Neutral Citation Number: [2017] EWCA Civ 1127

Case No: C1/2016/1860

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
HIS HONOUR JUDGE WAKSMAN QC
(SITTING AS A JUDGE OF THE HIGH COURT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2017

Before:

SIR TERENCE ETHERTON, MR
LORD JUSTICE DAVIS
and
LORD JUSTICE UNDERHILL

- -

Between:

EALING LONDON BOROUGH COUNCIL	**Appellant**
-and-	
THE QUEEN ON THE APPLICATION OF H AND OTHERS	**Respondents**
-and-	
THE EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

- -
- -

Matt Hutchings QC (instructed by **London Borough of Ealing**) for the **Appellant**
Ian Wise QC and Michael Armitage (instructed by **Hopkin Murray Beskine Solicitors**) for the **Respondents**
Dan Squires QC (instructed by **Equality and Human Rights Commission**) for the **Intervener**

Hearing dates: 20 & 21 June 2017

- -

Approved Judgment

Sir Terence Etherton, MR:

1. This appeal concerns the lawfulness of the housing allocation policy ("the Housing Policy") of the defendant Council ("Ealing") insofar as it sets aside a small but not insignificant proportion of lettings for "working households" and "model tenants". It is said that the working household priority scheme ("the WHPS") discriminates indirectly against women, the elderly and the disabled, and that the model tenant priority scheme ("the MTPS") (together "the two Priority Schemes") directly discriminates against non-Council tenants.

2. There are two questions for this Court. First, whether section 2 paragraph 2 of the Housing Policy was unlawfully discriminatory contrary to sections 19 and 29 of the Equality Act 2010 ("EA 2010") and Article 14 in conjunction with Article 8 of the European Convention on Human Rights ("the Convention"). Second, whether in adopting and maintaining the two Priority Schemes, Ealing was in breach of its public sector equality duty ("the PSED") under EA 2010 s.149, as well as section 11 of the Children Act 2004 ("CA 2004").

3. This is an appeal against the order of HHJ Waksman QC sitting as a judge of the High Court dated 18 April 2016. By his order, the Judge allowed the claimants' application for judicial review, and made a declaration finding for the claimants on both of the issues set out above.

The background

4. The Judge below set out the factual background to the two Priority Schemes at length (see: [2016] P.T.S.R. 1546; [2016] EWHC 841 (Admin)). The following summary of the facts is sufficient to understand the context of the appeal.

5. Ealing is a local housing authority for the purposes of the Housing Act 1996 ("HA 1996"). The claimants are two families which Ealing has a duty to house. The first claimant is a disabled single mother, and the second claimant is her youngest child, who at the time of the hearing before HHJ Waksman was four years old. The third and fourth claimants are an older married couple and are both disabled. Their daughter is the fifth claimant, a disabled single mother whose infant son is the sixth claimant.

6. Prior to October 2013, the Housing Policy operated by reference to four priority bands to which applicants were allocated according to the urgency of their housing need:

   (1) Band A: Emergency and Top Priority Members;

   (2) Band B: Members with an urgent need to move;

   (3) Band C: Members with an identified housing need, and

   (4) Band D: No priority status, i.e. all the remaining seekers of Council housing. They cannot actively bid for properties save those which are not wanted by anyone in the higher bands.

7. Within bands, applicants were ranked chronologically by reference to the date of their entry into that band.

8. In 2012 Ealing decided to amend the Housing Policy to reward applicants from working households and model tenants. An equality impact assessment ("EIA") was completed and concluded that there was no evidence that the two Priority Schemes would be discriminatory. The two Priority Schemes were first published in August 2012. They were piloted over a six month period, and at the end of the pilot a review concluded that the policy changes did not appear to have had a negative impact on any particular equalities group. The two Priority Schemes were accordingly fully launched in October 2013. Section 2, paragraph 2 of the Policy provided that:

> "2. Applicants who work or adhere to the rules in conducting their Council tenancy
>
> 20% of lettings will be made available to applicants from working households and those Council tenants who comply with their tenancy agreement and pay their rent and council tax.
>
> Working households will only qualify if they have been employed for a minimum of 24 hours a week and for 12 out of the last 18 months. Evidence of employment will be required in the form of tax returns, copy of employment contract and/or any other suitable proof as requested.
>
> Ealing Council has a scheme which rewards good tenants who want the opportunity to seek a transfer. These transfer applicants are existing tenants who have demonstrated that they are "model" tenants by complying with their tenancy agreement for a specified period of time.
>
> In order to bid successfully for properties advertised as part of this scheme, Households:-
>
> a) Must not have rent arrears for the previous 12 months.
>
> b) Must not have breached their tenancy conditions for the previous two years.
>
> c) Must not have any anti-social behaviour record.
>
> Once tenants have been accepted for the scheme they must continue to comply with the above criteria until they are rehoused in order to remain with the scheme.
>
> Applications will be prioritised by band and date within that band…"

Of the 20%, 15% was allocated to the WHPS and 5% to the MTPS. The broad aim of the WHPS is to incentivise tenants to work or return to work, and the broad aim of the MTPS is to encourage good tenant behaviour.

The relevant statutory framework

9. The relevant statutory provisions relied upon by the claimants are as follows. Firstly, EA 2010 s.19:

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

10. EA 2010 s.29 renders unlawful discrimination by a person providing services to the public or in the exercise of a public function.

11. A separate claim is made under Article 14 in conjunction with Article 8 of the Convention.

12. Article 8 states:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

13. Article 14 of the Convention provides:

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

14. The claimants further allege that in maintaining the two Priority Schemes Ealing was in breach of its PSED under EA 2010 s.149, which provides:

> **"Public sector equality duty**
>
> (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.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;
disability;
gender reassignment;
pregnancy and maternity;

race;
religion or belief;
sex;
sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

(9) Schedule 8 (exceptions) has effect."

15. The claimants have also brought a further claim under CA 2004 s.11 which provides:

"Arrangements to safeguard and promote welfare

(1) This section applies to each of the following–

(a) a [local authority] in England;

….

(2) Each person and body to whom this section applies must make arrangements for ensuring that–

(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and

(b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.

(3) In the case of a [local authority] in England, the reference in subsection (2) to functions of the authority does not include functions to which section 175 of the Education Act 2002 (c. 32) applies.

(4) Each person and body to whom this section applies must in discharging their duty under this section have regard to any guidance given to them for the purpose by the Secretary of State.

The proceedings

16. On 21 October 2015 the claimants commenced judicial review proceedings, alleging that the WHPS unlawfully discriminated against women, the disabled and elderly persons contrary to EA 2010 and the Convention, and that in adopting it Ealing was in breach of its statutory duties to promote equality and protect the welfare of children. They also alleged that the MTPS discriminated against non-Council tenants.

17. On 25 February 2016, Ealing was granted permission to rely on the witness statement of Susan Parsonage dated 22 February 2016. In part, this witness statement addressed

and responded to allegations made by the claimants. The claimants were granted permission to amend their claim form and grounds, in light of Ealing seeking to rely on this further evidence.

18. On 18 April 2016 Judge Waksman (sitting as a judge of the High Court) found for the claimants and made an order quashing the two Priority Schemes and ordering that Ealing pay the claimants' costs. He refused permission to appeal.

19. On 11 January 2017 Briggs LJ granted permission to appeal. However, he refused to order a stay of execution of the order for costs.

20. On 22 May 2017 I gave the Equality and Human Rights Commission ("the Commission") permission to intervene to make written and oral submissions.

The judgment below

21. In a clear and careful judgment the Judge took each issue in turn and found for the claimants on every ground.

22. He held (para. [57]) that the WHPS indirectly discriminated against women, the disabled and the elderly within the meaning of EA 2010 s.19. He found this on the basis of his analysis in the preceding paragraphs. The relevant "provision, criterion or practice" ("PCP") for the purposes of section was the WHPS. Whilst the qualifying criterion of working 24 hours per week was applied neutrally to all, women and disabled and elderly people were less likely to be able to satisfy it due to their disadvantaged position in the job market. The Judge considered (para. [36]) that these groups were accordingly disadvantaged by the fact that they were unlikely to qualify for the 20% of housing stock which had been taken out of the general pool, and therefore faced the prospect of being "trumped" by others whose priority band or need was lower but who met the qualifying criterion.

