The Queen (on the application of Lina Jakimaviciute) v Hammersmith and Fulham London Borough Council

Case No: C1/2014/0125

Court of Appeal (Civil Division)

6 November 2014

[2014] EWCA Civ 1438

2014 WL 5599451

Before: Lord Justice Richards Lord Justice Tomlinson and Lord Justice Bean

Date: Thursday 6th November 2014

In the Matter of An Application for Judicial Review

Hearing date: 21 October 2014

Representation

Martin Westgate QC and Ben Chataway (instructed by Turpin & Miller LLP) for the Claimant.
Christopher Baker and Clare Cullen (instructed by Legal Services Division, London Borough of Hammersmith and Fulham) for the Defendant.

Judgment

Lord Justice Richards:

Introduction

1 This is an application for judicial review. Permission to apply was refused in the Administrative Court but was granted in the Court of Appeal by Sir Stanley Burnton, who directed that the application should be retained for hearing in this court instead of being returned to the Administrative Court. The case concerns the provisions of Part 6 of the Housing Act 1996 , as amended in particular by the Localism Act 2011 , governing the allocation of social housing by local housing authorities. Save where the context otherwise requires, references in this judgment to "the 1996 Act" are to the Act as so amended.

2 The claimant challenges the legality of the Housing Allocation Scheme adopted by Hammersmith and Fulham London Borough Council with effect from April 2013 ("the Scheme"). Specifically, she takes issue with paragraph 2.14(d) which provides that the following class of persons does not normally qualify for registration under the Scheme:

> "Homeless applicants placed in long term suitable temporary accommodation under the main homelessness duty, unless the property does not meet the needs of the household or is about to be ended through no fault of the applicant. Long term temporary accommodation can include private sector homes let via the council or a housing association under a leasing arrangement, and non-secure tenancies on regeneration estates."

3 In 2011 the claimant applied to the Council under the homelessness provisions of Part 7 of the 1996 Act. The Council accepted a housing duty towards her under section 193(2) and placed her in long term suitable temporary accommodation with a private landlord. Pursuant to the housing allocation scheme then in force, she was also placed on the register for an allocation of permanent accommodation under Part 6 of the 1996 Act. When the new Scheme came into effect in April 2013, however, she lost her place on the register because she fell within the exclusion in paragraph 2.14(d). A subsequent change of circumstances led to her being registered but that complication can be left on one side for the time being.

4 The case turns on the relationship between the Council's power under section 160ZA(7) of the 1996 Act to decide what classes of persons are, or are not, qualifying persons and the duty under section 166A(3) to frame an allocation scheme so as to secure that reasonable preference is given to certain classes of people, including those who are owed a housing duty under section 193(2) . The claimant contends in summary that the power to set the qualification criteria is subject to the duty to secure reasonable preference and that the exclusion in paragraph 2.14(d) is in breach of the reasonable preference duty. The Council contends in summary that the power to set the qualification criteria is entirely separate from the provisions relating to reasonable preference.

The legislative framework

5 The relevant provisions of Part 6 of the 1996 Act are to be found in sections 159, 160ZA, 166, 166A, 168 and 169 .

6 Section 159 provides by subsection (1) that a local housing authority "shall comply with the provisions of this Part in allocating housing accommodation". Subsection (2) provides that an authority "allocate" housing accommodation when they select or nominate a person to be a secure or introductory tenant or nominate a person to be an assured tenant of a private registered provider of social housing or a registered social landlord.

7 Section 160ZA is headed "Allocation only to eligible and qualifying persons: England". Subsection (1) provides that an authority shall not allocate housing accommodation to a person from abroad who is "ineligible" by virtue of subsection (2) or (4) . The ineligibility provisions are not in issue in this case. The section goes on, however, to deal with "qualifying persons":

(6) Except as provided by subsection (1), a person may be allocated housing accommodation by a local housing authority in England (whether on his application or otherwise) if that person –

(a) is a qualifying person within the meaning of subsection (7), or

(b) is one of two or more persons who apply for accommodation jointly, and one or more of the other persons is a qualifying person within the meaning of subsection (7).

