Neutral Citation Number: [2018] EWHC 1791 (Admin)

Case No: CO/1119/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 July 2018

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

THE QUEEN **on the application of TW, SW, and EM**	**Claimants**
- and -	
LONDON BOROUGH OF HILLINGDON	**Defendant**
- and -	
EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

- -
- -

Ian Wise QC and Azeem Suterwalla
(instructed by **Hopkin Murray Beskine**) for the **Claimants**
Kelvin Rutledge QC and Andrew Lane (instructed by **LB Hillingdon**) for the **Defendant**

Hearing dates: 26, 27 and 28 June 2018

- -

Approved Judgment

Mr Justice Supperstone :

Introduction

1. The Claimants challenge the Social Housing Allocation Policy (December 2016) ("the Allocation Scheme") of the London Borough of Hillingdon ("the Council") in so far as it provides: (1) in para 2.2.4, a condition that only households with at least 10 years' continuous residence in-borough qualify to join the three welfare-based bands (A-C) of its housing register ("the residence qualification"); (2) in para 14.3, additional preference for such households who are in Bands C and B of the housing register ("the residence uplift"), and (3) in para 14.4, additional preference for those in Bands C and B who are working households on low income ("the working household uplift").

2. The Claimants are all of Irish Traveller descent currently living in temporary accommodation in the London Borough of Hillingdon. TW, the First Claimant, is a woman, who is a lone parent, who cares for SW, the Second Claimant, her two-year-old daughter. EM, the Third Claimant, cannot work, on the grounds of his own disability and as a full-time carer for his three adult disabled children.

3. On 5 April 2018 Choudhury J granted permission on three grounds. First, that both the residence qualification and the residence uplift discriminate indirectly and unlawfully under ss.19 and 29 of the Equality Act 2010 ("EA") against persons with the protected characteristic of "race" and that, as Irish Travellers, the Claimants have such a characteristic (**Ground 1**). Second, that the working household uplift discriminates indirectly and unlawfully under the same statutory provisions against persons with the protected characteristics of "disability" and "sex", the former applying to EM's household and the latter to TW as a single parent (**Ground 2**). Third, in formulating the three provisions under challenge the Defendant acted in breach of its obligations under s.11(2) of the Children Act 2004 ("CA").

4. Mr Ian Wise QC and Mr Azeem Suterwalla appear for the Claimants, and Mr Kelvin Rutledge QC and Mr Andrew Lane for the Council. Mr Dan Squires QC, on behalf of the Equality and Human Rights Commission ("the Commission"), made written submissions limited to Ground 1. I have been considerably assisted by the submissions of Counsel.

The Legislative and Policy Framework

Housing Act 1996

5. The allocation of social housing is substantially contained in Part 6 of the Housing Act 1996 ("HA").

6. S.166A ("Allocation in accordance with allocation scheme: England") provides, so far as is relevant:

> "(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.

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

(a) a choice of housing accommodation; or

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

(3) As regards priorities, the scheme shall, subject to sub-section (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)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).

(5) The scheme may contain provision for determining priorities in allocating housing accommodation to people within sub-section (3); and the factors which the scheme may allow to be taken into account include—

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

(6) Subject to sub-section (3), the scheme may contain provision about the allocation of particular housing accommodation—

> (b) to persons of a particular description (whether or not they are within sub-section (3)).
>
> (11) Subject to the above provisions, and to any regulations made under them, the authority may decide on what principles the scheme is to be framed.
>
> (14) A local housing authority in England shall not allocate housing accommodation except in accordance with their allocation scheme."

7. Part 7 of the HA contains provisions relating to those who are homeless. By s.184(1) where an applicant presents himself to the authority and the authority have reason to believe that he may be homeless or threatened with homelessness, they must make such enquiries as are necessary to satisfy themselves whether he is eligible for assistance and if so what duty, if any, is owed to him under Part 7. The fullest duty is owed once the authority is satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are satisfied that he did not became homeless intentionally (s.193(1)).

8. Accommodation provided under Part 7 is generally known as temporary accommodation whereas accommodation provided under Part 6 is generally known as settled accommodation. This claim is concerned with the allocation of accommodation under Part 6.

Hillingdon's Social Housing Allocation Policy (December 2016)

9. The key objectives of the Allocation Scheme, set out at para 1.2, are to:

> - "Provide a fair and transparent system by which people are prioritised for social housing.
> - Help those most in housing need.
> - Reward residents with a long attachment to the borough.
> - Encourage residents to access employment and training.
> - Make best use of Hillingdon's social housing stock.
> - Promote the development of sustainable mixed communities."

10. Para 1.2 further states:

> "The Council will register eligible applicants who qualify for the reasonable preference criteria and certain groups who meet local priority. In addition, the Council will ensure that greater priority through 'additional preference' is given to applicants who have a longer attachment to the borough, are working, … and childless couples."