23. He found (paras. [38] to [41]) that even though women, the disabled and the elderly were likely to be given a greater priority in respect of the 80% of housing stock not covered by the two Priority Schemes, this could not be taken to cancel out the negative effects of the schemes themselves. Unlike in *SG v Secretary of State for Work and Pensions* [2015] 1 WLR 1469, the WHPS contained no specific measure designed to ameliorate the impact of the WHPS on these groups. In particular, he emphasised (para. [46]) that there was no "safety valve" in the form of an exceptional discretion to admit non-working women, disabled and elderly people into the WHPS. He further found (paras. [42] – [46]) that *Hurley v Secretary of State for Business Innovation and Skills* [2012] EWHC 201, in which Elias LJ accepted that the impact of an increase in tuition fees should be assessed against the background of other measures designed to increase university access, could be distinguished on its facts.

24. He found (para. [56]) that the available figures demonstrated at least some disadvantageous effect which was more than *de minimis* and which called for an explanation. Therefore, he found (para. [57]) that the WHPS indirectly discriminated against women, the elderly and the disabled, all of which were protected groups under EA 2010.

25. He further found (para. [68]) that discrimination could not be justified under EA 2010 s.19(2) as a proportionate means of achieving a legitimate aim. He acknowledged that encouraging tenants to work and be well-behaved in relation to their tenancy was a legitimate aim to which the two Priority Schemes were rationally connected. However, he found (para. [62]) that an exceptionality discretion or qualification criterion based on community contribution would have been a less intrusive measure which would have also reflected the approach taken by other local authorities. He found that such a provision would neither have diluted the aim of encouraging tenants back to work, nor been administratively unworkable. He considered that was demonstrated by what he described (para. [65]) as a solid body of evidence from three other local authorities (Barnet, Bexley and Hammersmith and Fulham) that such policies can be designed to take into account the needs of protected groups. He took note (para. [64]) of the fact that the need for the court to be wary of interfering with the housing policies of local authorities did not absolve Ealing from the need to show justification when a policy indirectly discriminated contrary to EA 2010.

26. He found that the WHPS unlawfully discriminated against women, the elderly and disabled, children and the MTPS against non-Council tenants contrary to Articles 14 of the Convention in conjunction with Article 8. He considered that the Policy was clearly within the ambit of Article 8 of the Convention (para. [79] and [85]), as was held by Goss J in *HA v Ealing LBC* [2016] PTSR 16, a decision which, he said, there was no reason not to follow. He found (para. [80]) that the Housing Policy had more than a merely tenuous link to Article 8 (*M v SSWP* [2006] 1 AC 91), and that (para. [82]) provision changing the priority accorded to vulnerable families where stable permanent accommodation was a real imperative was well within the ambit of Article 8. He considered (paras. [83] – [84]) that, by analogy with the Court of Justice of the European Union's decision in *Bah* (2012) 54 EHRR 773, the two Priority Schemes had had an impact on the family lives of the claimants and moreover the fact that its requirements could be satisfied by "households" would usually or at least often connote family.

27. He found (para. [89]) that the WHPS indirectly discriminated against women, the disabled and the elderly for the same reasons as set out above in respect of EA 2010 s.19(2). In addition, he considered (para. [90]) that the MTPS resulted in direct discrimination against non-Council tenants who were unable to become model tenants by definition and also (para. [91]) that there was disparate treatment of children of single-parent carers, both of which could constitute a status group for the purposes of Article 14 of the Convention (albeit not under EA 2010).

28. He then directed himself (para. [99]) that, when considering whether discriminatory measures adopted by local authorities were justified, the "manifestly without reasonable foundation" standard (adopted by the ECJ in *Bah*) was insufficient. In any case, he found (paras. [94] – [104]) that Ealing was unable to justify the WHPS under either test. Moreover, in relation to the MTPS, if the aim was to reward good behaviour it did not follow that this should only apply to Council tenants, nor that it would be unworkable to do otherwise.

29. He further found (paras. [105] – [114]) that in introducing and maintaining the two Priority Schemes Ealing had failed to comply with its PSED under EA 2010 s.149. He directed himself (para. [106]) that there was a heavy burden on public bodies in discharging the PSED. He considered (para. [112]) that Ealing appeared to have

considered the Housing Policy as a whole, rather than looking at the discriminatory effect of the two Priority Schemes themselves, and in particular made no real enquiry into the potential effects of the WHPS. In particular, he found (paras. [109] – [110]) that the EIA and the pilot review were both inadequate. He considered (para. [111]) that Ealing had therefore failed to fulfil its duty to have due regard to the need to eliminate discrimination and advance equality of opportunity between those who share a protected characteristic and those who do not (EA 2010 s.149(1)(a)) and the need to remove or minimise disadvantages suffered by the relevant protected group (section 149(3) EA 2010).

30. The Judge found (para. [116]) that children with single-parent carers will be adversely affected by the WHPS. He further found (para. [117]) that Ealing had not given any consideration to the interests of such children. Therefore he found (para. [118]) that the Ealing had breached its duty under CA s.11(2) to have regard to the need to safeguard and promote the welfare of children in discharging its functions.

31. Lastly, he considered (para. [120]) the claimants' delay in bringing the two "due regard" challenges did not require the court to exercise its discretion to refuse relief, especially as granting relief would cause Ealing no real prejudice.

32. The Judge ordered that the claimants' application for judicial review be allowed. He quashed the WHPS and MTPS and further declared that:

    (a) the provisions of section 2, paragraph 2, of Ealing's housing allocations policy introduced in October 2013 unlawfully discriminate against women, disabled and elderly persons and children of single parent carers contrary to Article 14 of the Convention (read with Article 8 of the Convention) in relation to the working household provisions;

    (b) the MTPS unlawfully discriminates against tenants who do not hold council tenancies contrary to Article 14 of the Convention (read with Article 8 of the Convention);

    (c) in adopting and maintaining the two Priority Schemes, Ealing is in breach of its PSED under EA 2010 s.149;

    (d) in adopting and maintaining the two Priority Schemes, Ealing is in breach of the obligations in respect of the welfare of children imposed by section 11 CA 2004.

<u>The appeal</u>

33. Ealing was given permission to appeal on 14 separate grounds of appeal. The issues can, however, be grouped together thematically in the same way that they were dealt with by the Judge below.

34. First, the Judge took the incorrect approach to establishing whether there was prima facie indirect discrimination for the purposes of section EA 2010 s.19 because he should have considered the Housing Policy "in the round".

35. Second, the Judge was wrong to find that the two Priority Schemes were not justified. In particular, he was wrong to compare them with other local authority policies and he was also wrong to find that they did not have a "safety valve".

36. Third, he made a number of errors of law in respect of the Convention claim. Specifically, he wrongly held that the claim was within the ambit of Article 8 and he applied the proportionality test when considering justification under Article 14 when he should have applied the manifestly without reasonable foundation test.

37. Fourth, he wrongly found that Ealing was in breach of its PSED obligations under EA 2010 s.149.

38. Fifth, that he wrongly found that Ealing was in breach of its duty in CA 2004 s.11 to have regard to the need to safeguard and promote the welfare needs of children.

Discussion

EA section 2010 s.19(2)

39. Mr Matt Hutchings QC, for Ealing, conceded at the outset of his submissions that, for the purposes of EA s.19(2), each of the two Priority Schemes is a provision, criterion or practice ("PCP") and that, if looked at in isolation, they give rise to indirect discrimination. He expressly accepted that two examples relating to this point, given in the skeleton argument of the Commission, are correct.

40. One of those examples is taken from the Explanatory Notes to EA 2010 and is as follows:

> An observant Jewish engineer who is seeking an advanced diploma decides (even though he is sufficiently qualified to do so) not to apply to a specialist training company because it invariably undertakes the selection exercises for the relevant course on Saturdays. The company will have indirectly discriminated against the engineer unless the practice can be justified.

41. On the stance taken by Ealing before the Judge, one does not decide whether requiring the selection exercise to be held on a Saturday is more likely to disadvantage Jewish applicants. One should, instead, consider all of the criteria for admission to the diploma course (including, for example, requirements to hold a particular degree or have particular experience) and see whether, overall, Jewish applicants were more or less likely than non-Jews to be accepted. As the Commission explains in its skeleton argument, that is not the approach of the Explanatory Notes. As the Explanatory Notes make clear, one examines only the PCP (the requirement to undertake a selection exercise on a Saturday), and asks whether "it" (i.e. that PCP) places Jewish engineers at a "particular disadvantage" as compared with equally qualified non-Jewish engineers. One does not consider whether, overall, Jewish engineers are over or under represented on the course, given all the admission criteria.

