Neutral Citation Number: [2019] EWHC 157 (Admin)

Case No: CO/4553/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th February 2019

Before :

ROWENA COLLINS-RICE
(Sitting as a Deputy High Court Judge)

- -

Between :

R (on the application of TW) (No.2)	**Claimant**
- and -	
LONDON BOROUGH OF HILLINGDON	**Defendant**

- -
- -

Mr Ian Wise QC (instructed by Hopkin Murray Beskine Solicitors) for the **Claimant**
Mr Kelvin Rutledge QC and Mr Andrew Lane (instructed by London Borough of Hillingdon Legal Services) for the **Defendant**

Hearing dates: 22nd & 23rd January 2019

- -

Approved Judgment

Ms Collins Rice :

Background

1. The context of this case is an area of public policy and administration the challenges of which are well known: the fair allocation of housing resources by local authorities in circumstances where demand considerably outstrips ready supply. More specifically, the context is localism, and the fair reconciliation of a housing policy favouring people with established local ties, with the needs of those for whom that may present particular difficulties – in this case, members of the Irish Traveller community.

2. It is a case about the housing of a young mother of Irish Traveller heritage. She has three small children, two of primary school age and a younger third. She is known in this case as TW to protect family privacy. It is also a case about a London Borough where there are on average four applicants for each home it can make available.

3. TW applied to the London Borough of Hillingdon ('Hillingdon') for homelessness assistance in 2015. Hillingdon accepted it had a responsibility to help, and provided her with temporary accommodation on 7th December of that year. By all accounts it was in extremely poor condition. TW was concerned for her family's health and welfare, and anxious to move. At the beginning of 2018, with legal help, she began the process, to which she has a right, of formally challenging Hillingdon's failure to rehouse her. In the course of that process, her accommodation was found to be unfit for human habitation, and Hillingdon agreed in March of 2018 that it would move her as soon as possible.

4. How soon that could be in reality was a matter of how much priority Hillingdon would give her case, in comparison with others who also needed accommodation. TW was not satisfied Hillingdon was properly prioritising her family. In the summer of 2018 she brought judicial review proceedings ('*TW (no.1)*') to challenge the lawfulness of Hillingdon's handling of her case. The High Court declared that in some respects the allocation policy Hillingdon was applying to TW was unlawful. The judgment in that case (*TW & Ors v London Borough of Hillingdon* [2018] PTSR 1678) is considered more fully below. By the middle of November 2018, however, she had still not been rehoused. She began these judicial review proceedings on 15th November 2018.

The Legal Framework

5. Three substantial pieces of legislation set out Hillingdon's legal responsibilities in a case such as this. There is considerable case-law in relation to each.

The Housing Act 1996

6. Part VI of the Housing Act sets out the principal housing duties of local authorities. Section 166A requires Hillingdon to have an allocation scheme for determining priorities in allocating housing, and it is then obliged to allocate housing in accordance with that scheme. Reasonable preference has to be given to people who are homeless within the meaning of Part VII of the Act, as TW was, and certain other categories of people. Within this 'reasonable preference' group, the scheme may

contain provision for determining priorities among people, and the factors which s.166A(5) particularly mentions as being able to be taken into account in doing so include people's financial resources and any local connection which exists between a person and a local authority's district. Section 199 provides more detail about what 'local connection' means for these purposes; it includes, as might be expected, factors such as residence, employment and family associations.

7. Part VII makes further specific provision in respect of homelessness, as there defined. In particular, it provides that local authorities' housing functions in relation to homeless people can be discharged only by securing that 'suitable' accommodation provided by them is available; or by securing the obtaining of 'suitable' accommodation from another person; or by giving such advice and assistance as will secure that 'suitable' accommodation is available from another person (section 206).

