeth* [2002] EWCA Civ 1084, [2002] HLR 998. This may present a problem, in the light of the effect of the amendments to section 167 effected by the 2002 Act, as already discussed.

64. In any event, nothing in the Scheme is inconsistent with the general thrust of the Code, which is accurately summarised in the accompanying letter from the Office of the Deputy Prime Minister (dated 11 November 2002) as being that a scheme should accord "reasonable preference to those with the most urgent housing need". Indeed, in my view, there is nothing in the Code which undermines the statutory freedom accorded to authorities by section 167(6), subject always to complying with the other express statutory requirements. Indeed, following the amendments made by the 2002 Act, as

foreshadowed by the Green Paper, the Code has become less prescriptive. Quite apart from this, the terms of section 169 do not even require an authority to follow the recommendations of the Code, although an authority would no doubt have good reasons before not doing so

*The second issue*

65. In paras 17 to 21 of her opinion, Baroness Hale explains why it is not unlawful for the Scheme to provide for up to 5% a year of the CBL properties to be allocated to Tenants Seeking a Transfer. There is nothing that I can usefully add to her explanation, with which I wholly agree.

*Conclusion*

66. For these reasons, which coincide with those of Baroness Hale, I would allow the appeal of the London Borough of Newham; it follows that the claim for judicial review should be dismissed insofar as it challenged the legality of the Appellants' housing allocation scheme and the declaration made in paragraph 2 of the order of the Administrative Court should be set aside (quoted by Baroness Hale in para 11 above).