42. The other example given in the Commission's skeleton argument supposes the recruitment by a police force of a person for a senior position from a pool of more

junior officers who are equally split between male and female. The assumptions in the example are that (1) the force requires applicants to have undertaken particular courses and obtained a particular grade (an academic requirement), and also requires applicants to meet some physical criteria (they are over a certain height or can run a particular distance in a specified time), (2) more female police officers than male officers within the pool of potential applicants meet the academic requirement but less women than men meet the physical requirements, and (3) in consequence, those who meet both the recruitment criteria turn out to be approximately 50% male and 50% female officers. According to the stance taken by Ealing below, the female officers are not at a "particular disadvantage" because, as a result of application of the qualification criteria taken as a whole, they make up approximately half of those who will be considered for the senior position. As the Commission points out, that cannot be right. If a legitimate academic qualification requirement means that more female officers than male officers are eligible for the position, it will still be "indirect discrimination" then to impose a physical requirement which is not necessary for the role and which reduces the number of properly qualified women who can apply for it.

43. Notwithstanding Ealing's concession on this point on the hearing of the appeal, Mr Hutchings submitted that, in order to determine whether or not the WHPS indirectly discriminates against women, the disabled and the elderly ("the Protected Groups"), it is necessary to look at the housing arrangements as a whole, or, as he put it, "in the round", in order to see whether all or any of those Protected Groups are under-represented.

44. Mr Hutching's central submission on that question is that Ealing's Housing Policy contains a number of "safety valves", the effect of which is that each of the Protected Groups as a whole is not disadvantaged by the WHPS.

45. Mr Hutchings described Ealing's Housing Policy as including the following safety valves. First, the priority banding favours the Protected Groups, who are well represented in the top bands because they have the greatest needs. They will be more likely to fall within Bands A and B. There is in any event an overriding discretion to move applicants to a higher band than would otherwise be the applicable one. Second, the same priority banding operates within the WHPS, the effect of which is that the Protected Groups have a higher success rate than others. Third, the WHPS does not affect direct letting of sheltered accommodation for the elderly and quotas fixed by Ealing for, for example, disabled people, which, Mr Hutchings said, in effect "top slices" the general pool of housing. Fourth, the 15% of housing stock reserved for the WHPS is, in effect, taken from those in the bottom category of those eligible for housing by Ealing and is given to working households. Fifth, the WHPS does not exclude the 54% of disabled people who work. Sixth, the WHPS does not exclude a non-working disabled person in an otherwise working household.

46. Mr Hutchings elaborated on the practical consequences of those matters. He observed that the comparative percentages for the allocation of housing for both women led households and for those over 60 years of age needing sheltered accommodation for the year ending 30 September 2012 and the year ending 30 September 2015 were not materially different.

47. So far as concerns disabled people, Mr Hutchings submitted that the statistics show that they were not disadvantaged by the introduction of the WHPS and, indeed, were

overall better off. Taking the year ended 30 September 2015, he said that the evidence is that there was a success rate of approximately 8% for applications for lettings in respect of Ealing's housing stock as a whole. The overall success rate for the same year under the WHPS was just under 6% (5.7%). In the same year disabled people (as defined by Ealing for the purposes of its housing policy) or households with a disabled person were less than 2% of the total number of working applicants but working disabled people and households with a disabled person had a success rate of 23% (on the basis of the figures for actual lettings for the 2015 calendar year). That is considerably higher than the 13.5% success rate of disabled people in respect of total lettings for the year ended 30 September 2012. Mr Hutchings submitted that the Judge was wrong in the circumstances to discount that figure because, as the Judge put it (at para. [53]), "What the figures cannot show is what the position would have been in relation to lettings as a whole in the absence of the Scheme".

48. Mr Hutchings referred to *R (Hurley) v Secretary of State for Business Innovation & Skills* [2012] EWHC 201 (Admin), [2012] HRLR 13, *R(MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, [2014] PTSR 584 (in the CA) (the SC is reported at [2016] UKSC 58, [2016] 1 WLR 4550) and *R(SG) v Secretary of State for Work and Pension* [2015] UKSC 16, [2015] 1 WLR 1449 in support of his submission that these factors can and should be taken into account in determining whether the WHPS gives rise to indirect discrimination for the purposes of EA s.19(2).

49. In *Hurley* the claimants applied for judicial review of the decision to allow universities to increase fees up to £9000 per year. The argument was that the decision to increase the permitted limit was contrary to the right to education conferred by Article 2 of Protocol No. 1 to the Convention ("A2P1") and Article 14 of the Convention and was made in breach of the PSED. The claim was dismissed. Ealing relies on the following passage in the judgment of Elias LJ, with whom the other member of the Court, King J, agreed:

> "51 I accept [counsel for the Secretary of State's] submission that it is necessary to look at the policies in the round and not simply focus on the increase in fees set down in the regulations. There can be no doubt that a steep increase in fees alone would discourage many from going to university and would in particular be likely to have a disproportionate impact on the poorer sections of the community.
>
> 52 However, the availability of loans mitigates that effect. Further, given the existence of the various measures which are directed specifically at increasing university access to poorer students, I do not think that at this stage it is sufficiently clear that as a group they will be disadvantaged under the new scheme."

50. In *MA* the claimants issued proceedings for judicial review of regulations which applied "standard sized criteria" to the household of a housing benefit claimant of working age who was a social sector tenant, so as to determine how many bedrooms the claimant's household was deemed to need for the purpose of determining the appropriate maximum housing benefit. The claimants alleged that the new measure

unlawfully discriminated against them in violation of their rights under Article 14 of the Convention read with Article 8 and/or Article 1 of the First Protocol ("A1P1") and also that it involved a breach by the Secretary of State of the PSED. Ealing relies on the following passage in the judgment of Lord Dyson MR:

> "39 In my view, regulation B13, if read in isolation and without regard to the DHP scheme, plainly discriminates against those disabled persons who have a need for an additional bedroom by reason of their disability as compared with otherwise comparable non-disabled persons who do not have such a need. …"

> "40 But it is not realistic to confine the inquiry to regulation B13. That is because the Secretary of State has made it clear all along that this regulation is part of a package for dealing with the problem of under-occupation. He has recognised that there are some persons who should not be subjected to the percentage reductions in HB specified in regulation B13(4) . That recognition has found expression in (i) the inclusion in regulation B13 of certain exempted groups (children who cannot share a bedroom, persons who require overnight care, foster carers and certain members of armed forces who are away on operations categories) and (ii) his reliance on the DHP scheme for payment to others to whom it may not be reasonable to apply the bedroom criteria. So the question is whether the scheme as a whole discriminates against disabled persons."

51. In *SG* the claimants issued judicial review proceedings against the Secretary of State challenging the lawfulness of a regulation which provided for a benefit cap to reduce a person's housing benefit if their total entitlement to welfare benefits exceeded a stated amount equivalent to the net median earnings of working households. They claimed that the Secretary of State had indirectly and unjustifiably discriminated against women, contrary to Article 14 of the Convention read with A1P1, and that he had failed to treat the best interests of children as a primary consideration. Ealing relies on the following passage in the judgment of Lord Reed:

> "62. On the other hand, the argument that the Regulations [Benefit Cap (Housing Benefit) Regulations 2012] also result in differential treatment of women because of their effect on the victims of domestic violence has not in my opinion been established. … In so far as the argument was that women fleeing domestic violence may live in temporary accommodation rather than refuges, and may then be entitled to housing benefit in respect of both their original home and the temporary accommodation, that problem, which is inherently of a temporary nature, is capable of being addressed under the DHP Regulations [Discretionary Financial Assistance Regulations 2001] by the use of discretionary housing payments; and the funding made available by Government for such payments has been increased for that very purpose. … It

> cannot therefore be said that the Regulations have a disparate impact on victims of domestic violence."

