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Allocation Schemes (England)
Lessons from the Courts

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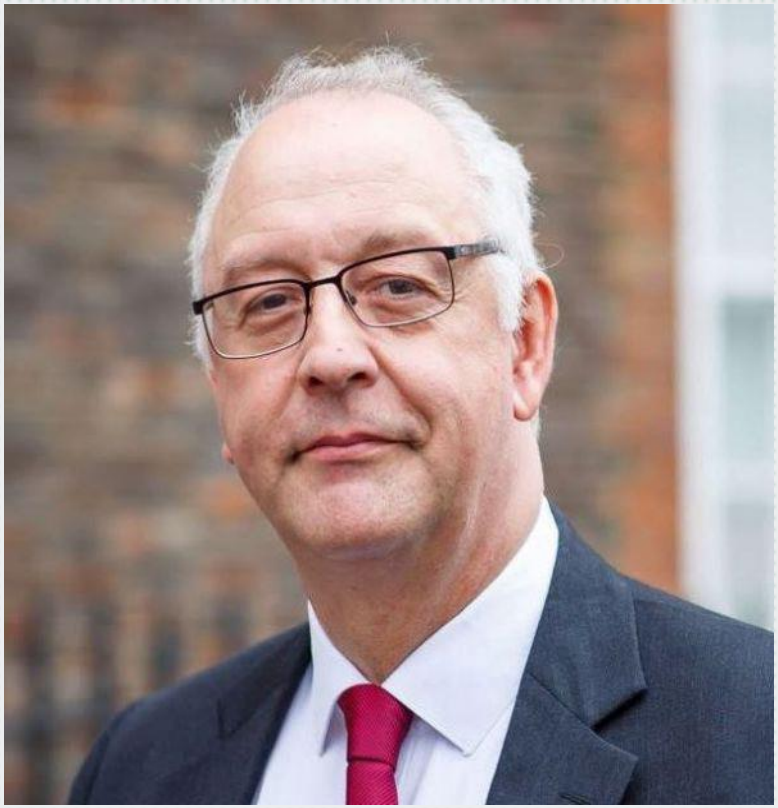
Your Presenters



Lord Neuberger
Ahmad v Newham LBC [2009] P.T.S.R. 632

"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."

What are we talking about?

The issues

1. Overview of Allocation Schemes' flexibility, powers and duties
2. Residency qualification & Discrimination
3. Inclusion of 'reasonable preference' individuals
4. Public sector equality duty (PSED)
5. False information
6. Remedies
7. Discussion and questions

Statutory requirements

Housing Act 1996, Part 6

159 (7) Subject to the provisions of this Part, a local housing authority may allocate housing accommodation in such manner as they consider appropriate – *Osman v Harrow LBC* [2017] EWHC 274 (Admin)

- **Applies to LHAs (**sections 159(1), 166A(1)**)** – nomination agreements **(**section 170**)**

- **Localism Act 2011 changes (**sections 145-147 of 2011 Act**)**

They give local housing authorities in England the power to determine what classes of persons are or are not qualifying persons to be allocated housing **(**section 160ZA(7)**)** and take existing social tenants out of the scope of Part 6 of that Act, with the exception of those who must be given reasonable preference for an allocation (section 159(4A)(4B**)).** (Explanatory Notes)

- **Eligibility (**section 160ZA(1)-(5)**)**

- **Reasonable preference (**section 166A(3)(5)**)**

- **Allocation only via the Scheme (**section 166A(14)**)**

Statutory Guidance

Section 169

169 Guidance to authorities by the Secretary of State.

(1)In the exercise of their functions under this Part, local housing authorities shall have regard to such guidance as may from time to time be given by the Secretary of State.

(2)The Secretary of State may give guidance generally or to specified descriptions of authorities.