8. Part VII also provides (section 202) a right to request a review of the decisions local authorities take about housing, and as to the 'suitability' of accommodation offered in the discharge of its duties. There is a further right to appeal against the outcome of a review, on a point of law, to the County Court (section 204). These provisions are the principal routes of challenge available to people who are not satisfied that local authorities have properly discharged their housing duties towards them.

The Equality Act 2010

9. The Equality Act 2010 places particular obligations on authorities such as Hillingdon in relation to certain protected characteristics of people. Protected characteristics are defined in section 4 to mean age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It was accepted in this case that for these purposes 'race' includes Irish Traveller heritage.

10. The effect of section 29 of the Equality Act is that Hillingdon must not, in its provision of housing services to the public, or otherwise in the exercise of its public functions, unlawfully discriminate against anyone. Unlawful discrimination can be either direct or indirect. By section 13(1), direct discrimination would happen if Hillingdon treated someone, because of a protected characteristic, less favourably than it would treat others. Section 19 defines indirect discrimination as follows:

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage*

> *when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

11. The Equality Act does not permit 'positive discrimination'. Simply treating someone more favourably because of a protected characteristic can amount to unlawful direct discrimination against others with a protected characteristic who have inevitably been treated less favourably as a result. That does not, however, prevent the taking of positive action, as defined in section 158 of the Act. The Act imposes no duty to take positive action. However, if Hillingdon were reasonably to think that persons who shared a protected characteristic suffered a disadvantage connected to the characteristic, or had needs that were different from the needs of others, or that participation in an activity by persons sharing a protected characteristic was disproportionately low, then it could take positive action. That means action which is a proportionate means of achieving the aim of, as the case may be, enabling or encouraging persons sharing the protected characteristic to overcome or minimise the relevant disadvantage, meeting their different needs, or enabling them to participate in the relevant activity.

The Children Act 2004

12. In accordance with section 11 of the Children Act 2004, Hillingdon must

> *"make arrangements for ensuring that … their functions are discharged having regard to the need to safeguard and promote the welfare of children…"*

That includes their housing functions.

Hillingdon's Social Housing Allocation Policy

13. The Allocation Policy published by Hillingdon, as required by section 166A of the Housing Act, and in force at the relevant time, is contained in a 48 page document dated December 2016. It states (paragraph 1.2):

> *"The Allocation Scheme is designed to meet all legal requirements and to support and contribute towards the Council's wider objective of putting residents first. The Council is also committed to preventing homelessness and the Allocation Scheme focuses on supporting residents to actively pursue suitable alternatives to avoid becoming homeless."*

14. At paragraph 2.2.4, the policy states that households who have not been continuously living in Hillingdon for at least 10 years will not qualify to join the housing register. A number of exceptions to that are set out. There is an exception for statutorily homeless persons and others within the 'reasonable preference' group identified in section 166A of the Act. Further provision is made, as the Act envisages, for

prioritisation within this category, at paragraph 12 of the policy. This is by means of creating a tiered system of four Bands into which each category of 'reasonable preference' people are respectively divided. Paragraph 14.3 provides for applicants to receive an uplift equivalent to one priority Band if they have been continuously resident in Hillingdon for at least 10 years.

15. Paragraph 12.1 deals with the banding of homeless households. Internal prioritisation within this group is principally according to need. Top priority (Band A) is given to people in temporary accommodation where the landlord wants the property back. Next highest priority (Band B) is given to people in bed and breakfast, council hostel or women's refuge accommodation. Band C priority includes people in all other forms of temporary accommodation. However the lowest priority, Band D, is given to homeless applicants with less than 10 years' continuous residence in Hillingdon. Paragraph 12.6 of the Policy deals with banding on hardship grounds. This allows for a measure of flexibility to place applicants into Band B or Band C if a combination and degree of different hardship factors indicate it. A Hardship Panel will review a case and make a decision, with a view to ensuring that the greatest priority is given to those with greatest need.