52. Mr Hutchings submitted that, by failing to consider the position of disabled people "in the round", that is to say by failing to see that overall the Protected Group comprising disabled people are not worse off but better off under the WHPS, the Judge had wrongly concentrated on a sub-group within the Protected Group as a whole, that is to say those disabled people who do not work and who do not have a person who works within their household. He referred us to *R (Unison) v Lord Chancellor* [2015] EWCA Civ 935, [2016] 1 ICR 1, on what he said was the illegitimacy of such an approach.

53. In that case Unison, the Trade Union, commenced judicial review proceedings challenging the decision of the Lord Chancellor to bring in a fees regime under which employment claims in Employment Tribunals and appeals to the Employment Appeal Tribunal could only be started and continued upon payment of fees, with a different level of fees applying according to the complexity of the case. Under the Fees Order the issue fee and the hearing fee varied depending on whether, among other things, the claim was classified as "type A" or "type B". Broadly speaking, type A claims were those which the Lord Chancellor regarded as typically the more straightforward, and did not include unfair dismissal claims and discrimination claims. They, accordingly, fell into type B. The fees for a type B claim were higher than for a type A claim. The challenge was on the basis that the scheme was unlawful and discriminatory. The initial proceedings ("*Unison 1*") were dismissed by the Divisional Court in February 2014.

54. Further proceedings ("*Unison 2*") were filed. The grounds of challenge overlapped those in *Unison 1* but Unison was able to rely on evidence about the actual impact of fees in the period of more than a year since they were introduced. *Unison 2* was heard by the Divisional Court comprising Elias LJ and Foskett J, who dismissed the claim in December 2014. There were then appeals in both *Unison 1* and *Unison 2*, which came before the Court of Appeal. In the Court of Appeal the lead judgment was given by Underhill LJ, with whom the other two members of the Court agreed. Underhill LJ referred to the following statement by Elias LJ in the Divisional Court at paragraph [71] of his judgment, where Elias LJ addressed the argument that there was discrimination against those bringing discrimination claims because the proportion of women who bring discrimination claims was greater than the proportion of men, the statistics apparently showing that 58% of all discrimination claims were brought by women. Elias LJ's response to that way of putting the case, was:

> "…I do not think that to select a sub-group of cases within category B is a legitimate way to seek to establish indirect discrimination. It is necessary to test any potentially adverse effect of the …PCP by focusing on all those who are subject to it, the overall pool to whom the PCP is applied. It is not legitimate to take a self-selected group. That simply distorts the true effect of the PCP...".

55. Underhill LJ said as follows, in relation to paragraph [71] of Elias LJ's judgment:

> "99 I should summarise in my own words what I understand to be the gist of that reasoning. The PCP relied on in variant (2) is, again, the provision of the Fees Order that claimants bringing type B claims must pay the higher level of fee. That "disadvantages" all type B claimants, but it is said to *particularly* disadvantage women because more women than men bring discrimination claims. Elias LJ's point is that that is not the relevant disproportion: the only relevant disproportion would be between women and men bringing type B claims, since that is the group suffering the disadvantage. Type B claims are not of course limited to discrimination claims: most significantly, they also include claims of unfair dismissal. No gender disproportion is alleged as regards the group as a whole, and accordingly the higher level of fee cannot be said to particularly disadvantage women."

56. I have no hesitation in dismissing this ground of appeal.

57. Ealing accepts that women, disabled people and the elderly are less likely to be in work than others. Its skeleton argument in the court below gave the statistics: 36% of women in full time work, as opposed to 56% of men; 46% of disabled people, as opposed to 76% of others of working age; 67% of people aged 50-64 and 10% of people aged 65 and older, as opposed to 81% of younger adults.

58. In the light of that acceptance on the basis of those statistics, and the concession by Ealing on this appeal that each of the two Priority Schemes is a PCP, it inevitably follows that the WHPS gives rise to indirect discrimination within EA 2010 s.19(2). The wording of section 19(2) is precisely applicable, namely that participation in the WHPS is open to those who are not women, disabled people or elderly, and people who do have any of those characteristics will be disadvantaged in comparison because they are less likely to be in work than those who do not have those characteristics, and the claimants here are within those Protected Groups and would be disadvantaged.

59. In short, it is contradictory of Ealing to concede, on the one hand, that for the purposes of EA s19(2) the WHPS is a PCP, and, on the other hand, to seek to rely on Ealing's Housing Policy as a whole to rebut the PCP's discriminatory impact on the relevant Protected Groups. What this highlights is that the matters on which Ealing relies, the so-called safety valves, are matters which properly are relevant to justification under EA 2010 s.19(2)(d) rather than the existence of indirect discrimination under EA 2010 s.19(2)(a)-(c).

60. None of the cases on which Ealing relies on this aspect of the appeal are of assistance. All of them are clearly distinguishable. None of them was comparable to the present case in which the PCP is accepted to be a distinct scheme within the overall Housing Policy. As the Commission has said on this appeal, they were all instances in which the mitigation measure was (adopting EA 2010 s.19 terminology) part of the relevant PCP under consideration.

61. *Hurley* was addressing, in the context of the A2P1 right to education, the discriminatory effect of the ability of universities to charge annually up to £9000 in fees. When considering whether that policy would have a disparate impact on

different sections of the community, the correct approach was to view the arrangements for assisting students in the round.

62. Similarly, in *MA* the relevant regulation was part of a package for dealing with the problem of under-occupation and could not be viewed in isolation. In any event, reliance on *MA* is misplaced since the Court of Appeal found that there was discrimination but held that it was justified, that is to say it was legitimate and proportionate in light of the arrangements as a whole: see Lord Dyson at [46] and [47] and Longmore LJ at [99].

63. In *SG* it was conceded that there was discrimination between women and men and so the issue was as to justification. Lord Reed (with whom the majority agreed) did not consider that a separate category of victims of domestic violence had been made out. That was because, for the purposes of Article 14, there was no separate identification of a PCP as under EA 2010 s.19. The two aspects that particularly related to domestic violence were alleviated under other provisions and so there was no discriminatory effect separate from that relating to women generally.

64. Finally, the context and the reasoning in *Unison* share nothing with those in the present case. In the present case, it is common ground that, on the face of it, the WHPS involves indirect discrimination against women, disabled people and the elderly because people in those Protected Groups are less likely to be in work. There is no analogy with the *Unison* case in which all the people in the group (viz. those who made type B claims) were discriminated against by having to pay the higher fee but it was then sought to boost the claim by contending that a sub-group within that overall group, namely women, were particularly discriminated against. That has no analogy to the "in the round" argument now being advanced by Ealing.

65. By contrast with those cases, the claimants' approach is supported by *Essop v Home Office (UK Border Agency)* [2017] UKSC 27, [2017] 1 WLR 1343. At paragraph [27] Baroness Hale, with whom the other Supreme Court Justices agreed, said:

> "27 … there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory."
>
> "32. … the test [viz that the individual claimant has the same disadvantage that the group, to which he belongs, is or would be put] may in any event be justified despite its disparate impact. Although justification is aimed at the impact of the PCP on the group as a whole rather than at the impact upon the individual, … the less the disadvantage suffered by the group as a whole, the easier it is likely to be to justify the PCP."

66. It is not, therefore, necessary or appropriate to break down the relevant Protected Group in order to see what is the impact of the PCP on particular sub-sets within the Group, which is really the exercise Ealing advocates in the present case. The point was again made by Baroness Hale in *Chief Constable of West Yorkshire Police v Homer* [2012] UKSC 15, [2012] ICR 704 at [14], as follows:

> "14 … the current formulation of the concept of indirect discrimination … is now also to be found in the Equality Act 2010 . Previous formulations [of the concept of indirect discrimination] relied upon disparate impact—so that if there was a significant disparity in the proportion of men affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. But … the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in Equality: The New Legal Framework (2011) pp 64–68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages"

67. I would add that, in any event, Ealing's statistical analysis of the impact of the WHPS, in the context of the Housing Policy as a whole, is unsatisfactory in several respects. For the reasons I have given, those statistics are irrelevant to the issue whether there is indirect discrimination under EA 2010 s.19(2) but I shall refer to them briefly in the context of justification under EA 2010 s.19(2)(d).