(7) Subject to subsections (2) and (4) and any regulations under subsection (8), a local housing authority may decide what classes of persons are, or are not, qualifying persons.

(8) The Secretary of State may by regulations –

(a) prescribe classes of persons who are, or are not, to be treated as qualifying persons by local housing authorities in England, and

(b) prescribe criteria that may not be used by local housing authorities in England in deciding what classes of persons are not qualifying persons."

The power of the Secretary of State to make regulations under subsection (8) has been exercised to date only to prevent authorities from using "local connection" as a criterion for qualification in the case of members or former members of the regular forces or persons connected with them.

8 Subsections (9)-(10) provide that if an authority decide that an applicant for housing accommodation is ineligible or is not a qualifying person, they shall notify the applicant in writing of their decision and the grounds for it.

9 Section 166 requires an authority to secure that advice and information is available free of charge to persons in their district about the right to make an application for an allocation of housing accommodation, and that an applicant is informed that he has the rights mentioned in section 166A(9) (see below). It also provides, in subsection (3) , that every application for an allocation of housing accommodation "shall (if made in accordance with the procedural requirements of the authority's allocation scheme) be considered by the authority".

10 Section 166A is headed "Allocation in accordance with allocation scheme: England" and includes the following provisions:

"166 A(1) Every local housing authority in England must have a scheme (their 'allocation scheme') for determining priorities, and as to the procedure to be followed, in allocating housing accommodation.

For this purpose ' *procedure'* includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken.

…

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

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

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

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

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

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

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

The scheme must be framed so as to give additional preference to a person with urgent housing needs who falls within one or more of paragraphs (a) to (e) and who … [is a member of the regular forces, etc.]"

11 Subsection (5) states that the scheme may contain provision for determining priorities in allocating housing to people within subsection (3) and that the factors which the scheme may allow to be taken into account include (a) the financial

resources available to a person to meet his housing costs, (b) any behaviour of a person or a member of his household which affects his suitability to be a tenant, and (c) any local connection.

12 Subsection (7) provides that the Secretary of State may by regulations specify further descriptions of people to whom preference is to be given as mentioned in subsection (3) , or amend or repeal any part of subsection (3) . Subsection (8) provides that the Secretary of State may by regulations specify factors which a local housing authority in England must not take into account in allocating housing accommodation.

13 Subsection (9) provides that the scheme must be so framed as to secure that an applicant for an allocation of housing accommodation has the right (a) to request information about certain matters, including how his application is likely to be treated under the scheme, (b) to request the authority to inform him of any decision about the facts of his case which is likely to be, or has been, taken into account in considering whether to allocate housing accommodation to him, and (c) to request a review of a decision mentioned in (b) or in section 160ZA(9) , and to be informed of the decision on the review and the grounds for it.

14 Subsection (11) provides that subject to the preceding provisions and to any regulations made under them, the authority may decide on what principles the scheme is to be framed.

15 Subsection (12) requires an authority to have regard to certain matters, including their current homelessness strategy, in preparing or modifying their allocation scheme; and subsection (13) provides that before adopting an allocation scheme or making an alteration reflecting a major change of policy, the authority must send a copy of the draft of proposal to every private registered provider of social housing and registered social landlord with which they have nomination arrangements.

16 Subsection (14) provides that an authority shall not allocate housing accommodation except in accordance with their allocation scheme.

17 Section 168 requires an authority to publish a summary of their allocation scheme, to provide a copy of the summary free of charge on request and to make the scheme available for inspection.

18 Section 169 requires authorities to have regard to such guidance as may from time to time be given by the Secretary of State.