The Judgment in TW (no.1)

16. TW challenged the lawfulness of this policy in the 2018 judicial review proceedings. Among the grounds of challenge were: that the 10 year residence criteria amounted to unlawful indirect discrimination (contrary to the Equality Act) against TW in relation to a protected characteristic (race) because it put people of Irish Traveller heritage, including TW, at a disadvantage and could not be shown to be a proportionate means of achieving a legitimate aim; and that in setting and applying this criterion Hillingdon failed to comply with its obligations under section 11 of the Children Act.

17. Having reviewed the authorities, Supperstone J observed that:

> *"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."* (paragraph 50)

He considered that Hillingdon's residence qualification was almost certain to have a significant and adverse impact on Irish Travellers, but their position did not appear to have been considered at all (paragraph 53). The necessary balancing exercise as between the discriminatory impact and legitimate aim –localism – could not therefore have been properly undertaken (paragraph 54). In conclusion on this ground, he said:

> *"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 groups 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.*
>
> *I am firmly of the view that the council's evidence fails to justify the impact of the ten-year residential qualification and uplift."* (paragraph 59-60)

18. So far as the Children Act challenge was concerned, Supperstone J reached a similar conclusion. He said:

> *"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."* (paragraph 76)

He considered that the potential impact of the residency qualification on the education of children of Irish Travellers at the very least required the council to give consideration to the need to minimise educational disruption.

19. Supperstone J's conclusion was that the appropriate relief in *TW (no.1)* was declarations to the effect that the 10 year residency qualification and uplift provisions were unlawful, and that Hillingdon acted in breach of its obligations under section 11 of the Children Act in formulating and maintaining those provisions.

20. Mr Rutledge, for Hillingdon, has confirmed in these proceedings that the council is seeking to appeal *TW (no.1)*. Hillingdon has also applied for a stay on the effect of the declaratory relief in *TW (no.1)*. No decision on either application had been reached at the time the present proceedings came to trial.

The Present Proceedings

21. Permission was granted on 30th November 2018 for TW to challenge Hillingdon on the four grounds that:

i) it was in continuing breach of its duty to provide her with suitable accommodation under Part VII of the Housing Act 1996;

ii) in continuing to apply its residence qualification to her, it was in ongoing breach of the Equality Act 2010, and had failed to comply with the Court's judgment in *TW (no.1)*;

iii) it had failed without good reason to make a decision on her claim for rehousing in accordance with its own allocation policy;

iv) it had failed to comply with its obligations under s.11 of the Children Act 2004.

22. In the circumstances, the Court directed that the case should proceed relatively quickly, and it was listed for hearing on 22nd January 2019. Precisely what happened next is the subject of a certain amount of factual dispute. But by the time the case came to court in January, Hillingdon had rehoused TW in new accommodation ('The Brambles'). The Brambles is in much better condition than TW's previous accommodation, which she was glad to leave at last. She still, however, had two major objections to it. The first was that it was unaffordable for her. Hillingdon is making arrangements to subsidise its cost for a year, and to review the question of affordability at that point, but she is not content that she can pay for it even so, and is worried about the financial position of her family. The other objection is that it is too far from her older children's school. That, she says, means she needs to look for another school for them and a move would be disruptive to their education; meanwhile the increased distance means expensive travel fares and disruption to family life, including that of her youngest child.

23. In these circumstances, Mr Wise, for TW, confirmed that she has now commenced the process of formally challenging Hillingdon's decision to rehouse her at The Brambles. She is exercising her statutory right to ask for a review of its 'suitability' within the terms of the Housing Act, and therefore whether Hillingdon has or has not properly discharged its legal obligations towards her. In these circumstances, he confirmed that the challenge on the first and third grounds for which permission was given in these proceedings would be withdrawn. Hillingdon had now arranged for the provision of alternative accommodation, so ground (iii) fell away. The suitability of her old accommodation was no longer a live issue, and the suitability of The Brambles was being tested through the proper routes provided, so ground (i) fell away.