Justification under EA 2010 s.19(2)(d)

68. On the question whether the WHPS is a proportionate means of achieving a legitimate aim for the purposes of EA 2010 s.19(2)(d), Mr Hutchings cited the following statement of Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700, as the correct test of proportionality:

> "74. … The approach [to proportionality] adopted in [*R v Oakes* [1986] 1 SCR 103] can be summarised by saying that 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) 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.
>
> 75. In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781–782 that the limitation of the protected right must be one that 'it was reasonable for the legislature to impose', and that the courts were 'not called on to substitute judicial opinions for legislative ones as to the place at which to draw a precise line'. This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois State Board of Elections v Socialist Workers Party* (1979) 440 US 173 , 188–189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. …"

69. Mr Hutchings said that the third and fourth of those criteria are critical in the present case. His overriding submission on them was that Ealing's Housing Policy is the product of a political decision by elected representatives, who are democratically accountable, and whose decision reflects the reality of local government today, operating within the guidance given by the Department for Communities and Local Government, and the fewer resources available. He submitted that it is not appropriate in the present case for the court to gainsay that decision and, in effect, itself make decisions about housing allocation. Mr Hutchings referred to a number of cases in support of that submission.

70. He referred to the judgment of Lord Reed in *SG* at [11] where reference is made to the emphasis by the European Court of Human Rights ("the ECrtHR") on the width of the margin of appreciation in relation to general measures of economic or social strategy. Mr Hutchings said that the same approach should be adopted by the court in respect of decisions by local authorities about housing allocation. He cited the following passage in the judgment of Lord Reed in the same case:

> 92 Finally, it has been explained many times that the Human Rights Act 1998 entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature, but does not eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their accountability and their legitimacy. It therefore does not alter the fact that certain matters are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as matters of that nature have to be considered by the courts when deciding whether executive action or legislation is compatible with Convention rights, that is something which the courts can and do properly take into account, by giving weight to the determination of those matters by the primary decision-maker.

> 93 That consideration is relevant to these appeals, since the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered assessment made by those institutions. Unless manifestly without reasonable foundation, their assessment should be respected."

71. In *MA* [2016] UKSC 58, [2016] 1 WLR 4550 at [32] Lord Toulson said that choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities.

72. Mr Hutchings submitted that the test for justification in the present case is whether the policy decision to establish the WHPS was manifestly without reasonable foundation. He referred in that connection to Lord Dyson MR in *MA* in the Court of Appeal ([2014] EWCA Civ 13, [2014] PTSR 584) at [55] and to Lord Toulson in the Supreme Court at [29] to [38].

73. Specifically in the context of housing allocation, Mr Hutchings referred to *R(Ahmad) v Newham London Borough Council* [2009] UKHL 14, [2009] PTSR 632, in which the claimant sought judicial review of a local authority's decision to change its housing allocation scheme from a "needs-based" points system to a "choice-based" system. The Supreme Court dismissed the claim. Baroness Hale said at [15]:

> "The court is in no position to rewrite 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."

74. Mr Hutchings also relied on the following passage in the judgment of Lord Neuberger:

> "46 … as a general proposition, it is undesirable for the courts to get involved in questions of how priorities are accorded in housing allocation policies. Of course, there will be cases where the court has a duty to interfere, for instance if a policy does not comply with statutory requirements, or if it is plainly irrational. However, it seems unlikely that the legislature can have intended that judges should embark on the exercise of telling authorities how to decide on priorities as between applicants in need of rehousing, save in relatively rare and extreme circumstances. Housing allocation policy is a difficult exercise which requires not only social and political sensitivity and judgment, but also local expertise and knowledge."

75. As to Ealing's objectives in establishing the two Priority Schemes and their practical working and discriminatory effect, Mr Hutchings drew attention to the witness statement of Susan Parsonage, the Director of Safer Communities and Housing for Ealing since 2008. Her responsibilities include the management and administration of the housing register of person seeking housing, the allocation of housing, including

the administration and review of Ealing's Housing Policy, and the statutory review of decisions under the Housing Act 1996 Part VI. She described the aims of the two Priority Schemes as follows:

> "The first and main aim of the 20% Priority Groups was to reward and incentivise households who work and who comply with the terms of their Council tenancies to a high standard. The second aim was to achieve this by setting clear rules which are simple for applicants to understand and for officers to apply and so do not lead to an excessive administrative burden on the Council's already stretched resources."

76. Ms Parsonage explains that Ealing is currently carrying out a major review of its allocation policy, including retention of the two Priority Schemes; and, in the meantime, she has decided that Ealing should retain them. She says that the figures do not suggest that, overall and including the effect of the two Priority Schemes, the allocations policy disadvantages female led households, people with disability or older people, one significant factor being that various other provisions of the allocation policy confer significant priority on those groups. She accepts that there is evidence to suggest that female leaders of households, people with a disability and older people will as groups be less able to work 24 hours a week than persons outside those groups, and so, on the face of it, they are less likely to be able to qualify for the WHPS. She says that it is difficult to estimate the effect of that disadvantage with any precision, but she accepts that there will be people within those groups who are unable to work due to matters related to their protected status. She says that the evidence shows that, taken overall, Ealing's allocations policy does not disadvantage those groups. She continues:

> "However, the position of some households within these groups would undoubtedly be better if the WHPS did not exist. In that case, the allocations policy would do more to advance equality of opportunity and it can be said that the working household priority provisions fail to do this."

She does not accept, in respect of MTPS, that the evidence shows that there is any discriminatory effect.

77. Mr Hutchings submitted that the Judge, in reaching his conclusion that the two Priority Schemes were not justified for the purposes of EA 2010 s.19(2), was wrong to rely on the housing policies of Barnet, Bexley, and Hammersmith and Fulham local authorities. Mr Hutchings submitted that the Judge failed to appreciate the significant differences between the two Priority Schemes and the other local authority schemes and he failed to take into account or sufficiently into account that 80% of Ealing's housing was unaffected. Mr Hutchings said that the Judge had wrongly taken it on himself to decide whether Ealing had adopted the least intrusive measure rather than respecting Ealing's policy decision unless it was unreasonable. He also criticised the Judge for failing to carry out a proper balancing of the gains against the adverse impact.

78. I consider that the Judge was not entitled to reject Ealing's justification defence for the reasons he gave.

79. The Judge accepted (at para. [61]) that Ealing has a legitimate aim in encouraging tenants to work and to be well-behaved in relation to their tenancy, and that the WHPS and the MTPS are rational means of achieving that aim.

80. His rejection of Ealing's justification defence under EA 2010 s.19(2)(d) was effectively based entirely on his finding (in para. [62]) that he was not satisfied that the two Priority Schemes were the least intrusive way of achieving that aim because, he said, "there is no reason why Ealing could not have introduced some sort of "safety valve" for those groups, whether by an exceptional discretion and/or qualification by reference to some other community contribution". The only basis cited by the Judge for that finding was his view (in para [65]) that: "There is a solid body of evidence from three other local authorities who have adopted broadly similar policies that they can be designed in such a way as to cater, at least to some extent, for the needs of the protected groups".

81. I do not consider that it was open to the Judge to form that view on the material before him. The policies adopted by the other three local authorities were summarised as follows in the Judge's judgment (at para. [59]):

> (1) Barnet's policy, adopted in February 2015, operates by giving an increased priority band placing for those who have made a defined contribution to the community. A threshold criterion is that the household must have a current positive residence history (whether tenants of Barnet or not) which includes there being no breaches of the tenancy, no outstanding housing-related debts of more than £100, no unspent convictions and no involvement in antisocial behaviour. Then they can seek priority if they are in a working household or where voluntary work of 64 hours per month has been done or are in training or education or are ex-Armed Forces or carers. In addition there is a discretion to include within this group older or disabled people who cannot do either paid or voluntary work;
>
> (2) Hammersmith and Fulham give increased priority on a similar basis to that offered by Barnet using almost identical wording;
>
> (3) Bexley's policy as from 2013 allows into a higher band than otherwise those who have made a community contribution by working, taking education or training or doing voluntary work or who provide full-time care to a disabled child or elderly person and to a disabled person whose disability prevents them from participating in work related activity.

82. I agree with Ealing that those policies are so radically different from the WHPS that it is impossible to derive from them the conclusion that the WHPS was a disproportionate way of achieving Ealing's legitimate aim. Not only would the provisions in those schemes for obtaining priority for reasons other than working the requisite hours undermine the whole purpose of the WHPS but, critically, the policies of those other local authorities related to the undifferentiated entirety of the entire housing stock. There is no recognition in the Judge's judgment of the critical differences that the WHPS only relates to 15% of Ealing's housing stock, and that banding both in the WHPS and for the rest of the housing stock gives priority to women led households, disabled people and the elderly requiring sheltered housing, and that there is an overall discretion to put people into a higher band than would otherwise strictly be applicable.