- "Allocation of accommodation: guidance for local housing authorities in England" (~~June 2012~~ / December 2020)
- "Providing social housing for local people" (December 2013)
- "Right to Move and social housing allocations" (March 2015)
- "Improving access to social housing for victims of domestic abuse" (November 2018)

Residency Qualifications

Statute/regulation/guidance

- **Housing Act 1996 –**

i. Section 160ZA (7): power to make qualifications

ii. Section 166A(5): factors to determine priorities **(**financial resources, behaviour, local connection**)**

- **Regulations –**

i. Allocation of Housing (Qualification Criteria for Armed Forces) (England) Regulations 2012/1869

ii. Allocation of Housing (Qualification Criteria for Right to Move) (England) Regulations 2015/967

- **Statutory guidance** - 'Providing social housing for local people' (December 2013)

Local lettings schemes

Section 166A(6)(b)

- *R. (on the application of C) v Islington LBC* [2017] H.L.R. 32

- *Allocation of accommodation: guidance for local housing authorities in England* , DLCG (June 2012), para.4.21

- An allocation scheme may contain provision about the allocation of particular housing accommodation to persons of a particular description, whether or not they are to be accorded a reasonable preference - section 166A(6)(b):

(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)).

Direct offers

Legality

"Secondly, there is nothing in the 2015 scheme which sets out the criteria which the defendant uses to make direct offers, so as to enable an applicant, such as the claimant, both to make a realistic application to be dealt with under this system, and to know whether they are likely to succeed." **(***C v Islington LBC* [2017] H.L.R. 32 at 61 per Baker J**)**

- May be unlawful
- Need explanation as to use
- Monitor application

Residency qualification

Discrimination – the cases

- *Z v Hackney LBC* [2020] 1 W.L.R. 4327
- *Gullu v Hillingdon LBC* [2019] P.T.S.R. 1738
- *H v Ealing LBC* [2018] P.T.S.R. 541
- *C v Islington LBC* [2017] H.L.R. 32
- *XC v Southwark LBC* [2017] H.L.R. 24
- *HA v Ealing LBC* [2016] P.T.S.R. 16

Equality Act 2010 - sections 19/29 (see sections 13, 15)

ECHR – articles 8/14. Does it add anything?

Lord Reed JSC
Bank Mellat v HM Treasury (No 2) [2014] AC 700

"**74**…it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4)G whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter ... In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

Reasonable preference

Section 166A(3)

1. Reasonable preference is not the same as success.
2. It is possible for a lawful allocation scheme to give reasonable preference to a person even if that person is never allocated accommodation.
3. Whether a preference is reasonable is a decision for the authority.