24. However, Mr Wise's submissions were that grounds (ii) and (iv) remained pertinent. The Children Act ground was a challenge to the continuing process which Hillingdon was applying to TW (ground (iv)). The challenge to the lawfulness of the policy (ground (ii)) had if anything gained further impetus from a second development since the commencement of these proceedings. Hillingdon had undertaken a review of its residence requirement policy with a view to addressing the shortcomings identified by Supperstone J in *TW (no.1)*.

25. Deborah Weller, Policy and Strategy Manager (Housing) at Hillingdon, provided a witness statement in these proceedings dated 21st December 2018 to say that she had carried out in consultation with colleagues an Officers' Review of the residence provisions of the 2016 Allocation Policy, as it affected Irish Travellers. The Review itself is undated. She said that the Review had concluded that the residence provisions were a proportionate means of achieving Hillingdon's legitimate policy aim of rewarding long-term attachment to the borough, thereby building a stronger community. It had nonetheless identified certain 'beneficial procedural changes' which would be made to its Allocation Policy.

26. The Review is a 10 page document which opens by setting a context of statistical information, drawn from the 2011 National Census figures for 'White Gypsy or Irish Traveller' households in Hillingdon, and from households on Hillingdon's housing register recorded as 'White Irish'. It concludes that, as a matter of both law and practical impact, no change to the residence requirement is necessary or desirable, either generally or in relation to Irish Traveller households. It relies on the availability of other mechanisms in the Policy to mitigate the impact of the residence requirement.

27. The Review proposes changes to the Allocation Policy with the position of Irish Travellers in mind. First, in the application of its 'tie-breaker mechanism' (where two or more applicants make a successful case for the same property) preference will be given to an applicant with a protected characteristic which has made it harder for them to comply with the residence requirement. Second, the powers of the Hardship Panel will be extended to provide that any household on the housing register not meeting the residence requirement, but who have a housing need 'commensurate with Band A priority', can be recommended for placement in Band A (previously the Panel could not place such an applicant higher than Band B).

Analysis

The Scope of the Present Proceedings

28. A preliminary issue arises about the scope of these proceedings. Mr Rutledge made a number of submissions on this. First, he drew attention to the emphasis placed by Singh LJ in *R oao Talpada v SSHD* [2018] EWCA Civ 841 (paragraphs 67-69) on the need for procedural discipline in public law litigation. He suggested that the grounds of challenge in this case had impermissibly 'evolved' and were now seeking to take issue with matters beyond the scope of the permission decision of 30th November 2018.

29. Second, he proposed that the entire proceedings had become academic as a result of the rehousing of TW. In those circumstances, she was no longer actively subject to Hillingdon's Allocation Policy. Any and all relevant complaints she had about the decision to house her at The Brambles could and should be dealt with through the statutory review and appeal procedure on which she had already embarked.

30. In so far as the remaining grounds in these proceedings are designed to secure declaratory relief for the specific assistance of TW in her continuing interactions with Hillingdon, I find these submissions persuasive. I do not agree with Mr Wise that these proceedings must be regarded as live merely because TW may find herself sooner or later subject to the Allocation Policy once more at some future date, whether because The Brambles is found not to be suitable and she falls to be rehoused once more, or because Hillingdon may withdraw its financial subsidy at the end of one year, or because her tenancy falls to expire at the end of two years, or for any other future contingent reason.

31. The rehousing of TW at The Brambles is the product of a fresh decision by Hillingdon (albeit at the eleventh hour so far as these proceedings are concerned) in purported discharge of its proper duties. The scheme of the Housing Act is clear that whether or not that decision is a proper discharge by Hillingdon of its duties to TW is

a matter for the section 202 review procedure and if necessary the section 204 appeal to the County Court. That is the course on which TW has properly embarked. So far as her own circumstances are concerned, all of the matters in which she has an immediate interest – including the 'suitability' of The Brambles, Hillingdon's duties to her under the Housing Act and under the Children Act in arranging for her to be housed there, and matters relating to the disclosure to her of relevant information – can and should be dealt with in those proceedings. There, all the facts, practicalities and circumstances of her situation (and Hillingdon's) can be looked at in detail and in the round – both as to substance and as to procedure. It would be quite wrong for a Court of supervisory jurisdiction to intervene prematurely in that process for which Parliament has provided. In so far as ground (iv) is formulated as a procedural challenge to Hillingdon's handling of TW's specific housing needs, then it has become academic as a result of Hillingdon's supervening decision and the alternative remedy which that has made available to her. I therefore reject it to that extent.