The Scheme

19 The Scheme states in paragraph 2.2 that the amount of accommodation in the borough is very limited and the Council will not maintain an "open" system allowing any person to be registered. Instead, it will operate a managed register approach with standard checks for eligibility "but with a tighter approach as to who will qualify to be on the register, i.e. registering only those who meet the reasonable preference criteria". Under the heading "Qualification and Reasonable Preference", it states:

> "2.7 Central to any Housing Allocation Scheme is ensuring that 'reasonable

preference' is given to people with high levels of assessed housing need. …

2.8 In framing this Housing Allocation Scheme the Council intends to give effect to s.166A(3) of the 1996 Housing Act (as amended) ….

2.9 In respect of Hammersmith & Fulham's new Housing Allocation Scheme, the Council intends to ensure that **all** successful applicants have reasonable preference. But it will give 'additional preference' to applicants who are making a community contribution. …

2.10 These are the only categories of people that the Council will consider for housing, except for Management transfers set out in Section 3 and where the Council adopts a Local Lettings Plan ….

…

2.12 The Council has developed a housing banding system to determine who will be prioritised for housing in the borough. The housing bands are summarised below and full details of what the characteristics of individual cases will be are set out in Annex 3:

Band 1:

Urgent Need to Move due to Reasonable Preference PLUS Additional Priority

Band 2:

Need to move – Reasonable Preference AND a Community Contribution

Band 3:

Need to move – Reasonable Preference BUT No Community Contribution

Band 4:

Reduced Priority: Need to Move – Reasonable Preference but with Reduced Priority

2.13 The principles guiding the Housing Allocation Scheme are that it is fair, realistic and affordable and that applicants take greater responsibility for their own actions and their future. The Council will only register eligible applicants who qualify to meet at least one of the reasonable preference criteria set out in Section 2.7 of this document (except for allocations under a Local Lettings

> Plan). Whilst the Council is giving clear preference to applicants making a community contribution, it is also keen to have qualifying criteria which better fits the supply of accommodation that the Council can reasonably have access to. This means that even in a number of instances where applicants meet the qualifying Reasonable Preference criteria described in Section 2.7 of this Housing Allocation Scheme, the Council will not accept a Housing Register Application" (all emphasis in the original).

20 There follows, in paragraph 2.14, a list of "Exceptional Cases including Classes of Person that do not Qualify". The list is introduced by the words:

> "Having considered the changes made to the Housing Act Part VI in the Localism Act , the following classes of person will **not** normally qualify for registration:"

By subparagraph (d), one of the classes listed is that of "homeless applicants placed in long term suitable temporary accommodation under the main homelessness duty". I have already set out the full text of the subparagraph. Other classes listed include applicants convicted of housing or welfare benefits related fraud (subparagraph (b)), applicants who have not lived in the borough for a minimum of 5 years (subparagraph (e)), and applicants who owe arrears of rent or other accommodation charges in respect of the current tenancy or former accommodation (subparagraph (g)). Paragraph 2.15 provides for a discretion to waive the exclusion from qualification in exceptional circumstances. Paragraph 2.16 provides that all applicants who do not qualify under the preceding criteria may submit a new housing register application if their circumstances change.

21 The Scheme contains a large amount of further detail which I need not dwell on here.

22 Mr Toby Graves, the Council's Head of Housing Advice and Assessment, has made a witness statement setting out the background to the Scheme and the intention behind it. He explains that demand for social rented accommodation far outstrips supply. Prior to April 2013 the Council had an open register which anyone could join. On 29 March 2013 there were 11,077 households on the register, of which some 49% had no identified housing need. By contrast, the Council would normally have access to about 500–600 units of social rented accommodation per annum. The new Scheme is a radical alteration of approach and is based on the following general principles: the focus is on applicants with the severest housing needs; applicants must satisfy a residence condition irrespective of housing need; and extra priority is available for qualifying applicants who satisfy the community contribution criteria. The introduction of the Scheme has resulted in a radical reduction in the numbers of qualifying applicants. By 9 April 2013 the size of the housing register had reduced to 1,359 households, and by 27 April 2014 there had been a further reduction to 831. Of those removed from the register following the introduction of the Scheme, only 519 were removed because they fell within paragraph 2.14(d); 3,701 did not satisfy the

residence condition; and 5,551 had no qualifying need. The much reduced number of registered applicants aligns much more closely with the amount of social rented accommodation the Council has available for letting, with the consequence that waiting times for qualifying applicants have substantially reduced.