166A(3)As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to—

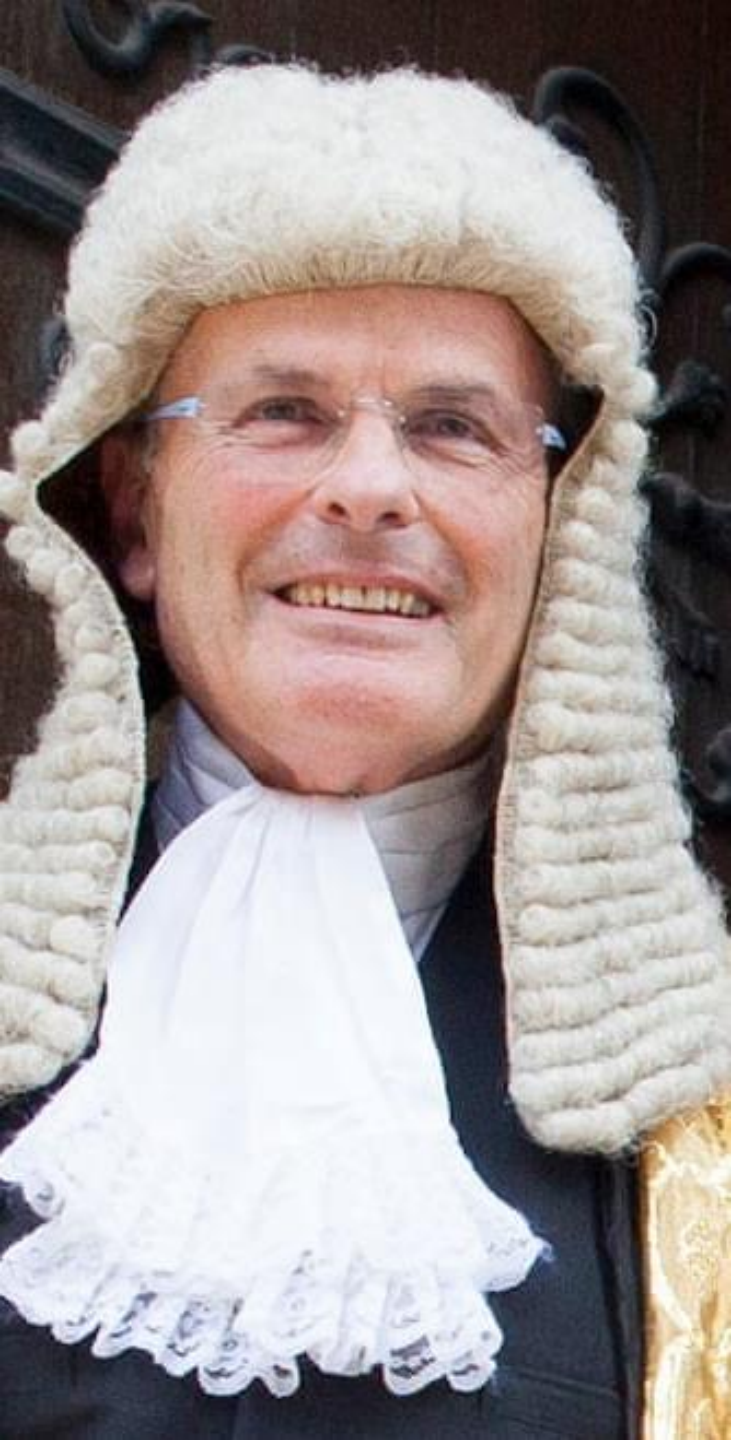
(a)people who are homeless (within the meaning of Part 7);

(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 any 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).



Lord Justice Dyson Reasonable Preference R(Lin) v Barnet LBC [2007] H.L.R. 30

"Preference should not be confused with prospects of success. Prospects of success depend on many factors, of which the most material is the fact that the demand for accommodation greatly exceeds the supply. It is quite possible for a lawful scheme to give reasonable preference to a person within s.167(2) and for that person never to be allocated Pt 6 housing. Such a person is entitled to no more than a reasonable preference."

Exclusion from schemes

Reasonable preference

- Encyclopaedia of Housing Law says that qualification powers cannot be used to disqualify a person entitled to a reasonable preference **(**1-3550**)**

- Relies on 3 cases:

1. *R. (Jakimaviciute) v Hammersmith and Fulham LBC* [2015] H.L.R. 5
2. *R. (Alemi) v Westminster CC* [2015] P.T.S.R. 1339
3. *R. (HA) v Ealing LBC* [2016] P.T.S.R. 16

- Is the key whether a 'class' of reasonable preference groups are excluded by a term of a policy **or** is it acceptable that an individual in such groups is excluded for it to be unlawful?

Judicial comment

Reasonable preference exclusion

- **47**…It is the exclusion of a large proportion of one of those [*reasonable preference*] classes that causes the problem. Nor do I accept that the power to effect such an exclusion is inherent in the flexibility allowed to an authority in securing that reasonable preference is given. **Jakimaviciute**
- **32**…This amended scheme carves out a whole sub-group which is altogether excluded from the potential of being allocated social housing for 12 months. They have no preference. Part VI of the Act does not permit the removal of a whole sub-group from a group which section 166A(3) requires be given reasonable preference in the allocation of social housing, when that sub-group is not defined by reference to differentiating features related to the allocation of housing, but applies a simple time bar to all who otherwise qualify. It is unlawful. **Alemi**
- **23**. Although a residency requirement is an entirely appropriate and encouraged provision in relation to admission onto a social housing list, it must not preclude the class of people who fulfil the "reasonable preference" criteria. **HA**
- **6.** All eligible persons included in the "reasonable preference" groups must be treated as qualifying for inclusion in the allocation policy. **Gullu**

Public Sector Equality Duty

- Equality Act 2010, section 149

  (1)A public authority must, in the exercise of its functions, have due regard to the need to—

  (a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

  (b)advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

  (c)foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

- Relevant "functions"?
  - The setting up of an allocation scheme and maintaining and applying it thereafter.