83. The only other matter which the Judge appears to have relied upon in rejecting Ealing's justification defence is that (as stated at para [67] of the judgment):

> "since the actual benefits of the aim of encouraging tenants back to work are not known in any empirical sense and … there is clear disadvantage to the protected groups, it is very hard to say that a fair balance has been struck".

84. I am unclear as to the basis for the Judge's assumption that the aim of the WHPS is to encourage unemployed tenants to take up work as distinct from rewarding tenants already in work. In any event, the assumption of the Judge appears to be that, in order to succeed in its justification defence, Ealing would have to maintain statistics as to which tenants were formerly unemployed who were induced by the WHPS to take up employment. That approach steps over the line of unacceptable incursion by the court into the practical running of a housing allocation scheme such as the WHPS.

85. Furthermore, the Judge's statement that there is clear disadvantage to the protected groups does not grapple at all with Ealing's case, which it is entirely legitimate to advance in respect of the justification defence, that it is necessary to take into the balance, when considering achievement of the legitimate aim of the WHPS, the effect on the Protected Groups as a whole under the entire Housing Policy for all Ealing's housing stock. So, for example, the Judge does not consider, in the context of justification, that Ealing does allocate some housing by fixing quotas and granting direct lettings for Protected Groups and that the effect of the priority banding is that those with the greatest needs will be in the top bands both in respect of the 15 % of housing stock in the WHPS and in respect of the remaining 80% of housing stock, and that there is in any event a discretion to move applicants up the bands.

86. There is a respondent's notice which seeks to uphold the judgment on the basis that "the measure did not strike a fair balance, as well as that it was not the least intrusive measure" but this is stated to be advanced only in relation to Ground 1 of the appeal (whether the WHPS is indirectly discriminatory). In any event, the point was not developed by either Mr Ian Wise QC, on behalf of the respondents, or by Mr Dan Squires QC, on behalf of the Commission, in relation to justification.

Article 14

87. It is well established that Article 14 does not confer a free-standing right of non-discrimination but, using the language of the ECrtHR, the facts must fall within the ambit of one or more of the Convention rights. It complements the other substantive provisions of the Convention: see, for example, *Steinfeld v Secretary of State for Education* [2017] EWCA Civ 81, [2017] HRLR 202at [25] and [26]; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250 at [14].

88. Ealing submits that the Judge was wrong to find that the facts of the present case disclose a link between Article 14 and Article 8. The submissions on this point were not well developed by counsel for either side.

89. Ealing's case is that its policy regarding the two Priority Schemes concerns general social welfare provisions, which fall outside the ambit of Article 8. Mr Hutchings

submitted that, so far as concerns the WHPS, there is no Strasbourg or domestic authority which obliges the State to provide permanent accommodation. He further submitted that, so far as concerns the MTPS, Article 8 has nothing to do with enabling an existing secure tenant to move to another property.

90. I agree with Ealing that the necessary link between Article 8 and Article 14 does not exist in relation to the MTPS. I do not accept Ealing's argument that there is no such link in relation to the WHPS.

91. The principles for identifying the necessary link between Article 14 and other Convention rights are well established.

92. It is well established that it is not necessary to show a breach of Article 8 for a disadvantage to fall "within the ambit" of Article 8 for the purpose of engaging Article 14: *Zarb Adami v Malta* [2007] 44 EHHR 3 at paras 42 and O-I7.

93. The expression "ambit" in this context, while not requiring a violation of a substantive Convention right, does denote a situation in which "a personal interest close to the core of such a right is infringed": *R (Clift v Secretary of State for the Home Department* [2007] UKHL 54, [2007] 1 AC 484, at [13] (Lord Bingham); *R (Countryside Alliance) v Attorney General)* [2007] UKHL 52, 1 AC 483, at [60] (Lord Hope). As both Lord Bingham and Lord Walker said in *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 at [4] and [60] a tenuous link is not enough. Lord Bingham in that case at [4] explained the issue of core values in the following way:

> "It is not difficult, when considering any provision of the Convention, including article 8 and article 1 of the First Protocol … , to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for."

94. In *Steinfeld* Beatson LJ, with whom neither of the other judges disagreed on this point, explained Lord Bingham's language in *Clift* as follows:

> "150 It is true that Lord Bingham's language in *Clift's* case reflects the ratio in that case but, in my judgment, the language of impairment, intrusion and infringement were used to show how closely related to the values protected by art.8 a measure has to be in the context of a substantive breach of art.8 and whether the matter is sufficiently close to the core values protected by art.8. If there is only a tenuous link to those core values that does not suffice. But in this case the measures in the 2004 and 2013 Acts are undoubtedly related to the core values of private and family life as shown by the Strasbourg

> jurisprudence which I have discussed. Accordingly, I do not consider that the domestic authorities can be regarded as requiring an additional requirement of concrete adverse impact other than deprivation of one of the means by which the State makes provision to recognise and protect those core values."

95. The Judge referred to *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184, [2006] 1WLR 505, *R (HA) v Ealing LBC* [2015] EWHC 2375 (Admin), [2016] PTSR 16, *Bah v United Kingdom* (2012) 54 EHRR 21 and *Rodriguez v Minister of Housing of the Government*, [2009] UKPC 52 in support of his decision on this part of the case.

96. *Morris* does not assist the analysis. It was a case on the effect of section 185(4) of the Housing Act 1996 Act where a parent was entitled to remain in the United Kingdom but their child was not. Having regards to the progenitor of Part VII, namely the Housing (Homeless Persons) Act 1977 and the judicial observations on that Act, Sedley LJ said (at [23]) that:

> "when the focus is narrowed to the provisions in issue in this case, we find ourselves looking at measures which are designed specifically to keep families together. There can ...be no question that this is, in the parlance of Strasbourg, a modality of the state's manifestation of respect for family life. If so that is within the ambit of Article 8".

97. Neither of the two Priority Schemes has anything to do with keeping families together.

98. Nor is *Rodriguez* of any assistance. That case concerned the lawfulness of a decision of the Gibraltar Housing Allocation Committee to refuse to grant the appellant and her same sex partner a joint tenancy of Government housing on the grounds that "only parents, spouses or children may be included". It was conceded that the facts fell within the non-discrimination provisions of the Constitution of Gibraltar and within the ambit of Article 8 for the purposes of Article 14. Both the different factual context and the concession undermine any useful comparison with the present case.

99. The facts in *Bah* were that the applicant was a Sierra Leonean national, who was granted indefinite leave to remain in the United Kingdom, and whose son, when aged 13, was allowed to enter and remain in the United Kingdom on the condition that he did not have recourse to public funds. She applied to the local authority for priority treatment in obtaining social housing. The local authority was unable to take into account the applicant's son when assessing whether the applicant had a priority need for housing assistance because of that condition. She claimed that she had been discriminated against by not being given priority for social housing in breach of Article 14 in conjunction with Article 8. The ECrtHR held that the facts fell within the ambit of Article 8. It said as follows:

> "40. Having thus defined the scope of its examination, the Court begins by observing that there is no right under art.8 of the Convention to be provided with housing. However, as the Court has previously held with regard to other social benefits,

> where a contracting state decides to provide such benefits, it must do so in a way that is compliant with art.14. The impugned legislation in this case obviously affected the home and family life of the applicant and her son, as it impacted upon their eligibility for assistance in finding accommodation when they were threatened with homelessness. The Court therefore finds that the facts of this case fall within the ambit of art.8. In so finding, the Court notes the conclusion of the Court of Appeal at [25] of *R (Morris) v Westminster City Council* and further notes the fact that the Government agrees that art.8 applies to the instant case. The Court must therefore go on to consider whether the applicant was impermissibly discriminated against within the meaning of art.14."

100. In *HA* Goss J held that Ealing's policy that applicants for secure accommodation under section 193 of the Housing Act 1996 had to have lived in its area for a minimum of five years as a condition of joining the housing register was unlawful. Goss J addressed, *obiter*, whether the policy discriminated against women who were victims of domestic violence contrary to Article 14. He held that it did. He explained the link with Article 8 as follows:

> "29. … The link here is said to be home and family life. There is no enshrined right to a physical home; the right is to the enjoyment of a family life. However, this can, in reality, only be enjoyed in settled accommodation. Accordingly, I am satisfied there is a sufficient link."