23 Mr Graves states that the intention of the Scheme is to prioritise in the first instance applicants with the severest housing needs. The Scheme is "firmly grounded" in the statutory reasonable preference categories but there will be a number of instances where an applicant in a reasonable preference group will not qualify. Referring to the disqualification effected by paragraph 2.14(d), he states (at paragraph 22 of his witness statement):

> "In setting this particular disqualification criterion, the Council is recognising an obvious but often neglected truth – i.e. that the housing needs of applicants owed the main housing duty are not uniform and that very often the quality of the accommodation provided in discharge of the main housing duty is such that the Council can reasonably conclude that an applicant's current housing needs are met. Long-term temporary accommodation into which homeless applicants are placed is of better quality and gives rise to fewer unmet needs than the accommodation occupied by applicants whom the Council is seeking to prioritise under the scheme. By disqualifying these applicants for so long as they remain adequately housed in their long term temporary accommodation, the council is able to focus its effort on those applicants who are in genuinely severe housing need …."

The claimant's own circumstances

24 It is unnecessary to add much about the claimant's own circumstances. Prior to April 2013 she was in the third of four priority bands under the then existing scheme. She made around 50 bids for available properties but the closest she came to securing accommodation was when she was between numbers 6 and 10 on a shortlist of bidders. She was removed from the register when the new Scheme came into force in April 2013. In December 2013, however, she was reinstated on the register. Mr Graves explains in his witness statement that this was because the owners of her current temporary accommodation defaulted on the mortgage and the property came under the control of receivers. The receivers indicated that they intended to seek possession "and as such the council has concluded that it would not be reasonable to regard the accommodation as available to [the claimant] on a long term basis". She was reinstated with a band 3 priority and with the date of her original homelessness application as the priority date.

25 Notwithstanding her reinstatement to the register, the claimant has neither been evicted from her temporary accommodation nor allocated permanent accommodation under the Scheme. Since she remains at risk of being removed again from the register, she retains an interest in maintaining the challenge to paragraph 2.14(d). The circumstances in which she came to be reinstated to the register are themselves relied

on as supporting a subsidiary argument as to why the Scheme is in breach of the reasonable preference duty.

First main issue: is the power to set the qualification criteria subject to the duty to secure reasonable preference?

26 Mr Martin Westgate QC, for the claimant, submits that on the proper construction of Part 6 of the 1996 Act, the duty under section 166A(3) to frame the allocation scheme so as to secure that reasonable preference is given to certain classes of people is a fundamental requirement which applies to the arrangements for allocation as a whole, including the setting of any qualification criteria under section 160ZA(7) . He places reliance on the structure and wording of the statute, on the legislative history, on considerations of policy and on the content of the relevant statutory guidance. Mr Baker, for the Council, submits that the claimant's approach sits ill with the terms of the discretion conferred by section 160ZA(7) and that Parliament would have framed the provisions differently if it had intended such a result. Further, as a matter of substance, deciding who is to qualify is very different from determining priorities between those who do qualify. The exercise of the discretion to set the qualification criteria could in principle be challenged on Padfield grounds (*Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997*) but no such case is or could be advanced here.

27 For the reasons set out below, I accept Mr Westgate's submissions on this issue.

28 It is true that the power of a local housing authority under section 160ZA(7) to decide what classes of persons are, or are not, qualifying persons is a discretionary power and, whilst made expressly subject to any regulations made by the Secretary of State under section 160ZA(8) , is not expressed to be subject to the reasonable preference duty in section 166A(3) . But when Part 6 is read as a whole, as it must be, it can be seen that there exists the close relationship for which the claimant contends between the two provisions.

