Neutral Citation Number: [2021] EWHC 1359 (Admin)

Case No: CO/3600/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2021

Before :

BEFORE THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

THE QUEEN **on the Application of** **ZAIDA MALLON MONTERO**	**Claimant**
- and –	
LONDON BOROUGH OF LEWISHAM	**Defendant**

- -
- -

Ben Chataway (instructed by **GT Stewart Solicitors & Advocates**) for the **Claimant**
Matt Hutchings QC (instructed by **London Borough of Lewisham**) for the **Defendant**

Hearing date: 27 April 2021
Draft judgment circulated to the parties: 13 May 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Justice Henshaw:

(A) INTRODUCTION

1. In this claim for judicial review, the Claimant challenges (i) the Defendant's alleged continuing failure to have in place a housing allocation scheme that complies with section 166A(3) of the Housing Act 1996 ("***the Act***"), and (ii) the Defendant's decisions refusing to admit the Claimant onto its housing register.

2. Part VI of the Act deals with the allocation of permanent social housing. Section 166A requires every local housing authority to have in place an allocation scheme which is framed so as to secure that a reasonable preference is given to certain people, including people occupying overcrowded accommodation. The Claimant lives in Lewisham and has applied for social housing on the basis that she and her family are overcrowded. Her application has been refused because the Defendant's scheme provides that, subject to limited exceptions, applicants will only qualify for an allocation if they have resided in the borough for at least 5 years ("*the past residence rule*").

3. The following issues arise:

    i) whether it is lawful for the Defendant to disqualify the Claimant on this basis, notwithstanding their duty to give a reasonable preference: the Claimant's case, relying on *R(HA) v Ealing LBC* [2015] EWHC 2375 (Admin), is that it is unlawful for a disqualification criterion pursuant to section 160ZA of the Act (considered later) to exclude a sub-group of persons falling within the reasonable preference provisions of section 166A(3); and

    ii) the proper interpretation and effect of the past residence rule itself, which includes the statement that *"your application will be disqualified for a period of 6 months"*: the Claimant contends that the disqualification is thus for a limited period of 6 months only, whereas the Defendant argues that applicants remain liable to be disqualified until they have built up the required 5 years of residence.

4. Permission to proceed on issue (i) was granted on the papers by Heather Williams QC, and permission to amend to add issue (ii) was granted on the papers by Lang J.

5. For the reasons set out below, I have come to the conclusion that neither ground of challenge succeeds. The legislation does not prohibit a disqualification criterion that affects some persons falling within a reasonable preference category, provided that viewed as a whole the scheme does give reasonable preference to that category of persons. Further, the only sensible meaning of the past residence rule in this case is that the disqualification for which it provides will continue to apply to any future applications, made at least six months after any previous application, until the applicant has satisfied the 5-year requirement.

(B) LEGISLATIVE FRAMEWORK

6. Section 159 of Part VI of the Act provides that:

> "(1) A local housing authority shall comply with the provisions of this Part in allocating housing accommodation.
>
> (2) For the purposes of this Part a local housing authority allocate housing accommodation when they—
>
> (a) select a person to be a secure or introductory tenant of housing accommodation held by them,
>
> (b) nominate a person to be a secure or introductory tenant of housing accommodation held by another person, or
>
> (c) nominate a person to be an assured tenant of housing accommodation held by a private registered provider of social housing or a registered social landlord."

7. Section 160ZA of the Act was added by Localism Act 2011. It is headed "*Allocation only to eligible and qualifying persons: England*". By section 160ZA(1), a local housing authority shall not allocate housing accommodation to persons from abroad who are "*ineligible*", as defined by subsections (2) to (4). Subsections (6) and (7) then provide as follows:

> "(6) Except as provided by subsection (1), a person may be allocated housing accommodation by a local housing authority in England (whether on his application or otherwise) if that person—
>
> (a) is a qualifying person within the meaning of subsection (7), or
>
> (b) is one of two or more persons who apply for accommodation jointly, and one or more of the other persons is a qualifying person within the meaning of subsection (7).
>
> (7) Subject to subsections (2) and (4) and any regulations under subsection (8), a local housing authority may decide what classes of persons are, or are not, qualifying persons."

8. Section 166A is headed *"Allocation in accordance with allocation scheme: England"* and provides, so far as 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.
>
> …
>
> (3) As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to—
>
> (a) people who are homeless (within the meaning of Part 7);
>
> (b) people who are owed a duty by any local housing authority under section 190(2), 193(2) or 195(2) (or under section 65(2) or 68(2) of the Housing Act 1985) or who are occupying accommodation secured by any such authority under section 192(3) ;
>
> (c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions;
>
> (d) people who need to move on medical or welfare grounds (including any grounds relating to a disability); and
>
> (e) people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others)
>
> The scheme may also be framed so as to give additional preference to particular descriptions of people within one or more of paragraphs (a) to (e) (being descriptions of people with urgent housing needs).
>
> …
>
> (5) The scheme may contain provision for determining priorities in allocating housing accommodation to people within subsection (3); and the factors which the scheme may allow to be taken into account include—
>
> (a) the financial resources available to a person to meet his housing costs;

> (b) any behaviour of a person (or of a member of his household) which affects his suitability to be a tenant;
>
> (c) any local connection (within the meaning of section 199) which exists between a person and the authority's district.
>
> …
>
> (9) The scheme must be framed so as to secure that an applicant for an allocation of housing accommodation—
>
> …
>
> (c) has the right to request a review of a decision mentioned in paragraph (b), or in section 160ZA(9), and to be informed of the decision on the review and the grounds for it.
>
> …
>
> (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."

9. The provisions to which section 166A thus cross-refers include section 190 (duties to persons becoming homeless intentionally); section 193 (duty to persons with priority need who are not homeless intentionally, which includes what is often referred to as the *"main housing duty"* under section 193(2)); section 195 (duties in cases of threatened homelessness); and section 199, which defines *"local connection"* by reference to the following basic test:

> "(1) A person has a local connection with the district of a local housing authority if he has a connection with it—
>
> (a) because he is, or in the past was, normally resident there, and that residence is or was of his own choice,
>
> (b) because he is employed there,
>
> (c) because of family associations, or
>
> (d) because of special circumstances."

10. Section 169(1) of the Act provides that in the exercise of their functions under Part VI, local housing authorities shall have regard to such guidance as may from time to time be given by the Secretary of State. The main guidance for English authorities is *"Allocation of accommodation: guidance for local housing authorities in England"*, first issued in June 2012 and last updated in January 2021. It includes the following passages relevant to the present case:

> *[Under the heading "Qualification" in the chapter on "Eligibility and qualification"]*

"3.29 In framing their qualification criteria, authorities will need to have regard to their duties under the equalities legislation, as well as the requirement in s.166A(3) to give overall priority for an allocation to people in the reasonable preference categories.

3.30 Housing authorities should avoid setting criteria which disqualify groups of people whose members are likely to be accorded reasonable preference for social housing, for example on medical or welfare grounds. However, authorities may wish to adopt criteria which would disqualify individuals who satisfy the reasonable preference requirements. This could be the case, for example, if applicants are disqualified on a ground of antisocial behaviour.