101. None of the authorities support the claimants' case that the MTPS falls within the ambit of Article 8 in conjunction with Article 14. The MTPS is concerned with the transfer of a secure tenant, who is already housed pursuant to Ealing's duties under Part VII of the Housing Act 1996, from one Council property to another. I cannot see that this has anything to do with a core value which Article 8 is intended to protect.

102. The position regarding the WHPS is, however, different. First, looking at the matter generally, so far as concerns single parents with children who are not already in secure accommodation or indeed not accommodated by Ealing at all, their right to permanent accommodation falls within the scope of family life protected by Article 8. Secondly, there is no suggestion that the personal circumstances of the first claimant are unique. She is a single mother, with five of her six children living with her. Although the position has now changed, at the time these proceedings were commenced they were living in a non-Council property pursuant to an agreement to occupy which could be terminated at short notice. Ealing had accepted in June 2015 that that accommodation was unsuitable for her needs and those of her children. The terms of the WHPS preclude her from applying for a suitable property on a permanent secure tenancy. Thirdly, in accordance with the principle in *Bah,* since local authorities are bound to provide the homeless in priority need with accommodation, and homelessness is related to the enjoyment of family life, then they must do so in a non-discriminatory way. It is not in dispute on this appeal that "other status" in Article is satisfied in this context.

103. In any event, I do not consider that the reasoning of Judge entitled him to conclude that, for the purposes of Article 14, neither of the two Priority Schemes was justified. This Court cannot interfere with the Judge's conclusion unless the Judge made an error of law or principle or his conclusion was outside the range of a proper judicial decision. In view of my decision that the MTPS falls outside Article 14 read with Article 8, the issue of justification does not strictly arise in relation to that Scheme.

104. I consider that the Judge did make an error of principle on the issue of justification with regard to both Schemes. As with EA 2010 s.19(2)(d), his reasoning rested almost entirely on the three other local authorities' allocation schemes. For the reasons I have given, however, I consider that the policies of those other local authorities are so radically different from the two Priority Schemes that it was not open to the Judge to assess the proportionality and reasonableness of their operation by reference to those other policies. To give but one example, in the case of the MTPS, as Mr Hutchings observed, there is no overall loss of accommodation to Ealing in the sense that, if a secure tenant transfers from one council property to another, the first property goes back into the general pool of council housing, whereas to extend the Scheme so as to give priority to new secure tenants would have very different consequences for the housing stock and would be an entirely different policy.

105. Further, the Judge never went on to weigh in the balance the nature and extent of the discrimination of the two Priority Schemes against the legitimate aims of Ealing, bearing in mind the operation of Ealing's Housing policy in relation to the entirely of its housing stock, including quotas, priority banding and general discretion to move applicants up the priority bands.

106. In relation to the MTPS the Judge appears to have rejected out of hand Ms Parsonage's evidence that requiring the private owners of the majority of Ealing's temporary accommodation to provide monitoring data on the occupants of that accommodation was impracticable under current market conditions, if only because of the cost. I do not consider that it was open to the Judge to dismiss her evidence on the basis of those radically different local authority policies, at least not without a great deal more direct evidence on the point.

The PSED

107. Mr Hutchings accepted that the initial EIA in 2012 did not pay due regard to the need to eliminate discrimination and to promote equality. The Judge noted that in September 2013 an EIA was appended to the proposal for the policy to continue beyond a pilot period, but he found that it contained no proper consideration of how the two Priority Schemes might affect the Protected Groups. He found that a further EIA undertaken in October 2013 was "not impressive". Mr Hutchings did not seek in his oral submissions to rebut those criticisms.

108. Ealing, however, relies on the fact, for which evidence is given in the witness statement of Ms Parsonage, that there is underway a major policy review of its allocation policy. That review was originally intended to be finalised by April 2017 but it has been delayed pending this case. He submits that Ms Parsonage has faced up to the issue and had to make a decision whether to retain or suspend the two Priority Schemes pending completion of the wider review, when they will be subject to a more

in depth review. In making the decision not to suspend the two Priority Schemes, she says that she has taken into account that the statistics do not suggest

> "overall and including the effect of the [two Priority Schemes], the allocations policy disadvantages female led households, people with a disability or older people. The reasons for this may be complex, but one significant factor is that various other provisions of the allocations policy confer significant priority on these groups".

109. Having set out the figures, she repeats that statement later in her witness statement. She does not accept that the evidence shows that there is any discriminatory effect of the MTPS.

110. I cannot see any proper basis for saying that there has been a breach of the PSED so far as concerns the MTPS. The position as regards the WHPS is less straightforward.

111. The principles applicable on this issue were summarised by Briggs LJ in *Hackney LBC v Haque* [2017] EWCA Civ 4, [2017] JLR 14, as follows:

> "21 The relevant underlying principles are as follows. First, the aim of the PSED (as of other equality duties) is to bring equality issues into the main-stream, so that they become an essential element in public decision making: see per Elias LJ in *Hurley* at [70], per Arden LJ in *Elias* at [274], and per Sedley LJ in *BAPIO* at [2]–[3]. In *Bracking*, at [59], McCombe LJ said:
>
> > "It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude."
>
> That was a case about formulation of policy, but the underlying principle applies equally to public authority decision-making of any kind.
>
> 22 Secondly, the duty is a matter of substance rather than of form. It requires that the decision maker be aware of the duty to have due regard to the relevant matters: see per Aikens LJ in *Brown* at [91]:
>
> > "It involves a conscious approach and state of mind."
>
> See also per Pill LJ in *Bailey* at [74]–[75]. The duty must be exercised in substance, with rigour and with an open mind. It is not a question of ticking boxes: see per Aikens LJ in *Brown* at [92] and per Dyson LJ in *Baker* at [37]:
>
> > "The question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory

> needs. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty as being performed, so too a failure to refer expressly to the statute does not of itself show that the duty has *not* been performed."
>
> 23 Third, the concept of due regard is to be distinguished from a requirement to give the PSED considerations specific weight. It is not a duty to achieve a particular result: see per Dyson LJ in *Baker* at [31] and per Aikens LJ in *Brown* at [81]. In *Hurley*, Elias LJ said this at [78]:
>
> "The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker.""

112. In *Hotak v Southwark London Borough Council* [2015] UKSC 30, [2016] AC 81, Lord Neuberger said at [75]:

> "… as Elias LJ said in the *Hurley case [2012] HRLR 13* , paras 77–78 it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been a rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision.""

113. As to the degree of detail required for a proper EIA, in *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441, [2016] 1 WLR 3923, Laws and Treacy LJJ, with whom Lord Dyson MR agreed, said the following:

> "83 … the requirement to pay due regard to equality impact under section 149 is just that. It does not require a precise mathematical exercise to be carried out in relation to particular affected groups or, for example, urban areas as opposed to rural areas. The assessment undoubtedly acknowledged the effect of the proposals upon protected groups but sought to place that in context by reference to other policies impacting on affordable housing.
>
> 85 Whilst it may fairly be said that the equality statement takes a relatively broad brush approach as compared to the exercise urged by the claimants and adopted by the judge, we consider that compliance with the terms of section 149 was achieved by what was done in this case. In so far is the judge adopted a

> more stringent and searching approach to the equality statement we consider that he was in error. "

114. As regards the WHPS, the question is whether the initial failure to comply with EA 2010 s.149(1) has been sufficiently remedied by Ms Parsonage's assessment of the two Priority Schemes - when deciding to continue with them pending finalisation of the full review of Ealing's allocation policy - to avoid the two Priority Schemes being set aside immediately for breach of section 149.

115. Ealing's difficulty is that Ms Parsonage's witness statement does not, for example, give any indication that she has sought to evaluate, in relation to the WHPS, the consequences of the fact that the EA 2010 definition of disability is different from that used by Ealing in its Housing Policy. Nor does her witness statement provide any analysis of the number of non-working disabled people who have been overtaken or are at risk of being overtaken by working people lower down the same priority band or on a lower band. Nor does she comment on the significance or otherwise of the fact that a considerable proportion of the housing in the two Priority Schemes comprises larger accommodation. In the circumstances of the present case, I do not consider that her witness statement is sufficient to correct the earlier omission to provide a proper EIA.