11. Paragraph 2 of the Allocation Scheme sets out eligibility and qualification rules for housing. The qualification rules include at para 2.2.4:

> "**Households who have not been continuously living in the borough for at least 10 years and will not qualify to join the housing register**
>
> Applicants will need to demonstrate a local connection with Hillingdon. Local connection within the terms of this scheme will normally mean that an applicant has lived in Hillingdon, through their own choice, for a minimum of 10 years up to and including the date of their application, or the date on which a decision is made on their application, whichever is later.
>
> For purposes of continuous residence, children spending time away from home for education due to periods of study such as at university and people who have moved away up to 3 times due to the requirements of their job will be disregarded. Secure, introductory or flexible tenants of Hillingdon Council and care leavers housed outside the borough will be considered as having a local connection with Hillingdon.
>
> People will also be considered as having a local connection with Hillingdon when they are placed in the borough of Hillingdon in temporary accommodation in accordance with sections 190(2), 193(2), 195(2) or who are occupying accommodation secured by any local authority under section 192(3)."

There are ten exceptions to this qualification. One exception is for "Statutorily homeless persons and other persons who fall within the statutory reasonable preference groups (see paragraph 12 below)".

12. Section 4 of the Allocation Scheme refers to the Council operating a 'Choice Based Lettings Scheme' through a central lettings agency known as "Locata", and section 5 sets out how the Choice Based Lettings Scheme operates. It states:

> "**5.1 Priority Banding**
>
> Housing need is determined by assessing the current housing circumstances of applicants. A priority 'band' is then allocated according to the urgency of the housing need. There are three priority bands as follows
>
> Band A – This is the highest priority band and is only awarded to households with an emergency and very severe housing need.
>
> Band B – This is the second highest band and is awarded to households with an urgent need to move.

> Band C – This is the third band, and the lowest band awarded to households with an identified housing need.
>
> If following an assessment it is determined that an applicant has no housing need, they cannot join the housing register…"

13. Section 6 of the Allocation Scheme provides that in certain specified cases, an allocation may be made outside of the Choice Based Lettings Scheme. These include "where homeless households have been in temporary accommodation for longer than the average period, they will be made one direct offer of suitable accommodation".

14. Section 12 of the Allocation Scheme ("Reasonable Preference Groups") states, so far as is relevant:

> "The council will maintain the protection provided by the statutory reasonable preference criteria in order to ensure that priority for social housing goes to those in the greatest need…
>
> **12.1 Homeless household**
>
> This applies to people who are homeless within the meaning of Part 7 of the 1996 Housing Act (amended by the Homelessness Act 2002 and the Localism Act 2011).
>
> …
>
> Where the Council has been able to prevent homelessness and the main homelessness duty has been accepted, applicants will be placed in one of the following bands:
>
> Band A – in temporary accommodation but the landlord wants the property back AND the council cannot find alternative suitable temporary accommodation. Where an applicant fails to successfully bid within 6 months, a direct offer of suitable accommodation will be made. If the property is refused the Council will discharge its duty under Part VII of the Housing Act and withdraw any temporary accommodation provided.
>
> Band B – In Bed and Breakfast, council hostel accommodation or women's refuge.
>
> Band C – In other forms of temporary accommodation.
>
> Where the Council has been unable to prevent homelessness and the main homelessness duty has been accepted, applicants with less than 10 years continuous residence in the borough will be placed in Band D.
>
> …
>
> **12.4 Medical grounds**

> If you apply for housing because your current accommodation affects a medical condition or disability, your application will be referred to the council's medical adviser or occupational therapy team depending on what you have put in your application for assessment.
>
> …
>
> **12.6 Hardship grounds**
>
> There are a number of households applying to the housing register who experience serious hardship because of a combination of different factors which make the need for re-housing more urgent than when considered separately.
>
> The decision as to the appropriate priority 'band' will depend on both the combination and degree of the various factors with a view to ensuring that the greatest priority is given to those in the greatest need.
>
> In circumstances where this applies, a panel of officers (Hardship Panel) will undertake a review of the case to determine whether priority for re-housing is necessary.
>
> The following priority banding will be considered
>
> Band B – the applicant or a member of their household has multiple needs or has an urgent need to move. Examples include:
>
> - To give or receive care or support from/to a resident in the borough, avoiding use of residential care. It is constant care to/from a close relative as evidenced by a professional's report and supported by the Council's Medical Adviser;
> - Child protection reasons;
>
> …
>
> - Other urgent welfare reasons."

15. Section 14 of the Allocation Scheme ("Additional Priority") provides that additional priority is awarded in order to determine priorities between people in the reasonable and local preference groups. It is awarded in circumstances which include:

> "**14.2 Couples aged over 21 without children**
>
> Additional priority is awarded to couples aged 21+ without children. This will improve access to available lettings to those households without children who would otherwise be in 'Band C'.

14.3 10-year continuous residency

Additional priority is awarded to those who have a local connection by living in the borough continuously for a minimum period of ten years. This will support stable communities and reward households who have a long-term attachment to the borough.

Local connection will normally mean that an applicant has lived in Hillingdon, through their own choice, for a minimum of 10 years up to and including the date of their application, or the date on which a decision is made on their application, whichever is later.

14.4 Working households

Additional priority will be given to households who are in housing need and are working but are on a low income which makes it difficult to access low cost or outright home ownership. This will encourage people who can, to work and raise levels of aspiration and ambition.