3.31 When deciding what classes of people do not qualify for an allocation, authorities should consider the implications of excluding all members of such groups. For instance, when framing residency criteria, authorities may wish to consider the position of people who are moving into the district to take up work or to escape violence, or homeless applicants or children in care who are placed out of borough.

…

3.33 There may be sound policy reasons for applying different qualification criteria in relation to existing tenants from those which apply to new applicants. For example, where residency requirements are imposed, authorities may wish to ensure they do not restrict the ability of existing social tenants to downsize to a smaller home. Authorities may decide to apply different qualification criteria in relation to particular types of stock, for example properties which might otherwise be hard to let.

3.34 Whatever general criteria housing authorities use to define the classes of persons who do not qualify for social housing, there may be exceptional circumstances where it is necessary to disapply these criteria in the case of individual applicants. An example might be an intimidated witness who needs to move quickly to another local authority district. Authorities are encouraged to make explicit provision for dealing with exceptional cases within their qualification rules." (footnotes omitted)

[In the chapter on "Framing an allocation scheme"]

"4.1 Housing authorities are required by s.166A(1) to have an allocation scheme for determining priorities, and for defining the procedures to be followed in allocating housing accommodation; and they must allocate in accordance with that scheme (s.166A(14)). All aspects of the allocation process must be covered in the scheme, including the people by whom decisions

are taken. In the Secretary of State's view, qualification criteria form part of an allocation scheme."

"**Reasonable preference**

4.4 In framing their allocation scheme to determine allocation priorities, housing authorities must ensure that reasonable preference is given to the following categories of people (s.166A(3):

[followed by a list of the section 166A(3) categories]

4.5 In framing their allocation scheme to give effect to s.166A(3), housing authorities should have regard to the following considerations:

• the scheme must be framed so as to give reasonable preference to applicants who fall within the categories set out in s.166A(3), over those who do not

• although there is no requirement to give equal weight to each of the reasonable preference categories, authorities will need to demonstrate that, overall, reasonable preference has been given to all of them

• there is no requirement for housing authorities to frame their scheme to afford greater priority to applicants who fall within more than one reasonable preference category (cumulative preference) over those who have reasonable preference on a single, non-urgent basis.

Otherwise, it is for housing authorities to decide how to give effect to the provisions of s.166A(3) in their allocation scheme.

…

Overcrowding

4.8 The Secretary of State takes the view that the bedroom standard is an appropriate measure of overcrowding for allocation purposes, and recommends that all housing authorities should adopt this as a minimum. The bedroom standard allocates a separate bedroom to each:

• married or cohabiting couple

• adult aged 21 years or more

• pair of adolescents aged 10-20 years of the same sex

• pair of children aged under 10 years regardless of sex

…"

"**Additional preference**

4.13 Section 166A(3) gives housing authorities the power to frame their allocation scheme to give additional preference to particular descriptions of people who fall within the statutory reasonable preference categories and have urgent housing needs, and they must do so for members of the Armed and Reserve Forces … . All housing authorities must consider, in the light of local circumstances, the need to give effect to this provision. Examples of people with urgent housing needs to whom housing authorities should consider giving additional preference within their allocation scheme include:

• those who need to move urgently because of a life threatening illness or sudden disability

• families in severe overcrowding which poses a serious health hazard

• those who are homeless and require urgent re-housing as a result of violence or threats of violence, including intimidated witnesses, and those escaping serious anti-social behaviour or domestic violence

…"

"**Determining priorities between households with a similar level of need**

4.15 Authorities may frame their allocation scheme to take into account factors in determining relative priorities between applicants in the reasonable (or additional) preference categories (s.166A(5)). Examples of such factors are given in the legislation: financial resources, behaviour and local connection. However, these examples are not exclusive and authorities may take into account other factors instead or as well as these.

Financial resources available to a person to meet his housing costs

4.16 This would enable a housing authority, for example, to give less priority to owner occupiers (wherever the property is situated).

Behaviour

4.17 This would allow for greater priority to be given to applicants who have been model tenants or have benefited the community, for example.

> *Local connection*
>
> 4.18 Local connection is defined by s.199 of the 1996 Act. A person has a local connection because of normal residence (current or previous) of their own choice, employment, family associations, or special circumstances. ...
>
> **Including local priorities alongside the statutory reasonable preference categories**
>
> 4.19 As the House of Lords made clear in the case of *R (on application of Ahmad) v. Newham LBC*, s.166A(3) only requires that the people encompassed within that section are given 'reasonable preference'. It 'does not require that they should be given absolute priority over everyone else'. This means that an allocation scheme may provide for other factors than those set out in s.166A(3) to be taken into account in determining which applicants are to be given preference under a scheme, provided that:
>
> • they do not dominate the scheme, and
>
> • overall, the scheme operates to give reasonable preference to those in the statutory reasonable preference categories over those who are not
>
> The Secretary of State would encourage authorities to consider the scope to take advantage of this flexibility to meet local needs and local priorities.
>
> 4.20 The House of Lords also made clear that, where an allocation scheme complies with the reasonable preference requirements and any other statutory requirements, the courts should be very slow to interfere on the ground of alleged irrationality." (all footnotes omitted)

11. Further relevant guidance was issued in December 2013, *"Providing social housing for local people"*, including sections relating to qualification for social housing, exceptions, and prioritising local connection. The following passages are relevant:

> "**Purpose of the guidance**
>
> 6. The government has made clear that we expect social homes to go to people who genuinely need and deserve them. That is why the Localism Act has maintained the protection provided by the statutory reasonable preference criteria which ensure that priority for social housing continues to be given to those in the greatest housing need.
>
> 7. The Localism Act has also given back to local authorities the freedom to better manage their social housing waiting list, as

well as providing authorities with greater flexibility to enable them to tackle homelessness by providing homeless households with suitable private sector accommodation. Local authorities can now decide who qualifies for social housing in their area, and can develop solutions which make best use of the social housing stock. This guidance is intended to assist housing authorities to make full use of the flexibilities within the allocation legislation to better meet the needs of their local residents and their local communities.

8. The government has also taken decisive steps to increase the supply of affordable housing, …

9. This investment in new affordable housing will help to meet housing need. We now want to see local authorities take an approach to social housing allocations which gives greater priority to those in need who have invested in and demonstrated a commitment to their local community.

10. The Prime Minister has made clear the government's determination to tackle the widespread perception that the way social housing is allocated is unfair, and to address concerns that the system favours households who have little connection to the local area over local people and members of the Armed Forces. Another important aim of this guidance, therefore, is to encourage authorities to be open and transparent about who is applying for and being allocated social housing in their area.

Qualification for social housing

…

12. The government is of the view that, in deciding who qualifies or does not qualify for social housing, local authorities should ensure that they prioritise applicants who can demonstrate a close association with their local area. Social housing is a scarce resource, and the government believes that it is appropriate, proportionate and in the public interest to restrict access in this way, to ensure that, as far as possible, sufficient affordable housing is available for those amongst the local population who are on low incomes or otherwise disadvantaged and who would find it particularly difficult to find a home on the open market.