The 2016 Allocation Policy and the 2018 Officers' Review

32. The position as regards the status of the Allocation Policy is however rather different. It is true that TW does not currently have what might be called an active interest in the Policy, in that it is not currently being applied to her for the purposes of making a fresh housing decision. It is also true that she is able to challenge the lawfulness of its specific application to her, so far as relevant, through the statutory processes. However that is not to say she has nothing other than an academic or bystander interest or locus in the underlying question of the current legal status of the policy for the purposes of these proceedings. And it is of course a question which goes beyond her own, or anyone else's, particular circumstances in any event.

33. The general question of the current legal status of the Allocation Policy was the focus of ground (ii) of these proceedings from the outset and – to the extent that it challenges the compatibility of the Policy with Hillingdon's Children Act duties – of ground (iv). The circumstances may have 'evolved' since permission was granted, with the intervention of the Officers' Review, but this aspect of the grounds has not. Hillingdon's position on this question was that, notwithstanding its primary submissions on scope, it was content for the Court to determine the issue and, if appropriate, consider declaratory relief.

34. Hillingdon acknowledged that there were some advantages in the Court proceeding to do so, in terms of both housing management and public expense. The 2018 Officers' Review was being proposed as a complete answer to the deficiencies in the Allocation Policy identified in *TW (no.1)*. It was inevitable that that question would prompt further litigation if not determined in these proceedings. Continuing uncertainty was undesirable in the meantime. No other matters were suggested to be relevant to the resolution of the question.

35. I do not need to – and do not – go as far as to conclude that it would be unconscionable to do other than determine the matter, as Mr Wise proposed. On the other hand, the Policy having been declared to a degree unlawful, I accept that it is a matter properly falling within the supervisory jurisdiction of the Court to determine whether the defects identified have now been remedied, and that it would be of assistance for the discharge of Hillingdon's housing functions, respectful to its

taxpayers, and in the interests of justice to do so. I heard full submissions from both sides on the substance of the question.

36. The context of the question thus before me is the proportionality exercise which has to be carried out to see whether the impact of the 10 year residence requirement on Irish Travellers is justifiable in law. The correct approach to proportionality was summarised by Lord Reed JSC in *Bank Mellat v HM Treasury (no.2)* [2013] UKSC 39 [2014] AC 700 at paragraph 74. He said it was 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."*

37. Applying that in this case, the proportionality exercise to be undertaken is an assessment of whether the objective of the 10 year residence provisions – localism – is sufficiently important to justify an indirectly discriminatory effect on Irish Travellers; whether those provisions are rationally connected to the localism objective; whether a less intrusive measure than a 10 year test could have been used without unacceptably compromising the achievement of the objective; and the outcome of the balancing exercise – whether in all the circumstances the impact of the effect of the test on Irish Travellers is or is not disproportionate to its likely benefit more generally.

38. This is not the first, or even the second, time that Hillingdon's 10 year requirement has been judicially considered. It was considered by the High Court shortly after *TW (no.1)* in *R oao YG v LB Hillingdon* [2018] EWHC 1937 (Admin). That was a case brought by a refugee. Mostyn J was disinclined in the circumstances to agree with Hillingdon's concession that the measure was prima facie discriminatory in the first place. But if it was, he had no hesitation in concluding that that was 'amply objectively justified'. It was not disputed in the present case that localism is a legitimate and important objective in housing allocation policy, and that a residence criterion is a rationally connected means of achieving it. The relevant proportionality issues in TW's litigation are about the 'intrusiveness' of the residence provisions and the balance between their beneficial effects and any disadvantageous impact on Irish Travellers.