This policy applies to households where:

- At least one adult household member is in employment.
- The employment should be a permanent contract, self-employment or part time for a minimum of 24 hours per week.
- The worker should have been in employment for 9 out of the last 12 months.
- Band A – where the household's housing need is 'Band B' + working.
- Band B – where the household's housing need is 'Band C' + working"

Equality Act 2010

16. S.19 defines indirect discrimination against an individual with the relevant protected characteristic as follows:

"**Indirect discrimination**

(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 sub-section (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 characteristics,
>
> (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."

17. By s.19(3) the relevant protected characteristics include disability, race, and sex.

18. The effect of s.29 EA is to render unlawful discrimination by persons providing services to the public or performing a public function. The Council accepts that the allocation of social housing is a public function for these purposes.

Children Act 2004

19. S.11 provides:

> "(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…"

S.11(1) applies to public bodies, including a local housing authority.

Factual Background

The Claimants

20. The evidence of both TW and EM is that they are Irish Travellers.

21. TW is 28 years' old (born on 17 March 1990). She has three children, T who is 7 (born on 6 November 2010), R who is 4 (born on 26 June 2013) and SW (born on 6 July 2016). She is a single parent. She cannot read or write. Having spent a significant part of her early life travelling, she says that she now wishes to settle, at least while her children are young and in school. She explains how important her children's educational opportunities are to her (see para 8 of her witness statement).

22. TW was living with relatives on a caravan site in West Drayton (Hillingdon) when she was asked to leave and became homeless in 2015. She applied for homelessness assistance to the Council. She was housed in a bed & breakfast hotel and then moved to another, before she was provided with her current accommodation under Part 7

HA. She says that the accommodation is in very poor repair and an independent environmental health officer has confirmed that it is unfit for human habitation.

23. She was not placed on the housing register until her solicitors wrote on 29 January 2018 requiring the Council to do so. In response the Council notified her that she had now been placed on the register, but that because she had not lived in the Borough for ten years she was placed in Band D.

24. EM is 60 years' old (born on 25 October 1957). He lives with his son "M" (aged 40, born on 4 July 1978) and daughters "A" (aged 35, born on 6 April 1983) and "L" (aged 23, born on 24 August 1994). All three are disabled and require care because of their disabilities. He too is disabled.

25. EM receives a carer's allowance in recognition of the more than 25 hours per week care he provides for L. All three children receive Employment Support Allowance and Disability Living Allowance.

26. EM has lived in Hillingdon since 2011. He became homeless in 2012 and was accommodated by the Council at a series of addresses until he was made to leave temporary accommodation on 1 March 2017. Between March 2017 and February 2018, save for occasional nights with friends or family, he and his children slept in his van until they were provided in February 2018 with accommodation under the Council's severe weather protocol. They continue to live in temporary accommodation.

27. By letter dated 8 June 2018 the Council informed EM that the hardship panel, to whom his housing register application had been referred, had decided that he did not meet the criteria for social housing. He was informed that if he disagreed with the decision he could request a review.

The present proceedings

28. The issues raised in this claim are substantially the same as those raised in *R (on the application of M and others) v Hillingdon LBC* (CO/1684/2017), a claim brought by an Irish Traveller family to the Council's Allocation Scheme. It was subsequently ordered that that claim be heard with *R (on the application of Gullu) v Hillingdon LBC* (CO/3461/2016), a claim concerning the alleged discriminatory effect of the Allocation Scheme on refugees. These two claims were heard by Gilbart J on 18 and 19 October 2017. Due to ill health Gilbart J was unable to deliver judgment, and on 18 January 2018 the President of the Queen's Bench Division ordered that the claims be listed before a different judge. In the meantime M and his family had been re-housed in private sector accommodation outside Hillingdon. In those circumstances M accepted that his claim was academic.

29. On 13 March 2018 Ouseley J dismissed an application to allow the current Claimants to be joined to the M case and the claim in *M and others* was dismissed. In doing so the judge expressed the view that the appropriate course was for the current Claimants to issue fresh proceedings which, as the issues were the same, should not result in significant expense or delay. This the Claimants did on 16 March 2018. I am informed that the Gullu case is to be heard in July 2018.

The Grounds of Challenge

30. Mr Wise advances three grounds of challenge:

i) The Allocation Scheme's 10-year residence criterion (that is the residence qualification and the residence uplift) unlawfully discriminates against the Claimants (**Ground 1**);

ii) The working household criterion (that is the working household uplift) unlawfully discriminates against the Claimants (**Ground 2**);

iii) That in devising these two criteria the Council failed to comply with their obligations under s.11 CA (**Ground 3**).