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 2 years.

…

15. Housing authorities may wish to consider whether there is a need to adopt other qualification criteria alongside a residency requirement to enable and ensure that applicants who are not currently resident in the district who can still demonstrate a strong association to the local area are able to qualify. Examples of such criteria might include:

- family association – for example, where the applicant has close family who live in the district and who have done so for a minimum period of time

- employment in the district – for example, where the applicant or member of their household is currently employed in the district and has worked there for a certain number of years

16. Whatever qualification criteria for social housing authorities adopt, they will need to have regard to their duties under the Equality Act 2010, as well as their duties under other relevant legislation such as section 225 of the Housing Act 2004.

…

Providing for exceptions

18. Housing authorities should consider the need to provide for exceptions from their residency requirement; and must make an exception for certain members of the regular and reserve Armed Forces – … . Providing for appropriate exceptions when framing residency requirements would be in line with paragraphs 3.22 and 3.24 of the 2012 guidance.

19. It is important that housing authorities retain the flexibility to take proper account of special circumstances. This can include providing protection to people who need to move away from another area, to escape violence or harm; as well as enabling those who need to return, such as homeless families and care leavers whom the authority have housed outside their district, and those who need support to rehabilitate and integrate back into the community.

20. There may also be sound policy reasons not to apply a residency test to existing social tenants seeking to move between local authorities. Housing authorities should assist in tackling under- occupation, for example allowing tenants to move if they wish to downsize to a smaller social home. There may also be

> sound housing management reasons to disapply a residency test for hard to let stock.
>
> 21. These examples are not intended to be exhaustive and housing authorities may wish to consider providing for other appropriate exceptions in the light of local circumstances. In addition, authorities retain a discretion to deal with individual cases where there are exceptional circumstances.
>
> …
>
> **Prioritising local connection**
>
> 26. Housing authorities have the ability to take account of any local connection between the applicant and their district when determining relative priorities between households who are on the waiting list (section 166A(5). For these purposes, local connection is defined by reference to section 199 of the 1996 Act.
>
> 27. Housing authorities should consider whether, in the light of local circumstances, there is a need to take advantage of this flexibility, in addition to applying a residency requirement as part of their qualification criteria. Examples of circumstances in which the power might be useful would include:
>
> - dealing sensitively with lettings in rural villages by giving priority to those with a local connection to the parish, as part of a local lettings policy …
>
> - where a group of housing authorities apply a wider residency qualification test, to give greater priority to people who live or work (or have close family) in any of the partner authorities' own district."

(C) LEWISHAM'S ALLOCATION SCHEME

12. The context of the Defendant's social housing allocation scheme is, as with many other London boroughs, a serious shortage of housing stock. Ms Rachel Dunn, Housing Partnership and Service Improvement Manager for the Defendant, states in her first witness statement *inter alia* that:

> "There is a severe shortage of social housing in Lewisham. There are currently more than 9,000 applicants on the housing register. The number of lettings under Lewisham's housing allocation scheme in recent years has been approximately 1,000 per annum (including general needs lets, special lets and housing moves).
>
> …
>
> In consequence of the above mismatch between demand and supply, for successful applicants the average waiting time

> between registration on Lewisham's housing register and an allocation is, and has been consistently for a number of years, in excess of 100 weeks. That is the average waiting time for successful applicants. The average waiting time for all applicants on the housing register is currently approximately 6 years.
>
> …
>
> Overcrowding is a significant national and regional problem: it has been estimated that 275,000 households in London are overcrowded. According to 2011 Census data, some 14,000 households in Lewisham were overcrowded.
>
> Overcrowding is the most common reason for applicants seeking rehousing on Lewisham's housing register. Over 5,000 of those on the housing register (more than half) have been awarded priority on the basis of overcrowding.
>
> The numbers of applicants registered on Lewisham's housing register who have been awarded priority due to overcrowding are currently as follows:
>
> Band 3 (lacking one bedroom) 4,612
>
> Band 2 (lacking two or more bedrooms) 577"

13. Relevant features of the Defendant's scheme ("***the Scheme***") may be summarised as follows. The Scheme was adopted on 10 April 2017. The Introduction makes *inter alia* the following points:

> "In Lewisham, there are many more people who need or who want to move, than there are homes available for them to move to. There are not enough rented homes owned by the Council and by partners (Housing Associations and Tenant Management Organisations) to offer housing to all who want it, or even to everyone who needs a home. To illustrate the size of the problems we face, the number of households on the Housing List has increased to 9,500, whilst the number of properties available to let has reduced to around 1,000 per year. There is a particularly severe shortage of family-sized properties.
>
> Our Lettings Policy is a way to distribute a small number of homes as fairly as possible, while using the resources available to us as efficiently as possible, retaining flexibility to respond to fluctuations in demand from different client groups, preventing homelessness and offering choice to applicants where we can. Everyone on the housing list has a reason for wanting to move, but in general we can only offer homes to those in the greatest need. This policy sets out our criteria for deciding who should have priority for available housing. We must comply with the law, which says that we must give "reasonable preference" to

> certain groups of people. We have had to make some tough choices in order to balance our objectives of fair allocation, efficiency, flexibility, preventing homelessness and choice and we appreciate that not everyone will agree with the decisions that we have made. It is not always easy to appreciate why someone else should be given priority over you and your family. However, in drawing up this policy we have used our knowledge and experience of allocating housing to many thousands of households across Lewisham.
>
> …
>
> We operate a Choice Based Lettings Scheme called Lewisham Homesearch. This document explains how the scheme works. Choice Based Lettings means that applicants can express an interest in the homes they wish to be considered for. However, in reality, the shortage of housing is so severe that any applicants who are restrictive about their choices may not be able to find housing. In some circumstances we will directly allocate properties to those groups we consider to be in most urgent need.
>
> …
>
> If you are allocated a tenancy or nominated for a Housing Association tenancy, to begin with this is likely to be a probationary or introductory tenancy (sometimes also called a "starter tenancy"). Unless steps are taken to end it within the probationary period, usually a year, this will be converted into a full secure or assured tenancy after the probationary period.
>
> …
>
> This allocations scheme has been written to comply with the provisions of the Housing Act 1996 as amended by the Homelessness Act 2002 and the Localism Act 2011. It also takes into account the Code of Guidance on Allocations June 2012 and Supplementary Guidance December 2013 Providing social housing for local people and March 2015 Right to Move. It has been drafted in line with the council's homelessness strategy, Tenancy Strategy, the London Housing strategy and in accordance with the Council's equality duties."

14. The Scheme indicates that the Defendant will operate a "*Choice Based Lettings Scheme*" whereby applicants on a housing list/register can express an interest in the homes for which they wish to be considered (§1.1). The list is open to anyone aged sixteen or above unless they are ineligible or disqualified (§2.1). Once admitted, applicants are allocated to one of three "*Priority Bands*" summarised below. In general, an available property is then allocated to whichever bidder is (i) in the highest priority band and (ii) has been waiting the longest of the bidders within that band (§3.3.2-3).