39. The interplay of the roles of policy-maker and court in coming to a conclusion about proportionality is a matter requiring some precision, and the correct standpoint of the Court was in issue in the present proceedings. However, the point emphasised by Supperstone J in *TW (no.1)* was that before it is possible for any overall conclusions to be addressed or reached by anyone about justifiability and balance, there is a

preliminary piece of evidential work to be done in identifying impact. How 'intrusive' or 'severe' is the relative disadvantage to Irish Travellers of the residence requirement in the first place? If Hillingdon did not know that – and Supperstone J found in *TW (no.1)* that there was no evidence that they did, or had even tried to find out – how could they ever come to a proper decision about its justifiability? Proportionality requires a balancing exercise, and it is necessary to know in the first place what it is that is being placed in the balance. Or, as Mostyn J put it in *YG* (paragraph 10), in order to judge if a difference is objectively justified, you need to know what the scale of the differential is. For that, you need a starting point.

40. Supperstone J inferred that there was a high probability ('almost certain') of adverse impact, and that adverse impact was likely to be 'significant'. But Hillingdon had not sought *to assess the extent* of any disadvantage – in practice and reality, rather than in theory and probability – and it needed to. Whether it has now done so is the preliminary, and limited, question before me. If, but only if, it has, can the question be considered of whether a disadvantage *of that extent* is proportionate. It is moreover a question in two parts. How does the residence criterion impact on Irish Travellers? And how does that compare with others who are not Irish Travellers?

The empirical evidence

41. The Review begins by considering the first part of the question in terms of total numbers of Irish Travellers in Hillingdon. There was considerable dispute about the reliability of those numbers. They are not very recent. They rely on census form-filling and other self-identification exercises from a community with literacy issues. Importantly, they do not identify Irish Travellers as such - they aggregate data by reference to groups with which Irish Travellers only partly intersect ("White Gypsy or Irish Traveller", "White Irish").

42. The inconclusivity of these *totals* may not be significant in its own right. The question of impact for present purposes is qualitative and comparative, rather than quantitative. On any basis the total number of Irish Travellers in Hillingdon at any one time is a very small proportion of its total population – perhaps something around 0.1%. Of those, some will be travelling Travellers with no intention of seeking housing accommodation, and some may be long settled. The 10 year residence requirement in the Allocation Policy, entirely obviously, does not impact adversely on anyone to whom it is not relevant and on whom it does not impact at all. The relevant question, however, is how the Policy does impact on Irish Travellers that it does apply to. These will include Irish Travellers in TW's position, who are seeking to settle in housing accommodation in the interests of their families and their education, but who do not satisfy the residence requirement because of their antecedent history of travelling – an aspect of their protected characteristic. As to numbers of Irish Travellers within the purview of the residence qualification, the Review indicates no empirical totals of any reliability at all. Again, that may not be significant in its own right; the question is the extent of any discriminatory impact on those concerned, whatever the numbers and even if the numbers are tiny. But it is significant for the operations which may be performed on those numbers.

43. The question of numbers becomes significant when the Review begins to break down totals into a distribution analysis. Paragraph 2.9 of the Review suggests that the distribution of the 28 households on its housing register currently identifying as

'White Irish' across the Policy's banding scheme is relatively even. Compared to the total distribution of households on the register, however, the distribution is more extreme. 32% of 'White Irish' households are in Band D, compared to 15% of the whole register. 28% of 'White Irish' are in Band A, compared to 19% of the total.