Public Sector Equality Duty

- If you read but one judgment … *R. (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), per Aikens LJ at [90-96]

  i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters.

  ii) The duty must be fulfilled before and at the time when a particular policy is being considered.

  iii) The duty must be 'exercised in substance, with rigour, and with an open mind'. It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument.

  iv) The duty is non-delegable.

  v) It is a continuing one.

  vi)It is good practice for a decision maker to keep records demonstrating consideration of the duty.

- And one more … *Bracking v SSWP* [2013] EWCA Civ 1345, per McCombe LJ at e.g. [59-61]

Salutary PSED lessons

- Lessons often learned from the experience – if misfortune - of others.
- Critical to be able to evidence the equalities assessments undertaken.
  - *"[…] the evidence did not disclose the equalities analysis prepared by the Council in advance of the adoption of the Allocation Scheme. […] Any proper examination of the compliance by a public body with the PSED duty must demonstrate how the potentially discriminatory effects of policy decisions have been considered by effective decisions makers at a public body."*

R (Nur) v Birmingham CC [2020] EWHC 3526 (Admin), per David Lock QC at [42] and [46]

- See also e.g.:
  - *R (Chavda) v Harrow LBC* [2007] EWHC 3064 (Admin), per HHJ Mackie QC at [40]
  - *Brown*, above, per Aikens LJ at [91]; and *Bracking* at [59-61]

Salutary PSED lessons

- Critical to 'road test' any policy adopted, to evaluate and consider potentially discriminatory effects.
  - "[…] where a specific decision had been made by the Council to give preference to one group of Birmingham residents, namely families with children, and where that decision had the effect of substantially reducing the opportunities available to another group of Birmingham residents with protected characteristics, namely families with a disabled adult, *the PSED requires the Council to have recognised this potentially discriminatory effect of its policy and to have specifically reached the decision that one group of residents should be preferred over another group. The PSED requires that conscious focus on the equality impacts of a policy*. If a policy has a discriminatory effect, this should have been drawn to the attention of decision makers so that can understand the impact of the decision on people with a range of protected characteristics."

  Nur, above, per David Lock QC at [49]
- Though note *Gullu / Ward v LB Hillingdon* [2019] PTSR 1738, per Lewison LJ at [72] and [81], on the limits of the PSED.

Salutary PSED lessons

- Critical to formally review the effect of a policy at regular intervals, and to evidence that review.
  - "I would not hold that Hillingdon was in breach of the PSED in carrying out the initial equality impact assessment in 2013. At that stage it had not been shown that there was any reason for Hillingdon specifically to have considered non-UK nationals or refugees. But by the time of the 2016 assessment Mr Gullu had made his challenge in court. In the light of that challenge, I consider that Hillingdon ought at least to have considered the position of non-UK nationals. But it did not. I would therefore hold that Mr Gullu has established a breach of the PSED."

  Gullu / Ward, above, per Lewison LJ at [74]

- Consultation about a "major changes of policy" (section 166A(13)) will require careful consideration of PSED.
  - Consider, e.g., introduction of working household scheme in *R (H) v Ealing LBC* [2017] EWCA Civ 1127; [2018] PTSR 541

Salutary PSED lessons

- Beware a "light touch" – PSED demands rigorous consideration, though not particular results.

  - "Thus an incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given to them […]"

    Brown, above, per Aikens LJ at [90]

  - "Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision."