29 Section 166A(1) requires every authority to have an allocation scheme for determining priorities, and as to the procedure to be followed, in allocating housing accommodation; and section 166A(14) provides that an authority shall not allocate housing accommodation except in accordance with their allocation scheme. Mr Baker argues by reference to the definition in section 159(2) that "allocation" refers only to the end of the process, namely the moment when the authority "select" or "nominate" a person to be a tenant. That may be so but it does not take the Council very far. By section 166A(1) the scheme is required to cover the entire process leading to such allocation: the "procedure" referred to in the subsection is defined as including *all aspects* of the allocation process. The process starts with the making of an application for an allocation of housing accommodation. The next step in the process is to determine whether the applicant is eligible and is a qualifying person. This strongly suggests that the criteria for eligibility and, more importantly, the qualification criteria are themselves to form part of the scheme: only those applicants who meet the criteria will fall for consideration at further stages of the process.

30 That the qualification criteria are to form part of the scheme is further supported by the requirement in section 166A(9) concerning the provision of information to enable

an applicant to assess "how his application is likely to be treated under the scheme", coupled with the general requirement in section 168 to publish information about the scheme: it would be very surprising and would greatly undermine the value of the information requirements if the qualification criteria did not need to be included within the scheme. Another strong indicator in the same direction is that section 166A(9) requires that the scheme be so framed as to secure that an applicant has the right to request a review of a decision mentioned in section 160ZA(9) , i.e. a decision that he is ineligible or is not a qualifying person. It would also be surprising if, when setting the qualification criteria, an authority did not have to comply with the duty in section 166A(12) to have regard to certain matters or the duty in section 166A(13) to consult relevant persons, yet those duties apply only in relation to matters contained within the scheme.

31 Moving on to section 166A(3) itself, it is an elaboration of the duty in section 166A(1) and requires the scheme to be so framed as to secure that reasonable preference is given to the classes specified in sub-paragraphs (a) to (e), including those who are owed a housing duty under section 193(2) . The reasonable preference duty applies on its face to the framing of the scheme as a whole and so as to require the giving of reasonable preference to all those specified, not just to those who are qualifying persons. There is no sensible reason why it should be read as applying only at a stage where the qualification criteria have operated to exclude certain applicants from registration under the scheme. Thus, on the natural interpretation of the statutory provisions the setting of the qualification criteria is subject to the reasonable preference duty.

32 Both counsel sought to derive some support from the legislative history. In summary, the position is as follows:

(1) From April 1986 until October 1996, the Housing Act 1985 conferred a general discretion on local housing authorities to manage and allocate their housing stock and imposed a duty to secure reasonable preference to certain persons, including those to whom a homelessness duty was owed. In *R v Wolverhampton Metropolitan Borough Council, ex p. Watters (1997) 29 HLR 931* it appears to have been common ground that the discretion was subject to the reasonable preference duty. The focus of the case was on the nature and effect of the requirement to give "reasonable" preference.

(2) From October 1996 until January 2003, the 1996 Act established a system broadly similar to that now existing, including a power for an authority to decide what classes of persons were, or were not, "qualifying persons" who could be admitted to the register, and a duty to frame the allocation scheme so as to secure that reasonable preference was given to specified groups. There are no reported cases on the relationship between the power to set qualification criteria and the reasonable preference duty during that period.

(3) From January 2003 until January 2012, by virtue of amendments made to the 1996 Act by the Homelessness Act 2002 , the power to set qualification criteria was removed and the register was required to be open to all "eligible" persons, with only very limited power in the authority to determine who was eligible. The reasonable preference duty was amended but its essence was unchanged.

(4) In January 2012 the amendments made to the 1996 Act by the Localism Act 2011 came into force, producing the legislative scheme which applies to the present case.