The issue on the discrimination challenges (Grounds 1 and 2)

31. In summary the Council's position at the outset of the hearing before me, in relation to the discrimination grounds (Grounds 1 and 2), was as follows:

i) Both Claimant households have the protected characteristic of "race", due to their historical association with the Irish Traveller community. The Council does not dispute that Irish Travellers are a racial group for the purposes of the EA.

ii) TW, as a single parent, has the protected characteristic of "sex", and EM and each of his three adult children have the protected characteristic of "disability".

iii) For the purposes of these proceedings each of the three provisions under challenge comprises a provision, criterion or practice ("PCP") within s.19(1) EA that has been applied to TW, EM and others.

iv) The residence qualification potentially gives rise to indirect discrimination under s.19(2) for applicants within Band D of the Allocation Scheme (in which the Claimants having less than 10 years' continuous residence in the borough were placed), but not Bands A-C; and the residence uplift and working household uplift provisions potentially give rise to indirect discrimination under s.19(2) for applicants within Bands C or B (but not Bands D or A).

v) The Council's defence to Grounds 1 and 2 is one of justification (i.e. proportionality) under s.19(2)(d) EA.

General Principles in Relation to Grounds 1 and 2

32. The approach to proportionality adopted in our domestic law is set out in Lord Reed's judgment in *Bank Mellat v HM Treasury (No.2)* [2014] AC 700. Lord Reed stated:

> "74. The judgment of Dickson LJ in *Oakes* [1986] SCR 103] provides the clearest and most influential judicial analysis of proportionality within the common law tradition of reasoning. The approach adopted in *Oakes* 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, Dixon CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781-782 that the limitation of 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 Worker's 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…"

33. In the context of housing allocation Lord Neuberger in *R (Ahmad) v Newham LBC* [2009] UKHL 14 said:

> "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."

34. In *R (MA and others) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550, Lord Toulson said (at para 32):

> "The fundamental reason for applying the manifestly without reasonable foundation test in cases about inequality in welfare systems was given by the Grand Chamber of the European Court of Human Rights in *Stec*, para 52. Choices about welfare systems involve policy decisions on economic and social

> matters which are pre-eminently matters for national authorities."

Lord Toulson accepted this to be the correct test, at paras 29-38 of his judgment.

35. Specifically, in the social housing context, in *R (Turley) v Wandsworth LBC* [2017] HLR 21, Underhill LJ considered the appropriate standard of review in assessing the proportionality of a twelve-month condition of residence for succession to a secure tenancy. He could see no difference between access to social housing and access to welfare benefits, both representing public resources, the conditions for access to which must be eminently a matter for political judgment. That being so he considered that Brooke LJ's observations in *Wandsworth LBC v Michalak* [2003] 1 WLR 617 to be equally applicable in the case before him. Brooke LJ said at 631:

> "It appears to me that this is pre-eminently a field in which the courts should defer to the decisions taken by a democratically elected Parliament, which has determined the manner in which public resources should be allocated for local authority housing on preferential terms."

36. In *In Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016 Lord Mance (at para 45) was inclined to accept that the "manifestly without reasonable foundation" approach was to be applied to the first to third stages of Lord Reed's test, with a level of deference ("significant weight") being given to the particular legislative choice even at the fourth stage.

37. In *R (A) v Secretary of State for Health* [2017] 1 WLR 2492 Lord Wilson (at 2505) said:

> "… It is now clear that, whilst this criterion ['manifestly without reasonable foundation'] may sometimes be apt to the process of answering the first question, and perhaps also the second and third questions, it is irrelevant to the question of fair balance, which while free to attach weight to the fact that the measure is the product of legislative choice, the court must answer for itself: see *In Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016, para 46, Lord Mance JCS."

Ground 1: residence qualification and uplift

38. The Council contend that these measures represent a proportionate means of achieving legitimate aims.

39. The Claimants accept that the measures have a legitimate aim sufficient to justify the limitation of a protected right (the first stage of Lord Reed's test in *Bank Mellat*). However they do not accept that the residence requirement is rationally connected to the Council's aims. Mr Wise submits that if the Council wishes to support stable communities, which includes promoting the development of mixed communities, then this will inevitably be undermined by a length residence criterion. In support of this submission he refers to the witness statement of Ms Polly Neate, chief executive of

Shelter, who (at paras 8-11) suggests that lengthy residence requirements are increasingly likely to prevent large numbers of families from ever achieving stability or settling in any area. I do not accept Mr Wise's submission that that aim is fundamentally undermined by the measure itself. A ten-year residence criterion is, as the Claimants accept, rationally connected to the Council's aim of rewarding long-term attachment to the borough. I agree with Mr Rutledge that the residence requirement is rationally connected to the Council's aims. The second stage of Lord Reed's test is therefore satisfied.

40. The third and fourth stages of the test overlap to a certain extent.

41. Mr Rutledge submits (at para 75.3 of his skeleton argument) that

> "… less intrusive measures could not have been used without unacceptably compromising the achievement of the foregoing policy objectives. The key objective of the residence provisions is to reward applicants for their 'long term' attachment to the Borough. Hillingdon considered short-term residence qualification periods but settled on 10 years as striking the right balance [see Melissa Murphy's witness statement at para 15]. The 2016 consultation exercise demonstrated wide-spread support for that approach with two-thirds of the respondents agreeing with it. The provision potentially has a positive impact on all those seeking housing in Hillingdon by helping to create a more stable community. Its impact on those who do not meet the requirement is mitigated by the numerous exceptions to the rule, most notably for the statutorily homeless who have the right also to be considered for a PRSO."