44. No reliable conclusion can be drawn from any of this for present purposes. We do not know how many, if any, of those 'White Irish' are Irish Travellers. If any Irish Travellers are included, which is not known, the pattern is entirely consistent, statistically, with the possibility of the very uneven distribution of Irish Travellers across the Bands and their disproportionate representation at one level or another. We simply do not know either way. And of course we do not know why anyone has been banded as they have – whether it is by operation of the 10 year criterion or not. It does not tell us anything reliable about the impact of the Policy on Irish Travellers.

45. The Review makes the logical point that Irish Travellers will not be adversely impacted if they satisfy the residence requirement or if they fail to qualify for the register at all for some unrelated reason. Again, that is simply to state the obvious – that the requirement does not affect those to whom it is irrelevant. It does not help us to understand the practical, operative effect of the residence requirement in the priority and banding scheme in general, and its impact on Irish Travellers in particular.

46. The essential question is not how many Irish Travellers there are altogether in Hillingdon, or even how many there are seeking housing assistance. It is how far the impact of the residence requirement on Irish Travellers is, or is not, determinative of their priority for housing allocation *in practice* and how that differs from the applicant population at large. The theory is clear. It is *highly likely* that Irish Travellers seeking housing assistance from Hillingdon will be disproportionately unable to satisfy the residence requirement where that is a result of antecedent travelling. But it is the practice that matters. That may or may not be what happens in practice. And if it is, those affected may or may not necessarily be disproportionately unable to access accommodation as a result. What is highly likely, or even almost certain, in theory, may or may not turn out to be so in practice – whether because of factors about the characteristics of Irish Travellers seeking accommodation in Hillingdon, or because, as Mostyn J described it, Hillingdon's residency requirement forms part of a detailed and sophisticated scheme the overarching key theme of which is the assessment and meeting of housing needs according to many different factors. Do Irish Travellers have disproportionately unmet housing needs because of the 10 year rules? We know what the rules say. We need to understand the results they produce.

47. To know how the residency criteria impact on Irish Travellers in Hillingdon, it would be necessary to understand more than is addressed in the Review about the combination of relevant factors that Irish Travellers failing to satisfy the residence requirement present to the housing authorities. If, for example, Travellers seeking housing services, but failing to satisfy the residence requirement *because of antecedent travelling*, characteristically present with other relevant factors such as homelessness, financial hardship, health or child welfare issues, particular educational considerations or other priority needs, then it is conceivable that the *operative* effect of the residence requirement per se, *in practice* in such cases, may be minimal. There is some indication from material before the Court in these proceedings – such as the Equality and Human Rights Commission's 2016 report *England's most*

disadvantaged groups: Gypsies, Travellers and Roma – that that is a real question; these issues may all be very closely connected for Irish Travellers unable to satisfy the residence requirement. Or they may not. We simply do not know one way or the other from the empirical evidence in the Review.

48. In any event, it is necessary to have some idea of what difference, if any, the residence requirement is making to Irish Travellers in practice rather than in theory. That is the exercise to which *TW (no.1)* directs Hillingdon. Without that, it is impossible to know how far that impact is determining their housing outcomes, how that differs from others' outcomes, and how far any difference is justifiable as a matter of law.

49. This in turn seems to require rather more penetration into the realities of the experience of Irish Traveller housing issues than the Review comes near to. So what more should Hillingdon have been expected to do? On that question, it is entirely right for the Court to remind itself that the problem identified in *TW (no.1)* was total – there was no evidence that Hillingdon had made any efforts. It has now gone to the trouble of a Review. Administrative perfection is not to be expected, and Hillingdon's housing department has many priority claims on its resources. No more than what is reasonable may be looked for. On the other hand, as Mr Wise put it, this was not just any old review. This was an evidential exercise to which the High Court had specifically directed Hillingdon's attention, on the basis that it was an essential prerequisite to its legal entitlement to rely on a policy which otherwise indicated unlawful indirect discrimination.