33 For my part, I do not think it profitable to delve any further into that history in order to examine the relationship between the reasonable preference duty and other provisions of the legislation at different times. The present version of Part 6 of the 1996 Act is not identical to anything that has gone before and it must be assessed on its own terms.

34 It is, however, useful to consider the policy considerations behind the relevant provisions of the present Part 6 , as they appear from the consultation exercise that preceded the amendments made by the Localism Act 2011 .

35 The Government's consultation paper, *Local decisions: a fairer future for social housing* (December 2010), referred to the size of social housing waiting lists and the fact that many of those on the lists had no realistic chance of getting a home. One of the changes proposed was summarised in these terms:

> "1.28 Local authorities will no longer be forced to include on their waiting lists for social housing those with no real need and no realistic prospect of ever receiving a social home. Instead they will have the freedom to decide who should qualify to be considered for social housing, while continuing to ensure that priority for social housing goes to those most in need. That will allow landlords to operate a more focused waiting list – one that better reflects need and local priorities and can be more readily understood by local people."

36 A separate proposed change related to the homelessness duty. One of the problems identified was that those owed the duty could effectively insist on being provided with temporary accommodation until offered social housing, with the result that around 21% of new lettings in social housing was allocated to people who were not actually homeless but were owed the homelessness duty, thus significantly restricting the number of social homes that could be made available to others in need on the housing waiting list. The proposed solution to *that* problem, however, was an amendment to Part 7 of the 1996 Act (now section 193(7AA)) to enable authorities to discharge the main homelessness duty by arranging offers of suitable accommodation in the private sector, so that those owed the duty would no longer be able to insist on being offered social housing as the only way the duty could be brought to an end.

37 Whilst proposing that change to the way the homelessness duty could be brought to an end, the consultation paper plainly contemplated a linkage between the power to decide who was to qualify for social housing and the duty to give reasonable preference to, among others, those to whom the homelessness duty continued to be owed:

> "4.8 We therefore intend to legislate to give back to local authorities the freedom to determine which categories of applicants should qualify to join the waiting lists ….
>
> 4.9 We take the view that it should be for local authorities to put in place arrangements which suit the particular needs of their local area. Some local authorities might restrict social housing to those in housing need (e.g. homeless households and overcrowded families). Other local authorities might

> impose residency criteria or exclude applicants with a poor tenancy record or those with sufficient financial resources to rent or buy privately. Others may decide to continue with open waiting lists ….
>
> 4.10 We want to provide local authorities with the power to decide who should qualify to be considered for social housing, while retaining a role for government in determining which groups should have priority for social housing through the statutory reasonable preference requirements ….
>
> 4.11 … We believe that the statutory duty on local authorities to frame their allocation scheme to give 'reasonable preference' to certain groups, together with local authorities' wider equalities duties, should serve to ensure that local authorities put in place allocation systems which are fair and that those who are vulnerable and in housing need are properly protected. However, to provide a safeguard, we intend to reserve a power to prescribe by way of regulations, that certain classes of people are (or are not) qualifying persons, if there is evidence that people in housing need are being excluded from social housing without good cause.
>
> …
>
> 4.15 The government believes that social housing should continue to be prioritised for the most vulnerable and those who need it most. We think the best way to ensure a consistent approach to meeting housing need is to continue to set the priorities for social housing centrally. Consequently we do not propose to remove the reasonable preference requirements in the allocation legislation."

38 Those proposals were confirmed in the Government's response to consultation, *Local decisions: next steps towards a fairer future for social housing* (February 2011) and were given effect in the amending legislation.

39 The policy considerations evidenced in that consultation material provide further support for my view as to the relationship between section 160ZA(7) and section 166A(3) .