42. I asked Mr Rutledge which documents the Council relied upon as justifying a ten-year residence requirement. He told me that the only documents were the 2013 Impact Assessment and the 2016 Equality and Human Rights Impact Assessment.

43. Section 6 of the 2013 Impact Assessment considers households who have not continuously lived in the borough for 10 years. Under the proposed revised policy households who have not been continuously living in the borough for at least 10 years will no longer join the register. It is stated (at page 9) that "If the 10-year residency period is applied, a further **1796** households will no longer qualify to remain on the housing register reducing it further to **1177** households". Table 6B includes a graph showing the estimated impact of a residency requirement (5-10 years) on different ethnic groups (white, BME, other, and unknown). In a section headed "Assessment" (at pp.17-19) the negative impacts (actual or potential) of the proposal for the "race/ethnicity" equality group states: "The introduction of a ten year residential qualification criteria will have a negative impact for local residents meeting the criteria. In addition, it will mean new residents arriving in the borough and/or country will not be able to access the Housing Register". No "positive" impacts are noted for that equality group. In the section headed "Conclusions" it is stated:

> "**2. Race**

> For residents who have not resided in the borough for more than 10 years, mainly BME residents, there will be a negative impact. In addition, for [new] BME and non-BME arrivals to the borough, there will be a negative impact as they will not be able to access the waiting list for ten years.
>
> **Action** – proposed options on residency ranging from 5-10 years to be considered by Cabinet – in order to minimise the impact."

44. At paragraph 11 of her witness statement Ms Murphy, the Council's Housing Register, Allocations and Lettings Manager in their Homelessness Department, states:

> "I understand that Cabinet considered the report and the Impact Assessment and approved the 10-year residence requirement as providing the most appropriate balance between the needs of those on the Housing Register and the aims of the policy, namely to support stable communities within the Borough and to reward those residents who could demonstrate a stronger attachment to Hillingdon. The Scheme allows for a number of exceptions to the 10-year residence requirement in specified situations and in cases where hardship would result, which was felt to provide protection to those applicants who would otherwise be disproportionately impacted by the changes."

45. The 2016 Equality and Human Rights Impact Assessment sets out proposed changes to the Council's 2013 Housing Allocation Policy which includes (as proposal 2):

> "A proposal to restructure the Policy so that all statutorily homeless persons with less than 10 years' continuous residence in the borough are placed in a new Band D on the housing register thus entitling applicants to a reasonable preference over those who are not admitted onto the housing register, but a lower preference than those in Bands A-C."

46. In the "Assessment" section negative impacts of the proposal on "Race" states that whilst the change initiated by proposal 2 "is still not enough to indicate a negative disproportionate impact – changes initiated through this proposal indicate an increase in the proportion of BME applicants by 3.75% and a reduction in the proportion of White British applicants from 42.70% to 37.51% - a 5.19% drop". No positive impacts specific to "race" are noted. It is stated in relation to all equality groups that:

> "One of the key benefits of the proposals is the relaxation of the 10-year rule as it applies to those individuals that fall under the reasonable preference categories – this includes statutorily homeless applicants, applicants occupying insanitary or over-crowded housing (or who otherwise live in unsatisfactory housing conditions), applicants who need to move on medical or welfare grounds or those applicants who need to move to a particular locality in the borough – where a failure to move would cause hardship to themselves or others. …"

47. Ms Murphy at paragraphs 12-16 of her witness statement states:

> "12. A further report, dated 14 October 2016, made recommendations to create a further exception to the 10-year rule in order to give qualification to all those in the statutory reasonable preference groups and for these applicants to be placed into a new Band D, and to continue to have an exception from the 10-year qualification rule for those in sheltered housing and those under-occupying their social housing but to include a requirement that applicants in these groups be resident in the Borough.
>
> 13. Meetings were held with Social Care colleagues regarding the Allocation Policy in the autumn of 2016. These followed publication of a Homelessness Review and in addition to the allocation policy, also included discussion of homelessness strategy and other areas of cross-service interest. These included meetings with the Head of Children's Services on 7 October 2016, and Head of Adult Services on 11 October 2016.
>
> 14. A completed draft of the Allocation Policy and accompanying Cabinet Report, Equality Impact Assessment and Consultation Report, was sent to the Adult and Children's Social Care Services Director for distribution to relevant colleagues, prior to a meeting on 24 October 2016. A further meeting was held in which the Housing Strategy Manager presented the proposed changes to the Allocation Policy to the Adult and Children's Social Care Services Director and Senior Management Team on 17 November 2016. Consequently, there was a full dialogue between Housing Services and both Children and Adult Social Services prior to the implementation of the current Scheme.
>
> 15. The documents I have produced show the following key policy aims of the Scheme: (1) to '*provide a fair and transparent system by which people are prioritised for social housing*'; (2) to '*help those most in housing need*'; (3) to '*reward residents with a long-term attachment to the Borough*'; (4) to '*encourage residents to access employment and training*'; (5) to '*make best use of Hillingdon's housing stock*', and (6) to '*promote the development of sustainable mixed communities*'. For present purposes, I draw attention to the third and fourth of those aims which were reflected in the residence and working household provisions of the Scheme.
>
> 16. Cabinet approved the current Social Housing Allocation Scheme on 15 December 2016."