15. Section 2.5 sets out the criteria by which applicants are assessed as falling into three priority bands: Emergency, High Priority and Priority. Band 1 (Emergency Priority) includes, for example, applicants whose need is urgent because unless they are rehoused their life will be in danger, or the welfare of any child within the household will be seriously prejudiced; and applicants currently in an NHS hospital who cannot leave because they have no suitable accommodation elsewhere and need a specially adapted home due to their medical condition. Band 2 (High Priority) includes, among others, certain persons threatened with homelessness; applicants who unless rehoused will suffer from a serious physical or mental illness resulting from their present housing circumstances; and households who are "*seriously overcrowded*" (two or more bedrooms short) in settled accommodation. Band 3 (Priority) broadly covers applicants within the section 166A(3) reasonable preference categories, insofar as they do not fall into a higher Band, including households who are "*overcrowded*" (one bedroom short) in settled accommodation.

16. Sections 2.1.1 and 2.1.2 of the Scheme deal with ineligibility to join the Scheme due to immigration status or unacceptable behaviour serious enough for a local authority or housing association to have obtained a possession order. Section 2.2 begins:

> "**2.2 Disqualification from the housing list or from receiving an offer**
>
> As a result of the severe shortage of housing in Lewisham, we have identified certain groups of applicants to whom we will not normally allocate housing. Such applicants are either disqualified from being on the housing list or are disqualified from receiving an offer (although they are allowed to be on the housing list).
>
> The Council considers that the factors set out in the grounds for disqualification below will ordinarily outweigh any reasonable preference to which an applicant is entitled. …
>
> The effect of being disqualified from the housing list is that your application will be cancelled. During the period of disqualification you will be unable to reapply. When the period of disqualification comes to an end, if you wish to pursue your application again, you will have to reapply. Your application will be taken to have been made on the date of your reapplication.
>
> …"

17. Section 2.2 sets out a number of bases on which applicants may be disqualified, based on (in summary):

    i) significant financial resources;

    ii) lack of local connection with Lewisham;

    iii) refusal of either one offer or three offers, depending on the category of case;

iv) significant rent arrears; and

v) lack of priority:-

> "If your application is assessed as not coming within any of the Priority Bands stated at 2.5 below, your application will be disqualified and removed from the housing register. This is to ensure that the Council makes efficient use of its resources and does not give false hopes to those who are unlikely to receive an offer within a reasonable time (or at all)"

18. As to (ii) above (local connection), section 2.2.2 states:

> "**2.2.2 If you do not have a local connection with Lewisham**
>
> If you do not have a local connection with Lewisham, your application will be disqualified for a period of 6 months from the date of our decision.
>
> Local connection means that:
>
> - You are currently resident in Lewisham and have been resident for a period of 5 years
>
> - The Council have accepted that they owe you the main housing duty under section 193 of the Housing Act 1996 (as amended by the Homelessness Act 2002) and you have been placed in temporary accommodation by the Council;
>
> - You need to move to Lewisham for work, and will suffer hardship if you cannot move:
>
> o You work in Lewisham and need to move in order to enable you to continue working in Lewisham; or
>
> o You need to move to Lewisham to take up an offer of employment in Lewisham; and
>
> o In either case, the work is not short-term, marginal or ancillary or voluntary work; or
>
> - You give or receive care or support from a family member who is already normally resident in Lewisham. …
>
> If you have recently left prison or other institution, we will consider whether or not you have a local connection bearing in mind where you were living before you were imprisoned or institutionalised and whether you have family and other connections in the Borough.

> We will ask you for evidence of your local connection with your application. This may include proof of residence, evidence from your employer or a social care assessment.
>
> This ground of disqualification does not apply to transfer applications from existing secure tenants of the Council or existing secure or assured tenants of our Partner Landlords, applicants nominated via sub-regional and pan-London agreements or applications from:
>
> - those who are serving or have served in the regular armed forces within the period of 5 years preceding their application
>
> - or a person has recently ceased, or will cease to be entitled to reside in accommodation provided by the Ministry of Defence following the death of that person's spouse or civil partner where the spouse or civil partner has served in the regular forces; and their death was attributable (wholly or partly) to that service
>
> - or is serving, or has served in the reserve forces and who is suffering from a serious injury, illness or disability which is attributable (wholly or partly) to that service."

19. Section 2.2.7 states:

> "**2.2.7 Reinstatement in exceptional cases**
>
> In exceptional cases, the Council will reinstate a disqualified application despite the existence of one or more grounds of disqualification or make an offer to an applicant disqualified from receiving an offer, despite the existence of rent arrears. In order to be reinstated, an applicant must apply to the Housing Needs Manager, who will reinstate the application or allow an offer only if satisfied that disqualifying the application or disqualifying the applicant from receiving an offer would cause exceptional hardship to the applicant and their household.
>
> There will be no further review of the decision of the Housing Needs Manager to refuse to reinstate a disqualified application or to allow an offer to be made to an applicant disqualified from receiving an offer.
>
> …"

20. Applications are made via a web-based form. The qualification rules are summarised at the start of the form under the heading "*Who can apply": "You can apply for council housing if you: … have lived in the borough continuously for the last five years*". There is no reference there to any exception or discretion.

21. Ms Dunn notes in her evidence that almost all London boroughs' housing allocation schemes use a residency test, with a 5-year test being the most common (14 boroughs). As pointed out in the Claimant's solicitor's evidence, some of these contain, however, an exception for applicants to whom the reasonable preference provisions of section 166A(3) apply.

22. Ms Dunn gives figures for the number of applicants who since 2017 have claimed to be overcrowded but have been disqualified under the past residence rule. These are low, the highest figure being 37 for 2019/2020, representing less than 1% of those on the housing register awarded priority based on overcrowding. It is difficult to know how much store to place by this, because (as the Claimant points out) the Defendant's online allocation process puts the past residence rule front and centre, making it likely that many who would otherwise apply based on overcrowding will simply not apply if they do not satisfy the 5-year criterion.

23. The Claimant refers to the London Borough of Redbridge's allocation scheme, which applies a 5-year past residence rule but only at the stage of relative prioritisation rather than as a qualification criterion. As a result, data are available as to the number of people affected by the rule. These indicate that in 2018/19, 942 out of 2,759 applicants (34%) did not meet the residence requirement; and in 2019/20, 921 out of 2,803 applicants (33%) did not meet it. Absent any reason to believe the picture to be markedly different in Lewisham, the Claimant suggests that a reasonable working assumption would be that about a third of those who applied or would have applied for housing based on overcrowding will have been disqualified by the past residence rule. That in turn would mean that the 5,189 (4,612 plus 577: see above) awarded priority based on overcrowding comprised about two-thirds of a total cohort which also included around 2,600 overcrowded would-be applicants barred by the past residence rule. These estimates may need to be adjusted to take account of the number of relevant applicants who benefit from (a) the exceptions to the past residence rule (i.e. alternative ways of showing local connection), as set out above, and (b) the exercise of the § 2.2.7 power to 'reinstate' applications in exceptional circumstances.