40 My view is also consistent with the guidance issued by the Secretary of State under section 169 of the 1996 Act (*Allocation of accommodation: guidance for local housing authorities in England* , 2012). The guidance is not a direct aid to interpretation of the statutory provisions but local housing authorities are required to have regard to it. It is unequivocal in its indication that the qualification criteria adopted by an authority form part of an allocation scheme and are subject to the reasonable preference duty:

> "3.20 In framing their qualification criteria, authorities will need to have regard to their duties under the equalities legislation, as well as the requirement in s.166A(3) to give overall priority for an allocation to people in the reasonable preference categories.
>
> 3.21 Housing authorities should avoid setting criteria which disqualify groups of people whose members are likely to be accorded reasonable preference for

> social housing, for example on medical or welfare grounds. However, authorities may wish to adopt criteria which would disqualify individuals who satisfy the reasonable preference requirements. This could be the case, for example if applicants are disqualified on a ground of anti-social behaviour.
>
> …
>
> 4.1 Housing authorities are required by s.166A(1) to have an allocation scheme for determining priorities, and for defining the procedures to be followed in allocating housing accommodation; and they must allocate in accordance with that scheme (s.166A(14)). All aspects of the allocation process must be covered in the scheme, including the people by whom decisions are taken. In the Secretary of State's view, qualification criteria form part of an allocation scheme."

41 It is an ironic feature of this case that the Council's qualification criteria do in fact form part of the Scheme, and paragraph 2.8 of the Scheme states that in framing the Scheme the Council intends to give effect to the reasonable preference duty under section 166A(3) , yet in its defence to the claim the Council contends that the function of setting qualification criteria is entirely separate from the duty to frame the scheme so as to secure the giving of reasonable preference to the classes specified in section 166A(3) . In my judgment, that contention is unsustainable.

Second main issue: does paragraph 2.14(b) of the Scheme breach the reasonable preference duty?

42 I can therefore move on to the second main issue: on the basis that the setting of qualification criteria is subject to the reasonable preference duty, does the exclusion in paragraph 2.14(d) of the Scheme amount to a breach of that duty?

43 Mr Westgate accepts that authorities have a wide discretion with regard to the securing of reasonable preference to the classes specified in section 166A(3) . He acknowledges the court's need for caution in this area, having regard in particular to the principles set out in *R (Ahmad) v Newham London Borough Council [2009] UKHL 14, [2009] 3 All ER 755* , and *R (Aweys) v Birmingham City Council [2009] UKHL 36, [2009] 1 WLR 1506* . But he submits that the duty is owed to *all* the members of each class and that reasonable preference cannot be given by giving them *no* preference at all. There is a distinction between setting priorities within a class and giving members of a class no preference. As Baroness Hale put it R (Aweys) v Birmingham City Council at paragraph 62, "[p]rovided that 'reasonable preference' is given to all those who are homeless within the meaning of Part VII , there is no reason why an authority should not decide to give some homeless groups priority over others, so long as the decision is not irrational". It is accepted that other factors may be taken into account and may weigh against the giving of preference in an individual case, but it is submitted that those to whom the reasonable preference duty is owed "should be given a reasonable head start" (per Judge LJ in ex p. Watters , cited above, at page 938).

44 Against that background, Mr Westgate advances two main grounds on which

paragraph 2.14(d) of the Scheme is said to amount to a breach of the reasonable preference duty: (1) it amounts to an impermissible attempt to redefine the preference class identified in section 166A(3)(b) ; and (2) no reasonable authority would have concluded that the policy gives a reasonable level of preference to that class. A third, subsidiary contention is that paragraph 2.14(d) lacks transparency and is open to abuse.