48. Mr Rutledge submits that when considering whether discriminatory treatment is justified, the court must look at the position "in the round". In so doing it is necessary to consider "the effect on the Protected Groups as a whole under the entire Housing

Policy for all [the authority's] housing stock" (*R (H) v Ealing LBC* [2018] HLR 2 at para 85). Relevant to that question is the question whether the scheme as a whole contains any or sufficient "safety valves" (*R (H) v Ealing LBC* at paras 44-45, 85). Specifically in relation to the protected characteristic of "race" Mr Rutledge relies on the following provisions contained in the Scheme: ring-fenced lettings for homeless households (para 5.9); local letting policies (5.11); care leavers (para 12.5.1); and specific schemes for gang and domestic violence etc (para 13.2). Further, for any person suffering from unusual hardship the scheme contains a number of "safety vales". They include "allocation outside choice-based lettings", that is direct offers (para 6) and hardship grounds (para 12.6).

49. Mr Rutledge contends that the rationale for placing the statutorily homeless in the lowest band (unless they satisfy the residence qualification) is that they enjoy certain advantages over those applying for re-housing from elsewhere. In particular they have the right to be provided with suitable temporary accommodation whilst they wait an allocation and are eligible also for a private rented sector offer ("PRSO") in discharge of the full housing duty. A PRSO guarantees suitable accommodation for a minimum period of 12 months with a guarantee that, if the tenant subsequently becomes unintentionally homeless from it, he will still be owed the full homeless duty irrespective of whether he still has a priority need.

50. The real problem for the Council in attempting to justify the ten years' residence qualification and uplift is the paucity and inadequacy of their evidence.

51. In *DH v Czech Republic* [2008] 47 EHRR 3 the ECtHR observed at para 176 that "Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and vigorous reaction". The courts will carefully examine the reasons offered for any discrimination on grounds of race (*R (Carson) v Work and Pensions Secretary* [2006] 1 AC 173, per Lord Hoffmann at para 16).

52. In a case of indirect discrimination it is the measure itself which has to be justified (*R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 at para 189, per Baroness Hale). In order to do this the authority must address the possible impacts of the measure. In *R (Coll) v Secretary of State for Justice* [2017] 1 WLR 2093, a case concerned the provision of single sex approved premises for prisoners released on licence, Baroness Hale stated at para 42:

> "Given that the Ministry has not addressed the possible impacts upon women, assessed whether there is a disadvantage, how significant it is and what might be done to mitigate it or to meet the particular circumstances of women offenders, it cannot show that the present distribution of APs for women is a proportionate means of achieving a legitimate aim."

53. The only consideration given to the impact of the residence requirement on "race" was in relation to BME or "white" residents. However the adverse impacts on racial groups defined by "colour" were not the only ones that required consideration. I agree with Mr Wise and Mr Squires that a residence requirement, especially one as long as ten years, is almost certain to have a significant and adverse impact on Irish Travellers, yet the position of Irish Travellers does not appear to have been considered

at all when the Council conducted their equality impact assessment. No consideration has therefore been given as to whether the Council has struck the correct balance between disadvantage to Irish Travellers and the aims of the residence requirement.

54. The authorities make clear that deference to a decision maker's conclusion that a measure is proportionate is only appropriate where a balancing exercise as between the discriminatory impact and legitimate aim has actually been undertaken by the decision maker. (See *R (E) v Governing Body of JFS* [2010] 2 AC 728 and *Coll* at para 52 above). In *JFS* Lord Mance, with whom the majority agreed on indirect discrimination, endorsed the approach to proportionality taken in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213. Lord Mance observed that "the school's [admission] policy was formulated without considering the extent" of the detriment it imposed on the disadvantaged racial group; and he held that it could not be established in those circumstances that the detriment was outweighed by the aims that were being pursued. (See also Lord Hope, who adopted the same approach at paras 211-214).

55. A similar approach was taken in *R (Winder) v Sandwell MBC* [2015] PTSR 34, a case specifically concerning residence requirements. A council tax reduction scheme was restricted to those who had lived in Sandwell for the previous two years. It was said that it discriminated on grounds of nationality. The council argued that the residence requirement was justified as it struck a fair balance between the disproportionate impact on non-UK nationals and the legitimate aim of discouraging migration to the area and achieving financial savings. However no assessment was conducted of the potential adverse impact on non-UK nationals and no consideration was given to whether it was justified. Hickinbottom J (as he then was) concluded (at para 90): "In the absence of any assessment of the looked-for beneficial effects of the measure on the one hand, or of the unwanted adverse effects on the other, the Council cannot begin to justify the impact of the measure".

56. As for the "safety valves", I agree with Mr Wise and Mr Squires that they are not likely to benefit Irish Travellers any more than those with other ethnic origins. There is no evidence that the Council gave consideration to whether they were likely to advantage persons who are Irish Travellers over other individuals with an equal need for housing.