116. The respondent's notice invites this Court to uphold the decision of the Judge on the PSED "because of the absence of due regard to the need to advance equality of opportunity, not merely the need to eliminate discrimination". Mr Wise did not, however, elaborate on that point in oral argument.

117. Notwithstanding the inadequacy of Ms Parsonage's witness statement in terms of compliance with section 149 in respect of the WHPS, it is relevant to the issue of any substantive relief for that breach of duty that Ms Parsonage has shown that, in deciding to continue the two Priority Schemes pending completion of the full review, she is alive to the discrimination issues and that there are complex analyses to be undertaken in relation to the WHPS in order to assess the impact on the Protected Groups. In the circumstances, I do not consider that it is necessary or appropriate to quash the WHPS.

CA 2004 s.11

118. Ealing makes two points on the appeal from the Judge's conclusion that there was a breach of CA s.11. The first is that, on examination of the figures, the WHPS did not have an adverse impact on single parent carers and, by extension, their children. The second is that the complaint seems to be that Ms Parsonage's mistake was of a "tick-boxing" kind in that, while she stated in paragraph 28 of her witness statement that she accepted that there would be an adverse effect of the WHPS on some households within the Protected Groups, she did not specifically mention the children of women led households.

119. I would allow the appeal against the Judge's finding on this issue.

120. The Judge's view on this issue was expressed very briefly. He made two points in reaching his conclusion that there was a breach of the section 11 duty. First, he said (in para [116]) that children with single parent carers who cannot work will be

adversely affected. Second, he said (in para [117]) that there appears to have been no actual consideration of the interests of children in this context.

121. Mr Wise referred to the judgment of Baroness Hale in *Nzolameso v Westminser City Council* [2015] UKSC 22, [2015] PTSR 549, where she sets out (at [22]-[24]) the general duty under section 11(2) and points out that it applies not only to the formulation of general policies and practices but also to their application in an individual case. I do not see, however, that this assists the resolution of the appeal on the particular facts of the present case.

122. I consider, adopting the words of McCombe LJ in *Haque* (at [62]), that the Judge was too exacting. Ms Parsonage says expressly in her witness statement (at para. [17]) that she has in mind the duty under section 11(2). She makes clear in her witness statement (at para. [18]) that she accepts "that one of the principal needs of children is to have access to satisfactory housing and, if they do not, this may harm their physical and emotional development … [and that] access to suitable long term housing is particularly important for the development of children". She accepts (at para. [20]) that female leaders of households will as a group be less likely to work 24 hours a week than persons outside those groups and therefore, on the face of it, will be less likely to be able to qualify for the WHPS. She goes on to explain, by reference to the statistics and the priority bands, that taken overall Ealing's allocation does not disadvantage female leaders of households. The figures show that for the year ended 30 September 2012 56 % of letting were to women led households, and for the year ended 20 September 2014 55 % of lettings were to women led households. Ms Parsonage says in her witness statement (at para. 23) that for the year ended 30 September 2015 58% of lettings to people with working household status went to female led households whereas they represented 54% of total applications. The Judge made no reference to those statistics.

Conclusion

123. For the reasons I have given, I would allow the appeal against the Judge's findings that there was unjustified indirect discrimination under EA s.19, a contravention of Article 14 of the Convention in conjunction with Article 8 and a breach of CA 2004 s.11.

124. In view of the pending general review of Ealing's Housing Policy, including the two Priority Schemes, I see no purpose in remitting the issue of justification under EA 2010 s.19(2)(d) and Article 14 for further consideration.

125. For the reasons I have given, save to the extent indicated at paragraph 110 above, I would dismiss the appeal against the Judge's declaration of a breach of the PSED.

126. I would allow the appeal against the order that the two Priority Schemes be quashed.

Lord Justice Davis:

127. I agree, subject to the following.

128. I would not be minded to accept that the WHPS is "within the ambit of" Article 8 and so within the reach of Article 14. In particular, I do not, as at present advised, accept

that there is, for these purposes, a "right" to settled or permanent accommodation protected by or within the reach of Article 8; and it seems to me, with respect, that the obiter statement of Goss J in *HA* may be altogether too broad. I thus also have related reservations about the correctness of the concession in this case as to "other status" for the purposes of Article 14. But, that said, I in any event wholly agree that the WHPS (in common with the MTPS) was justified in the circumstances of this case.

129. I would refer to the decision of Garnham J in *R (XC)* v *London Borough of Southwark* [2017] EWHC 736 (Admin); itself a case relating to the validity of a housing allocation scheme. It seems to me that the approach adopted in that decision was the right approach: and is one which corresponds with the approach to be adopted in the present case.

130. As to s. 149, one has to address the substance of matters. I agree that, in this particular case, there are concerns; but that, given there is to be a full review, no relief is now required.

Lord Justice Underhill:

131. I agree with the disposal of this appeal proposed by the Master of the Rolls. I also agree with his reasoning, save that, like Davis LJ, I do not as at present advised agree that the provisions of the WHPS fall within the ambit of article 8 of the Convention. As the Master of the Rolls says, this aspect was not very fully explored in the submissions before us, and since, in view of our agreement on the justification issue, it is not necessary to express a definitive view I prefer not to do so. But I will briefly outline the reasons for my provisional view.

132. The essential basis of the Judge's reasoning on this point, following the observations of Goss J in *HA* quoted by the Master of the Rolls at para. 100, is that the two Schemes impact on the way in which access is afforded to "settled accommodation" or "stable permanent accommodation". The enjoyment of settled accommodation is said to fall within article 8 because family life cannot be enjoyed without it. The Master of the Rolls accepts that analysis as regards the WHPS (though not the MTPS). But it depends what is meant by "settled" accommodation. I agree that family life cannot be enjoyed if the family is in precarious accommodation such that they cannot be sure from day to day, or week to week, whether they will still have a roof over their heads. I accordingly agree that rights which are intended to take a family out of precarious accommodation fall within the ambit of article 8. The provisions of Part VII of the Housing Act 1996 are of that character: I accept of course that accommodation provided under Part VII is often characterised as "temporary", and may involve a licence rather than a tenancy. Nevertheless it is not precarious in as much as it must be provided indefinitely (at least as long as the person is in priority need). It must also be suitable. It was because the purpose of part at least of the provisions of Part VII is to afford such accommodation to those whose right to family life would be impaired by having no, or only precarious, accommodation that this Court in *Morris* held that access to the rights in question fell within the ambit of article 8: see paras. 24-25 of the judgment of Sedley LJ. But the WHPS does not impact on access to settled accommodation in that sense. It is an aspect of a scheme for allocating social housing made under Part VI of the 1996 Act. No doubt the housing accommodation allocated under that scheme is in fact "settled". But, as appears clearly from Sedley LJ's analysis in *Morris*, what we are concerned

with is the *purpose* of the legislative provisions in question. The purpose of Part VI of the Act, or of schemes made under it, is not to ensure access to settled, as opposed to precarious, accommodation: after all most private-sector tenancies will also be "settled" in the relevant sense.

133. In my provisional view, therefore, the provision and allocation of social housing is a social welfare benefit of a kind which does not, without more, fall within the ambit of article 8. This distinction is at the heart of Sedley LJ's reasoning in *Morris* – see in particular para. 23 of his judgment. Although I do not say that *Morris* is binding authority that, outside the homelessness context, the scheme of entitlement to social housing falls outside the ambit of article 8, it seems to me that we would be advancing the case-law further than it has so far gone if we endorsed the reasoning of Goss J in *HA* or of the Judge in the present case.

134. The decision of the ECtHR in *Bah* is not in my view inconsistent with this approach. Although the statement at para. 40 of the Court's judgment, quoted by the Master of the Rolls at para. 99, that "where a contracting state decides to provide [social benefits] it must do so in a way which is compliant with art. 14" can be read very widely, I do not understand it to be intended as a wholly general proposition. The applicant's complaint was that she and her son were excluded from the benefit of the homelessness provisions of Part VII of the Act. It is clear that the point being made by the Court is that the UK might not have been under an obligation to enact those provisions, but that, it having done so, the rights conferred by them fell within the ambit of article 8. The Court referred in terms to *Morris* and plainly believed that its reasoning was to the same effect.