45 The argument in support of the first ground is that Parliament has provided in section 166A(3)(b) that all those who are owed a housing duty under Part 7 must be given reasonable preference. The class is not limited to those who are owed such a housing duty but have been placed in short-term or unsuitable accommodation. Yet by paragraph 2.14(d) the Council has effectively carved out such a sub-group from the statutory class. Those in the sub-group are given some preference but the remainder of the class, i.e. those who have been placed in long term suitable accommodation, are given no preference at all; they are simply excluded from qualification under the scheme. This amounts to an attempted redefinition of the statutory class or, putting the point another way, to an attempt to thwart the statutory scheme. It is permissible to adopt a rule excluding individual applicants by reference to factors of general application, such as lack of local connection or being in rent arrears, but it is not permissible to cut down the statutory class in the way that subparagraph 2.14(d) attempts to do.

46 There is an overlap between that and the second ground, where the argument is that section 166A(3)(b) requires an allocation scheme to be framed so as to secure a reasonable preference to people owed a housing duty under Part 7 , yet no reasonable authority would conclude that the Scheme affords a reasonable preference to that class as a whole. The evidence shows that some 87% of households accommodated pursuant to one of the Part 7 duties was disqualified from allocation under the Scheme by virtue of paragraph 2.14(b). No reasonable authority would conclude that a criterion that disqualified 87% of applicants within one of the section 166A(3) classes afforded a reasonable preference to people falling within that class.

47 In my judgment, those two grounds are both well founded. The disqualification effected by paragraph 2.14(d) is fundamentally at odds with the requirement under section 166A(3)(b) to frame a scheme so as to secure that reasonable preference is given to people who are owed a housing duty under one of the provisions of Part 7 . The great majority of people within that class, far from being given any preference, are excluded altogether from consideration for housing accommodation under the Scheme; and they are excluded for a reason that cannot sit with Parliament's decision to define the section 166A(3)(b) class as it did. It does not assist the Council to point to the fact that the only people to whom housing accommodation may be allocated under the Scheme are people within the section 166A(3) classes. It is the exclusion of a large proportion of one of those classes that causes the problem. Nor do I accept that the power to effect such an exclusion is inherent in the flexibility allowed to an authority in securing that reasonable preference is given.

48 The claimant's subsidiary contention is that a scheme can be in breach of the statutory requirements through failure to give sufficient information about the allocation process (see *R (Lin) v Barnet London Borough Council [2007] EWCA Civ 132,*

[2007] HLR 30) and that paragraph 2.14(d) gives insufficient information as to when accommodation will cease to be regarded as "long term" so as to enable an applicant to qualify for allocation. This lack of transparency is said to be demonstrated by the claimant's own case. She was readmitted to the register on the basis that the receivers in control of her current temporary accommodation intended to seek possession, but the Scheme gives no indication of how imminent such a threat of eviction must be. Nor is it clear how, under the terms of the Scheme, the claimant came to be readmitted to the register without any application by her for that purpose.

49 I am not greatly impressed by that line of argument but in the circumstances I do not need to reach any decision on it. I have found that paragraph 2.14(d) is unlawful in any event, and the point raised as to absence of sufficient detail in that provision has no wider significance.

Conclusion

50 In my judgment, the Council has gone further than the statute permits in providing that people falling within paragraph 2.14(d) will not normally qualify for registration under the Scheme. I should, however, note that Mr Westgate's challenge was not to the rationality of the Council's overall objective. If those falling within paragraph 2.14(d) have a lesser need for social housing than other people within the reasonable preference classes, the Council may wish to consider whether it is possible to reflect that factor in an appropriate banding structure under the Scheme in place of the impermissible exclusion effected by paragraph 2.14(d).

51 I would allow the application for judicial review and, subject to any further argument as to the form of relief, I would be minded to grant a declaration that paragraph 2.14(d) of the Scheme is unlawful.

Lord Justice Tomlinson:

52 I entirely agree, although I regret the conclusion to which we are compelled. For the reasons touched on by my Lord at paragraph 50 above, I doubt if either these proceedings have achieved any practical purpose or that the Claimant will derive any benefit from our decision. However, if the scheme is unlawful we must so declare.

Lord Justice Bean:

53 I also agree that the application should be allowed for the reasons given by Richards LJ.