(D) THE CLAIMANT'S SITUATION AND APPLICATION

24. The Claimant lives with her husband, her sons aged 16 and 14, and her daughter aged 7. They live in a privately rented flat two-bedroom flat in Lewisham with a combined living room/kitchen. The two sons share one bedroom. The Claimant, her husband and their daughter share the other. The family moved to the flat in June 2018, having previously lived in Southwark.

25. On 25 July 2019 the Claimant applied to the Defendant for social housing. At that time there was another couple sharing the flat with them; the Claimant, her husband and the three children were sleeping in one bedroom.

26. The Defendant refused the application on 13 November 2019, writing that:

> "…you have not resided in the Lewisham borough for a minimum of 5 years. You stated you moved to the Lewisham borough on 06/06/2018 so under our current policy you will not be able to re-apply until 06/06/2023."

The letter made no reference to the other facts of the Claimant's case or to the Defendant's discretion under §2.2.7 of the Scheme.

27. On 24 December 2019 the Claimant wrote requesting a review, with help from a local advice agency. Her letter explained that the couple with whom they shared the home were about to move out, but that the Claimant's family remained overcrowded. The household was by this stage *"overcrowded"* for the purposes of the Scheme by reason of having one bedroom too few. The letter referred to the decision in *HA* and argued that the Claimant's disqualification was not lawful.

28. The Defendant replied on 30 June 2020 maintaining the decision to disqualify.

29. Pre-action correspondence then occurred, and the claim was issued on 29 September 2020.

30. Thereafter, the Claimant made a second application to the Defendant on 1 October 2020, on the basis that, properly interpreted, §2.2.2 of the Scheme provides for a 6 month disqualification period only. The Defendant refused the second application by a letter apparently issued on 5 November 2020, though dated 14 October. The Defendant subsequently took the position that an internal review was not the appropriate means to resolve the dispute about the effect of § 2.2.2 of the Scheme.

31. In the meantime, permission to apply for judicial review was granted on 29 October 2020. Following further correspondence, permission to amend to add the claim in relation to refusal of the second application was sought, and was granted on 24 December 2020.

(E) CASE LAW

32. The reasonable preference provisions in the legislation are long-established, section 166A(3) replacing materially identical provisions in the Housing Act 1985, which themselves followed similar provisions dating back many years. The disqualification provisions in section 160ZA are much newer, having been inserted in 2011 as noted above. I aim to summarise below the main case relevant to the nature of these sets of provisions, and their interaction.

33. The earliest such case drawn to my attention is *R v Wolverhampton MBC, ex p. Watters* (1997) 29 H.L.R. 931 (CA), where the Court of Appeal held that an applicant within a reasonable preference category under the Housing Act 1985 had been lawfully refused an allocation of housing on the basis that she owed rent arrears. That was held to be a relevant factor which the local housing authority could properly decide outweighed the reasonable preference due to her.

34. Under the 1985 Act, local housing authorities had a wide discretion to manage their housing stock, subject to a duty under section 22 to "*secure that in the selection of their tenants a reasonable preference is given to*" certain persons, broadly similar to the persons specified in section 166A(3) of the 1996 Act. Mrs Watters applied to be entered on the council's housing list because her household was overcrowded. Her application was refused on the basis of a rent arrears policy, because she owed the council substantial rent arrears from a previous tenancy. The refusal of her application was reconsidered by an Appeals Panel, whose remit was:

> "TRANSFERS WITH RENT ARREARS (more than 2 weeks)
>
> To hear appeals where:
>
> (a) There is a Social or Medical need award of 60 points in one single category.
>
> (b) Applicants have more than two weeks worth of rent arrears but have made substantial efforts to reduce arrears.
>
> (c) Any other exceptional circumstance." (p. 934)

35. Giving the lead judgment, Leggatt LJ noted that the judge at first instance, Dyson J, had said *"If the Council's policy conferred no right of appeal, and involved no more than a mechanical application of the two weeks' arrears rule ... then I would have no doubt that the policy was unlawful"*. Dyson J had stated *inter alia* that:

> "… The obligation was only to give a reasonable preference. That connotes the possibility that a tenant may be so bad that it is not reasonable to give any preference at all. In fixing the criteria for allocation, the Council is entitled to weigh in the balance the seriousness of the history of behaviour as a tenant, against the severity of the circumstances identified in section 22 that apply in the particular case. The weight given to each factor is a matter for the Council to determine, and the court will only rarely interfere. In the present case, the policy adopted by the Council gives considerable negative weight to non-payment of rent. The Council has, however, mitigated this where substantial efforts have been made by a tenant to reduce the arrears. The Council has also decided, that even those tenants owing arrears of rent who have not made substantial efforts to reduce them, should be allocated housing if they have a substantial social or medical need or if other exceptional circumstances exist. This seems to me to be a perfectly reasonable response to the statutory obligation imposed upon it by section 22. …" (quoted at pp. 934-935 of the Court of Appeal's judgment)

36. As part of his summary of the facts, Leggatt LJ noted that:

> "Fiona Davies, the solicitor who appeared for the Council before the Panel, … had earlier told the appellant's solicitors that there would be an Appeals Panel hearing because, independently of the result of the medical assessment for which the appellant had been referred, exceptional circumstances existed. She specifically told the appellant's representative of the wide nature of the Appeals Panel's discretion. The record of the hearing shows that Ms Davies explained that the Council's rent arrears policy could be "waived in exceptional circumstances". More importantly, the hearing concluded with a statement by her that "the Housing Act 1985 required the Local Authority to give 'reasonable preference' in its housing policy to anyone who is in

> statutory overcrowding". It appears likely that the emphasis was upon overcrowding because that is what the appellant's medical condition was attributed to. (p. 935)

37. Mrs Watters' submission was that the statutory duty to accord reasonable preference could not be complied with if no preference were given at all. The council's submission was as follows:

> "once it is conceded that a policy which takes account of rent arrears is not unlawful, a local authority is free to choose which procedure to adopt for determining preferences. Different local authorities adopt different procedures: some award points, whilst others do not allow applicants with particular shortcomings on to the waiting list. The obligation to give reasonable preference was in this case fulfilled by the consideration given to the appellant's case by the Appeals Panel. That is the means by which the Council ensured that those in any of the first three categories of section 22 were afforded reasonable preference. But reasonable preference means what it says. If two applicants are otherwise equal, but one is within one of the first three categories of section 22, that one will be preferred. It is for the Council to decide what weight to give to relevant factors. Reasonable preference is to be equated with extra weight: it cannot be determinative per se. … the Council must have power to determine whether in the circumstances an applicant's arrears outweigh the reasonable preference that has to be given; and there would be no point in taking rent arrears into account unless they could in a proper case outweigh the statutory factors." (p. 936)

38. Leggatt LJ stated:

> "I agree with Mr Findlay's submissions. If section 22 simply required "preference" to be given, Mr Gallivan's argument would be correct. But it does not: it requires "reasonable preference". That envisages that other factors may weigh against and so diminish and even nullify the preference. In the sentence I have cited from the judgment of Sedley J. in ex p. Njomo (supra) he asserted that the Council must not "eclipse or distort the priority". If he meant that the statutory preference cannot be outweighed by other relevant considerations, he was in my judgment wrong. No preference is to be given except reasonable preference. That involves balancing against the statutory factors such factors as may be relevant. So the Council is entitled to take account of substantial arrears of rent due to the Council. As the judge remarked, the Council has a duty to have regard to the financial consequences of its action and to the need to balance its housing revenue account. The answer to Mr Gallivan's sole point is that because, as is common ground, rent arrears may be taken into account in the process of selecting tenants, it follows that, when in the Council's judgment an applicant's rent arrears