57. The statutory guidance on social housing allocations for local authorities in England (December 2013) states (at para 13):

> "Some housing authorities have decided to include a residency requirement as part of their qualification criteria, requiring the applicant (or member of the applicant's household) to have lived within the authority's district for a specified period of time in order to qualify for an allocation of social housing. The Secretary of State believes that including a residency requirement is appropriate and strongly encourages all housing authorities to adopt such an approach. The Secretary of State believes that a reasonable period of residency would be at least two years."

58. The evidence of Ms Neate is that many local authorities now operate schemes which restrict access to the housing register based on residence criteria, and five-year rules are relatively common. She is not aware of any authorities applying requirements greater than ten years (para 4).

59. Whether a residence requirement is lawful will depend on whether it can be justified. A residence requirement, especially one as long as ten years, is highly likely to have a significant and adverse impact on Irish Travellers. Irish Travellers are significantly less likely than members of other racial grounds to have resided in a particular location in the UK continuously for at least ten years. However there is no evidence that the Council sought to assess the extent of the disadvantage on Irish Travellers or considered whether it was justified or what might be done to reduce it. Further, there is no evidence from the Council to show that a shorter period than ten years would undermine their stated objectives.

60. I am firmly of the view that the Council's evidence fails to justify the impact of the ten-year residential qualification and uplift.

Ground 2: the working household uplift

61. The Council accepts that TW, as a single parent, has the protected characteristic of "sex" and that EM and each of his three adult children have the protected characteristic of "disability".

62. Further the Council accepts that the working household uplift potentially gives rise to indirect discrimination for those who are within Bands C or B, but not D or A. That is because the working household uplift cannot, under the scheme as presently operated, be applied to those in Bands D or A. However if, as I have found, the residence criterion is unlawful, Mr Wise contends that it follows that the Claimants should not be in Band D and, were they not in Band D, then the discriminatory impact of the working household criterion directly arises. Additionally, Mr Wise submits, in any event, at some point in the future the Claimants may be elevated to Bands C and B, for example, if they attain ten years' residency in the Council's area. At that stage they would be discriminated against, not being able to avail themselves of the working household uplift.

63. As with Ground 1, the issue is whether the Council can demonstrate this provision represents a proportionate means of achieving the Council's legitimate aims.

64. The Claimants accept that the Council's stated aim behind this uplift – to "encourage people who can, to work and raise levels of aspiration and ambition" (para 14.4) – is a legitimate one. The Claimants also accept the uplift is rationally connected to this aim.

65. However Mr Wise submits that the uplift is not the least intrusive measure which the Council could have put into place in order to achieve their aim. Alternative less intrusive measures, he suggests, include a community contribution available to, inter alia, carers and disabled people as well as working households, and reserving a proportion of lettings (say 20%) for, inter alia, working tenants, as adopted by other London local housing authorities who have sought to promote the same or similar aim to that of this Council. The Council could also, Mr Wise contends, have given this

uplift to applicant families in respect of Carer's Allowance, a benefit provided for caring for people in receipt of disability benefits for more than 35 hours a week (see witness statement of Ms Neate at paras 14-16). Ms Emily Holzhausen, director of policy and public affairs of Carers UK, in her witness statement refers to information and statistics which show that carers, such as EM, are more likely to face difficulties in finding and keeping paid work.

66. Mr Wise further submits that, applying a balancing exercise, the working household uplift is disproportionate because not only is it not the least intrusive means which the Council could have deployed to meet their stated aim of encouraging applicants in to work, but there are no applicable safety valves which operate to lessen the discriminatory impact of the uplift on women and carers. It is also relevant, he submits, that few, if any, working household uplifts appear to be awarded, and therefore whilst the uplift is considered to be an important aspect of the Scheme, in terms of allocations it has not dominated it (see Ms Murphy's witness statement at para 41).

67. I accept that alternative measures could have been adopted. As Ms Neate states, "there are many different ways that authorities may choose to give additional priority to working households" (para 14). However the criticisms made of this measure by the Claimants fall far short of satisfying me that it is manifestly without reasonable foundation.

68. Further, applying the principles to which I have referred in relation to Ground 1 (see paras 32-37 above), I consider that the discrimination which the uplift causes can be justified. In contrast to the WHPS in *R (H) v Ealing LBC*, it is not a general uplift for anyone who works but is directed at those whose income "makes it difficult to access low cost or outright home ownership". I agree with Mr Rutledge that this uplift applies expressly and exclusively to:

> "… households who are in housing need and are working but on a low income which makes it difficult to access low-cost or outright home ownership."

It is narrowly worded, aimed at a specific problem and does not dominate the Scheme.

69. Ms Murphy explains (para 39 of her witness statement) that:

> "Some households find that, whilst one or more members work, their income is sufficient to reduce their entitlement to benefits but insufficient to enable them to rent accommodation privately. This is sometimes referred to as the 'poverty trap' and, in terms of access to suitable accommodation, it is a substantial problem for those who are caught in it. To help those who find themselves in this predicament, the Scheme provides an uplift by way of additional preference."