50. In these circumstances, two modest observations suggest themselves. The first relates to the fact that there is no evidence that the compilers of the Review sought advice or assistance from any relevant external source of information about the particular circumstances of Irish Travellers relevant to their housing situation. Mr Wise pointed to the resources of national and London-based organisations with relevant expertise, including the Equality and Human Rights Commission. I did not hear a convincing explanation as to why no expert advice and assistance had been taken or information specific to Irish Travellers' circumstances sought for the purposes of the Review.

51. The other relates to Hillingdon's internal resources. Two issues potentially arise under that heading. The first is whether any relevant information would have been available as a result of inquiry into the functions it undertakes with travelling Travellers for whom it provides sites. It is possible, for example, that the discharge of those functions could throw light on the position of travelling Travellers transitioning to settled living, which may be the group standing to be adversely impacted by the residence requirement. There is no evidence such inquiry was made.

52. The second is whether, given the small numbers Hillingdon believes to be even potentially involved, a relatively light-touch exercise in reviewing its own case files on Irish Travellers (whether or not within the 'White Irish' data category) would have been useful in giving a more rounded view of the extent to which they had – or had not – been adversely affected by the residence requirement on grounds of race. Again, there is no evidence in the Review that Hillingdon had tried to join up its own data in this way.

The Review's Analysis and Conclusions

53. Because the Review does not give a clear analysis of how the 10 year rule impacts Irish Travellers in practice, it inevitably concludes that it cannot say what effect a shorter requirement would have on that impact. Nor can it be clear how far any steps which might be taken to support the prioritisation of (a possibly very small number of) Irish Travellers on this ground would affect others – beyond the statement of the obvious that the enhanced prioritisation of anyone means the relative deprioritisation of others where resources are scarce and finite.

54. The discussion of the revised hardship policy at paragraph 3.15 of the Review is, however, interesting in this respect. If Irish Traveller households who do not meet the residence requirement are particularly likely to benefit from this new provision, then it perhaps has real potential to avoid or neutralise any disproportionate effect of the residence requirement upon them in practice. However, as things stand, we do not know one way or the other whether they are.

55. A substantial proportion of the short Review is occupied with proportionality analysis. However, to be able to justify an adverse impact, it is necessary to be able to describe it and to understand it with reasonable sufficiency in the first place. I cannot read the 2018 Officers' Review as a sufficient attempt to describe and understand the impact of its policy on Irish Travellers. Its conclusions are to that extent insufficiently supported. Sufficiency might be able to be relatively easily attained by quick and simple recourse to accessible expert advice and information, and to such relevant information of its own as is also accessible. If not, then the exercise of exhausting these routes, or otherwise demonstrating the level of active and concerned curiosity of which the decision in *TW (no.1)* should surely have put Hillingdon on notice as being appropriate, may suggest other perspectives on the issue.

Conclusion

56. Supperstone J in *TW (no.1)* declared Hillingdon's residence qualification to be unlawful on the grounds that it was almost certain to have a significant and adverse impact on Irish Travellers; that there was no evidence that Hillingdon had sought to assess the extent of the disadvantage on Irish Travellers; that it was not therefore in a position to undertake the exercise, required by law, of considering whether that impact was justified; and that there was also no evidence of any action or discussion about the promotion or safeguarding of the welfare of Irish Traveller children in the formulation and maintenance of the residence requirement either.

57. The preliminary question before me was whether the 2018 Officers' Review provided sufficient evidence that Hillingdon had assessed the extent of the disadvantageous impact of the residence requirement on Irish Travellers and their children, in practice. That is a narrow question, and it is essentially an empirical one. For the reasons I have given, I have concluded that it does not. Hillingdon is still, therefore, not in a proper position to rely on the justifiability of the 10 year residence criterion. It may yet prove fully as justifiable in this case as Mostyn J found it to have been overall in *YG*. Or it may not. We are not yet in a position to resolve that either way.

The appropriate relief in these circumstances appears to be to confirm that the declarations made by Supperstone J in *TW (no.1)* continue in force.