> are such as to outweigh the reasonable preference that would otherwise avail him, that applicant will not be selected." p. 936)

39. Leggatt LJ then considered a submission to the effect that the *"exceptional circumstances"* provision in the council's policy was wrongly restricted, in the guidance note, to social and medical need. Leggatt LJ rejected that submission, saying:

> "There is nothing to suggest that the Appeals Panel regarded its power to treat the appellant's circumstances as exceptional as being so circumscribed that they could not accord her the reasonable preference to which section 22 entitled her; nor is there any ground for contending that the balancing exercise was not fairly conducted by the Appeals Panel at the hearing of the appellant's appeal. The Appeals Panel would have been entitled to pay regard to any substantial efforts to reduce arrears, even though they exceeded two weeks' arrears, and to any other exceptional circumstances, including social or medical need. The scope of "exceptional circumstances" was unfettered. The Council's policy, of which the appeal process was an integral part, was in my judgment sufficiently flexible to comply with the Council's duty under section 22. It would be absurd if local authorities were obliged to house or rehouse tenants who, whatever their need, have persistently failed to pay their rent, and who have made no substantial efforts to reduce the arrears, and whose circumstances are not to be regarded as exceptional. For the reasons summarised by the judge in the long passage that I have read from his judgment, which I have merely expressed in my own words, this ground of appeal fails." (p. 937)

40. Judge LJ agreed with Leggatt LJ, and added:

> "… Even in the case of applications by those within the criteria which entitle them to preferential treatment, the express requirement that the preference should be reasonable rather than absolute entitles the housing authority, in addition, to consider any other relevant fact including the extent to and circumstances in which the applicants have failed to pay due rent or have otherwise been in breach of the obligations of their existing or earlier tenancies. Such considerations are not excluded from the selection process.
>
> The statutory obligations imposed by section 22 therefore requires that positive favour should be shown to applications which satisfy any of the relevant criteria. To use colloquial language they should be given a reasonable head start. Thereafter all the remaining factors fall to be considered in the balancing exercise inevitably required when each individual application is under consideration. If despite the head start the housing authority eventually decides on reasonable grounds that the application for a tenancy must be rejected this will not constitute a breach of the obligations imposed by section 22." (p. 938)

41. Potter LJ agreed with both judgments.

42. In *Lin v Barnet LBC* [2007] EWCA Civ 132, [2007] HLR 30 (CA), the council operated a points-based scheme for housing allocation. Objection was taken *inter alia* to the fact that the scheme provided for points to be awarded, on a specific basis, to applicants outside the statutory reasonable preference categories. Accommodation could thus be allocated to such an applicant instead of to a person within one of the reasonable preference categories. Unlike in the present case, the dispute did not concern whether persons within a reasonable preference category could be excluded from the housing list altogether.

43. The claimant submitted that the statutory preference entitled all those who must be preferred to a head start in seeking accommodation over all those who were not preferred, whatever the circumstances of the non-preferred applicant; and that the scheme was unlawful because it permitted applicants who did not fall within a reasonable preference category to be awarded more points than those who did. Dyson LJ, with whom the other members of the court agreed, rejected that submission. Having already noted (in the context of another ground of appeal) that the question of whether the preference was "*reasonable*" was a matter for the discretion of the council (§ 28), Dyson LJ said:

> "35. … Section 167(2A) [now 166A(5)] expressly permits a scheme to determine priorities as between people who fall within subs. (2) [now 166A(3)] taking into account factors which include financial resources available to the applicant and any local connection with the authority's district. But it does not follow that such factors are otherwise irrelevant and must be excluded from a scheme. The discretion in s.167(6) [now 166A(11)] is wide enough to permit an authority to take such factors into account when considering the priority to be given to applicants who fall outside s.167(2) [now 166A(3)]." (current statutory numbering interpolated)

After citing that statutory guidance, which was in key respects similar to the current guidance, Dyson LJ said:

> "36. It is clear, therefore, that a scheme may give reasonable preference to applicants who do not fall within s.167(2) provided that such non-statutory preferences do not dominate the scheme at the expense of the statutory preference categories. This prohibition on domination of the scheme at the expense of the statutory preference categories reflects the fact that the discretion given by s.167(6) is expressed to be subject to the earlier provisions of s.167.
>
> 37. It is not in dispute that in certain circumstances the scheme awards fewer points to an applicant who falls within s.167(2) than to someone who does not. But in the light of s.167(6) and the Code of Guidance, it does not necessarily follow that the scheme is unlawful. It is necessary to look at the scheme as a whole and not at an individual case and consider whether the fact

> that non-statutory preference categories may in certain circumstances be awarded more points than statutory preference categories means that the scheme permits the former to dominate at the expense of the latter."

44. In *R(Ahmad) v Newham LBC* [2009] UKHL 14, the issues were (i) whether the Court of Appeal had been correct to hold, in finding the council's scheme to be unlawful, that the predecessor provisions of section 167 required a local housing authority to accord priority as between reasonable preference applicants by reference to the relative gravity of their individual needs, and (ii) whether the scheme was unlawful because the choice-based letting portion of the scheme allocated a significant, if small, proportion of housing (about 5% a year) to a class of applicants – tenants seeking a transfer – who did not satisfy any of the requirements in paras (a) to (e) of section 167(2), predecessor to section 166A(3). The House of Lords held the answer to both questions to be 'no'. The lead judgments were given by Baroness Hale and Lord Neuberger, with each of whose judgments all the other members of the court agreed. Baroness Hale's opinion included the following passage:

> "15. … The Act only requires a "reasonable preference" to be given to particular groups of people. It cannot be said that a scheme for identifying which individual households are in greatest need at any particular time is the only way in which a reasonable council might decide to give reasonable preference to those groups. It is the groups rather than the individual households within them which have to be given reasonable preference. Identifying the individual households in greatest need could only be done through some sort of points based system and experience has shown that these too may be open to attack, either on the ground that they are too rigid and therefore unduly fetter the council's discretion or on the ground that the particular distribution of points is for some reason irrational … The trouble is that any judicial decision, based as it is bound to be on the facts of the particular case, that greater weight should be given to one factor, or to a particular accumulation of factors, means that lesser weight will have to be given to other factors. The court is in no position to re-write the whole policy and to weigh the claims of the multitude who are not before the court against the claims of the few who are. Furthermore, relative needs may change over time, so that if the council were really to be assessing the relative needs of individual households, it would have to hold regular reviews of every household on the waiting list in order to identify those in greatest need as vacancies arose. No-one is suggesting that this sort of refinement is required. It would be different, of course, if the most deserving households had a right to be housed, but that is not the law." (§ 15)

45. Lord Neuberger said:

> "37. It is clear from section 167(6) that, subject to complying with the other provisions of section 167 , and subject to rationality and compliance with any other relevant legislation,

the terms of any allocation scheme are a matter for the local housing authority ("the authority"). Paras (a) to (e) of section 167(2) requires every scheme to give "reasonable preference" to those applicants whose households include at least one person falling within one or more of those paragraphs. The primary issue on this appeal is whether, as the courts below held, section 167 requires an authority to go further and accord priority as between reasonable preference applicants by reference to the relative gravity of their needs, and, if so, the extent to which such according of priority is required."