70. It is material that other provisions contained in the Scheme potentially assist those with the protected characteristics of sex and disability. Local letting policies (para 5.11) cover sex and disability, and specific schemes (para 13.2) cover sex. Ring-fenced lettings for homeless households (para 5.9), care leavers (para 12.5) disabled

adapted properties (para 16.1), sheltered housing (para 16.3) and extra care housing (para 16.4) all potentially assist those with disability. In addition, as I have already noted, anyone suffering unusual hardship can seek direct offers (section 6, see para 13 above) and make an application on hardship grounds (para 12.6, see para 14 above), which EM did (see para 27 above).

71. I note that the Equality and Human Rights Commission make no submission in relation to the working household uplift.

72. I consider that a fair balance has been struck between the importance of securing the Council's objective in introducing the working household uplift by way of additional preference to help those with a specific predicament and the effect of the discrimination on the Claimants' rights. In my judgment, having regard to the various "safety valves" in the Scheme that potentially assist persons with the protected characteristics of sex and disability, the focussed and limited working household uplift can be justified when the Allocation Scheme is considered as a whole (*R (H) v Ealing LBC* at para 85).

Ground 3: breach of s.11(2) of the Children Act 2004

73. For the purposes of this claim the Council accept that s.11(2) applies to them as an English local authority, and that "functions" include the allocation of social housing. The Second Claimant is a "child" for the purposes of the Act.

74. The Claimants contend that the Council's introduction and maintenance of the residence qualification and uplift and the working household uplift give rise to a breach of s.11.

75. Mr Rutledge submits that the evidence demonstrates that the Council had regard to the need to safeguard and "actively promote" (see *R (HC) v Secretary of State for Work and Pensions* [2017] 3 WLR 1486, per Baroness Hale at para 46) the welfare of children. Appropriate arrangements were made during the formulation and implementation of the Scheme for safeguarding and promoting the welfare of children in the Borough by including the Council's Children's Services in the process (see witness statement of Ms Murphy at paras 13-14 and 18-21).

76. The residency criterion has, in my view, potentially a significant impact on the welfare of children of Irish Travellers. However despite the Council's Children's Services engagement there are no records or documents evidencing any action they took or discussions they had to promote or safeguard the welfare of children when the residence qualification was introduced or under further consideration in 2013 or 2016. That being so, I agree with Mr Wise that the Council is not in a position to demonstrate, by reference to written contemporaneous records, the process of reasoning by which they reached their decision in relation to the impact of the residency qualification and uplift on the Claimants' children. (See *R (E) v Islington LBC* (2018) PTSR 349, per Mr Ben Emmerson QC sitting as a deputy High Court judge at para 114; and *R (J and L) v Hillingdon LBC* [2017] EWHC 3411 (Admin), per Nicklin J at para 47, as to judicial scrutiny requiring an objective and evidence-based analysis of the decision making process).

77. I reject Mr Rutledge's submission that compliance with s.11 in relation to the residential qualification is evident from the scheme itself. Mr Rutledge points to the scheme addressing, for example, "shared residency of children" (s.11), care leavers (para 12.5.1), and the availability of a move to Band B or Band C on hardship grounds where "child protection reasons" apply (12.6). However, in my view none of these "safety valves", individually or cumulatively, assist in explaining how the Council safeguarded or promoted the welfare of children when considering, as they should have done, the impact of the residential qualification and uplift on the children of Irish Travellers.

78. It seems to me that the potential impact of the residency qualification on the education of children of Irish Travellers at the very least required the Council, pursuant to their s.11 duty, to give consideration "to the need to minimise educational disruption" (*R (E) v Islington LBC* at para 114; and also see the report "Between the Cracks" referred to by Ms Neate at para 13 of her witness statement which shows a correlation between changes of school and lowered educational attainment). The Council did not engage with this issue at all.

79. I am led to the conclusion that the Council breached their duty under s.11(2) in relation to the imposition and maintenance of the residential qualification and uplift.

80. However, I take a different view in relation to the working household uplift. In the light of the conclusion that I have reached in relation to the working household uplift (see para 72 above), I do not consider that any issue of compliance with s.11 arises in relation to children whose parents are persons with the protected characteristics of sex and disability. However, even if it does, I am satisfied that proper regard has been had to the welfare of such children from this narrowly focussed measure which can be justified by the terms of the scheme as a whole. Further, the fact that the Council's Children's Services were involved in the process in 2013 and 2016 provides some support for the Council's contention that the welfare of children was considered in relation to the working household uplift (albeit insufficient evidence in relation to the residence qualification which plainly may have a significant impact on the children of Irish Travellers).

Conclusion

81. For the reasons I have given I am satisfied that (1) the residence qualification and uplift are unlawful, and (2) the Council breached their duty under s.11(2) CA in formulating and maintaining these provisions. The claim for judicial review is allowed to that extent.

82. I do not consider that the working household uplift is unlawful or that the Council acted in breach of their obligations under s.11(2) CA in formulating and maintaining that provision. Accordingly those parts of the claim fail.

83. On the basis of my findings, the appropriate relief is declarations to the effect that the residency qualification and uplift are unlawful, and that the Council acted in breach of their obligations under s.11(2) CA in formulating and maintaining those provisions.

84. I will invite Counsel to endeavour to agree the precise terms of the declarations I should make in the light of my judgment.