    R. (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin), per Elias LJ at [77]

Incorrect allocations and false information

- Allocation is <u>not</u> the same as the grant of a tenancy and not to be elided with disposal under Housing Act 1985.

  "Pt VI of the 1996 Act is concerned with, indeed limited to, establishing and then managing priorities between applicants for residential accommodation […], which effectively is preliminary to, and not part of, the actual letting of such accommodation, which is governed by Pt II of the 1985 Act."

  Birmingham CC v Qasim [2010] PTSR 471, per Lord Neuberger MR at [18]

- 'Incorrect' allocations are therefore not necessarily void and remain effective unless set aside by a court in judicial review proceedings.

  - "[…] the fact that the anterior public law procedural requirement of compliance with the Scheme was not complied with by no means necessarily means that the subsequent grant of a tenancy was invalid." [28]

Incorrect allocations and false information

- The same conclusion follows the grant of a tenancy to an applicant culpable of misrepresentation in the allocation process: the tenancy is valid, though not granted strictly "in accordance" with the allocation scheme.

  Qasim, above, at [32]

- Ground 5 (false statement possession ground) may still apply.

  "31. I accept that, in order to be material, the false statement must be relevant to whether the applicant is eligible for social housing. That, however, is not the same thing as requiring that the statement be directly determinative of that question. The appellant's false statements did not mean that she was entitled to social housing, but they still had sufficient materiality to be capable of inducing the local authority to grant her a tenancy when she was not entitled to one."

  Oshin v Greenwich RLB [2020] PTSR 1351, per Floyd LJ at [31]

- See also *Qasim* at [32]

Incorrect allocations and false information

- Further, like Part VII, Part VI also enacts a misrepresentation offence.
- Housing Act 1996, section 171

(1) A person commits an offence if, in connection with the exercise by a local housing authority of their functions under this Part—

(a) he knowingly or recklessly makes a statement which is false in a material particular, or

(b) he knowingly withholds information which the authority have reasonably required him to give in connection with the exercise of those functions.

(2) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Remedies (1)

Re Allocation

- Internal review
  - Section 166A(9)(c): scheme must be framed to secure right to request a review of:
    - any decision about facts taken into account by local authority, and
    - any decision that the applicant is ineligible or is not a qualifying person.
- Local Government & Social Care Ombudsman
  - London Borough of Bexley (19 020 702)
  - The Council has agreed it will, within four weeks of this final decision:
    - offer Mr X a formal review of its decision of 4 December 2019 not to make him a direct offer of accommodation;
    - give Mr X the opportunity of providing any further information he wants it to consider for the review;
    - send Mr X a written decision with reasons;
    - provide us with a copy of the review decision; and
    - apologise to Mr X for not offering him a review earlier

Remedies (2)

Re Allocation

- Judicial review
  - Principal route to challenging allocation policies and decisions
  - More common in respect of decisions made by London authorities than those made elsewhere
- Convention right challenge
  - Articles 8 and 14 ECHR often relied upon, in tandem with Equality Act obligations - see for example *H* above
  - Potential for damages claim for Article 8 infringement, though by section 8(3) Human Rights Act 1998 "No award of damages is to be made unless […] the award is necessary to afford just satisfaction to [the claimant]"
  - Consider, in respect of Part VII, *McDonagh v Enfield LBC* [2018] HLR 43

Remedies (3)

Re Allocation

- No common law duty of care owed in performing statutory duty to allocate.
  - "[…] the principal difficulty facing the claimant in this case is exactly the same difficulty as was identified in *X v Hounslow*, namely that the claimant's essential complaint is that the Council was not exercising its statutory duties and powers properly which, the cases show, is not sufficient to give rise to a duty of care […]"

R (Darby) v Richmond upon Thames LBC [2015] EWHC 909 (QB), per HHJ McKenna at paras. 26-27

- No difference therefore in the positions under Parts VI and VII, Housing Act 1996 respectively
  - Re the discharge of homelessness functions, see *O'Rourke v Camden LBC* [1998] AC 188

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Question and Answer session

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