"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"

and:

"61. Mr Andrew Arden QC, for Newham, told your Lordships that, though the need of the Ahmad family for alternative accommodation is undoubtedly pressing, indeed urgent, there are a great number of other applicants whose housing needs would be regarded by most people as even more pressing or urgent. Unfortunately, I have no difficulty in accepting that submission ...

62. This point also highlights how inapt it is for the courts to interfere with housing allocation schemes, save in clear and exceptional circumstances. This follows from the striking imbalance between supply and demand for housing, the very large number of families with an urgent need to be housed under Part 6 of the 1996 Act, and the almost infinite number of different permutations of circumstances giving rise to the urgency. Knowledge of the circumstances of applicants generally, long term strategy considerations, expertise, political and social awareness, and local knowledge all have a part to play when it comes to formulating and implementing a housing allocation scheme. With information essentially consisting of the Scheme itself, the circumstances of the particular applicant and a few statistics (of questionable mutual consistency), the court should be very slow indeed to second guess Newham."

46. I interpolate at this point that Baroness Hale's statement in § 15 that *"[i]t is the groups rather than the individual households within them which have to be given reasonable preference"* was not in my view directed at the question of whether an allocation policy could lawfully fail to give preference to some persons within a reasonable preference category provided it did give such preference to others. The issue under discussion in § 15 was not that question but, rather, the question of whether giving effect to the reasonable preference provisions necessitated an individualised analysis of applicants' circumstances. On the contrary, Lord Neuberger's statement at § 37 indicated that reasonable preference has to be given to *"those applicants"* falling within the reasonable preference categories. Moreover, Baroness Hale herself in the contemporaneous case *R(Aweys) v Birmingham City Council* [2009] UKHL 36, in the context of an issue as to whether it was irrational to accord priority to persons placed in new accommodation on a temporary basis over those who were left in their current accommodation, said:

> "… Provided that "reasonable preference" is given to all those who are homeless within the meaning of Part 7, there is no reason why an authority should not decide to give some homeless groups priority over others, as long as the decision is not irrational. …" (§ 62, my emphasis)

47. Nonetheless, the House's answer to the second question in *Ahmad* makes clear that, as it is only *"reasonable"* preference that must be given, it is lawful for a scheme to have the effect that persons outside the reasonable preference categories will sometimes be accommodated in priority to persons within the categories. That is clear from Baroness Hale's conclusion at § 17, addressing the argument that the people in the reasonable preference groups must be given preference in relation to every property which is let under the scheme:

> "The problem with this argument is that section 167(2) only requires that these groups be given a "reasonable preference". It does not require that they should be given absolute priority over everyone else. Still less does it require that an individual household in one of those groups should be given absolute priority over an individual household which wishes to transfer. … The scheme is about the overall policy for allocating the available housing stock between groups." (§ 18)

48. Nicol J in *Babakandi v Westminster CC* [2011] EWHC 1756 upheld an allocation scheme under which, pursuant to what is now section 166A(5)(b)), an applicant with rent arrears above a specified level was automatically disqualified from bidding for accommodation, subject only to an 'exceptional circumstances' proviso, even though no guidance was provided as to when that proviso would be operated (§§ 23-26).

49. Following the introduction of the power to set qualification criteria in section 160ZA(7), the Court of Appeal in *R(Jakimaviciute) v Hammersmith & Fulham LBC* [2014] EWCA Civ 1438 held that that power is "*subject to*" the reasonable preference duty in section 166A(3):

> "The reasonable preference duty applies on its face to the framing of the scheme as a whole and so as to require the giving

> of reasonable preference to all those specified, not just to those who are qualifying persons. There is no sensible reason why it should be read as applying only at a stage where the qualification criteria have operated to exclude certain applicants from registration under the scheme. Thus, on the natural interpretation of the statutory provisions the setting of the qualification criteria is subject to the reasonable preference duty." (§ 31)

50. The court had regard to what are now §§ 3.29, 3.30 and 4.1 of the statutory guidance quoted in § 10 above, and to the Government's consultation paper, *"Local decisions: a fairer future for social housing"* (December 2010), which preceded the amendments made by the Localism Act 2011. The consultation paper referred to the size of social housing waiting lists and the fact that many of those on the lists had no realistic chance of getting a home. One of the changes proposed was summarised in these terms:

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

51. The consultation paper noted that since 2003, local housing authorities had been required to operate 'open' housing registers with only a limited power to treat applicants as 'ineligible' to join where *"they (or a member of their household) have been guilty of unacceptable behaviour serious enough to make them unsuitable to be a tenant of the authority"* (§4.2); and commended practices "*aimed at ensuring that those who have little or no realistic prospect of accessing social housing under the current reasonable preference criteria are prevented, or strongly discouraged, from joining the waiting list*" (§4.7).

52. Then, as the Court of Appeal in *Jakimaviciute* noted:

> "37. Whilst proposing that change to the way the homelessness duty could be brought to an end, the consultation paper plainly contemplated a linkage between the power to decide who was to qualify for social housing and the duty to give reasonable preference to, among others, those to whom the homelessness duty continued to be owed:
>
> > "4.8 We therefore intend to legislate to give back to local authorities the freedom to determine which categories of applicants should qualify to join the waiting lists ….
> >
> > 4.9 We take the view that it should be for local authorities to put in place arrangements which suit the particular needs of their local area. Some local authorities might restrict social housing to those in housing need (e.g. homeless households

> and overcrowded families). Other local authorities might impose residency criteria or exclude applicants with a poor tenancy record or those with sufficient financial resources to rent or buy privately. Others may decide to continue with open waiting lists ….
>
> 4.10 We want to provide local authorities with the power to decide who should qualify to be considered for social housing, while retaining a role for government in determining which groups should have priority for social housing through the statutory reasonable preference requirements ….
>
> 4.11 … We believe that the statutory duty on local authorities to frame their allocation scheme to give 'reasonable preference' to certain groups, together with local authorities' wider equalities duties, should serve to ensure that local authorities put in place allocation systems which are fair and that those who are vulnerable and in housing need are properly protected. However, to provide a safeguard, we intend to reserve a power to prescribe by way of regulations, that certain classes of people are (or are not) qualifying persons, if there is evidence that people in housing need are being excluded from social housing without good cause.
>
> …
>
> 4.15 The government believes that social housing should continue to be prioritised for the most vulnerable and those who need it most. We think the best way to ensure a consistent approach to meeting housing need is to continue to set the priorities for social housing centrally. Consequently we do not propose to remove the reasonable preference requirements in the allocation legislation."
>
> 38. Those proposals were confirmed in the Government's response to consultation, Local decisions: next steps towards a fairer future for social housing (February 2011) and were given effect in the amending legislation.
>
> 39. The policy considerations evidenced in that consultation material provide further support for my view as to the relationship between section 160ZA(7) and section 166A(3) ."

The Claimant in the present case also highlights the statements in the consultation paper that "*[i]t is important that those who are vulnerable and in housing need do not lose out under these changes*" (beginning of § 4.11) and "*by retaining the 'reasonable preference' categories, we are ensuring that overcrowded households continue to receive priority*" (§ 7.5).

53. Accordingly, the Court of Appeal in *Jakimaviciute* held to be unlawful a provision of the allocation scheme in question (paragraph 2.14(d)) under which homeless applicants

placed in long term suitable temporary accommodation under the main homelessness duty would not normally qualify for registration under the scheme, unless the property did not meet the needs of the household or was about to be ended through no fault of the applicant. (I note in passing that the exclusions from the scheme also included persons who had not lived in the borough for a minimum of five years.) There was a discretion to waive the exclusion in exceptional circumstances. It is necessary to set out the court's reasoning on this point in full:

> "44. … [the Claimant] advances two main grounds on which paragraph 2.14(d) of the Scheme is said to amount to a breach of the reasonable preference duty: (1) it amounts to an impermissible attempt to redefine the preference class identified in section 166A(3)(b) ; and (2) no reasonable authority would have concluded that the policy gives a reasonable level of preference to that class. ...
>
> 45. The argument in support of the first ground is that Parliament has provided in section 166A(3)(b) that all those who are owed a housing duty under Part 7 must be given reasonable preference. The class is not limited to those who are owed such a housing duty but have been placed in short-term or unsuitable accommodation. Yet by paragraph 2.14(d) the Council has effectively carved out such a sub-group from the statutory class. Those in the sub-group are given some preference but the remainder of the class, i.e. those who have been placed in long term suitable accommodation, are given no preference at all; they are simply excluded from qualification under the scheme. This amounts to an attempted redefinition of the statutory class or, putting the point another way, to an attempt to thwart the statutory scheme. It is permissible to adopt a rule excluding individual applicants by reference to factors of general application, such as lack of local connection or being in rent arrears, but it is not permissible to cut down the statutory class in the way that subparagraph 2.14(d) attempts to do.
>
> 46. There is an overlap between that and the second ground, where the argument is that section 166A(3)(b) requires an allocation scheme to be framed so as to secure a reasonable preference to people owed a housing duty under Part 7 , yet no reasonable authority would conclude that the Scheme affords a reasonable preference to that class as a whole. The evidence shows that some 87% of households accommodated pursuant to one of the Part 7 duties was disqualified from allocation under the Scheme by virtue of paragraph 2.14(b). No reasonable authority would conclude that a criterion that disqualified 87% of applicants within one of the section 166A(3) classes afforded a reasonable preference to people falling within that class.
>
> 47. In my judgment, those two grounds are both well founded. The disqualification effected by paragraph 2.14(d) is fundamentally at odds with the requirement under section

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

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

54. Following *Jakimaviciute*, the High Court in *R (Alemi) v Westminster City Council* [2015] EWHC 1765 (Admin) struck down a waiting period, by which a homeless applicant was not permitted to bid for social housing, pursuant to Part VI of the Act, for the first 12 months following the council's acceptance of a duty toward her under the main housing duty under section 193(2) of the Act. The argument appears to have been conducted on the basis of an assumption that the waiting period provision could not have been used as a disqualification criterion under section 160ZA(7), but might be justified under section 166A(3):

> "I accept that Mr Peacock is right in saying that what is legally impermissible by using section 160ZA(7) to disqualify a sub-group of persons might possibly be achievable through a different route in a LHA's Scheme – paragraph 50 of *R (Jakimaviciute) v Hammersmith & Fulham LBC.*" (§ 27)

55. Judge Blair QC held that:

> "The differentiation which is permitted by the legislation (and which the Courts should leave to the wide discretion afforded to a LHA and the democratic process) is restricted to adjusting the relative priority of sub-groups by reference to features which do

> nonetheless afford them some opportunity to be allocated social housing within the LHA's current cycle, however remote that possibility might be" (§ 28)

and:

> "… the examples set out in section 166A(5) reflect the legislative intention to recognise features of the circumstances of applicants for whom, as a sub-group, a LHA may justify a differentiation in the priority they are given within a larger group which must be given a reasonable preference in the allocation of social housing (section 166A(3)). What those examples in section 166A(5) do not do is to altogether remove them from the potential of being allocated social housing. …" (§ 29)

The judge rejected an argument that reasonable preference was not to be assessed at a finite 'snapshot' in time but should be measured over a reasonable period of time (§ 22), because the 12-month waiting period was totally arbitrary and did not pretend to be designed so as to manage relative priorities within the groups (§ 31).

56. Judge Blair QC further rejected an argument – similar to one advanced by the Defendant in the present case – that section 166A(3) provides for reasonable preference to be given to groups of applicants rather than individuals (§ 24), stating:

> "… This amended Scheme carves out a whole sub-group which is altogether excluded from the potential of being allocated social housing for 12 months. They have no preference. Part VI of the Act does not permit the removal of a whole sub-group from a group which section 166A(3) requires be given reasonable preference in the allocation of social housing, when that sub-group is not defined by reference to differentiating features related to the allocation of housing, but applies a simple time bar to all who otherwise qualify. ..." (§ 32)

57. Finally, in *R (HA) v Ealing LBC* [2015] EWHC 2375 (Admin), the claimant and her children were victims of domestic violence and moved to the defendant's housing authority's area to escape further violence. The authority accepted that the claimant was a person in priority need to whom it owed the main housing duty under section 193(2) of the Act. The claimant therefore fell within the reasonable preference category in section 166A(3)(b). However, Ealing refused the claimant's application for placement on its waiting list for permanent social housing, on the ground that she did not meet the condition in its housing allocations policy that, save in exceptional circumstances, applicants must have lived in its area for a minimum of five years. The policy did not specify what constituted exceptional circumstances, and the evidence indicated that no consideration had in fact been given to whether the situation of the claimant and her children amounted to exceptional circumstances.

58. At § 19 Goss J stated:

> "The defendant correctly identifies that the purpose of the statutory amendments introduced by the Localism Act 2011 is to

> permit local housing authorities to have greater control of their housing allocation schemes in particular by permitting them to specify classes of persons who would not qualify for an allocation; that statutory guidance which local housing authorities are obliged to take into account has consistently recognised that residency conditions are one form of control which may be introduced; the authorities (R (Jakimaviciute) v Hammersmith and Fulham London Borough Council [2015] PTSR 822 and R (Hillsden) v Epping Forest District Council [2015] 3 All ER 490) confirm that residence conditions are not unlawful per se and can be applied in cases involving reasonable preference; and that the claimant does not suggest that a residence condition per se (a) does not have an objective or reasonable justification in terms of the reasonable and proper policy aims which the defendant is pursuing or (b) that there is no reasonable relationship between those two things."

In *Hillsden*, McCloskey J had upheld an authority's refusal to treat an applicant as eligible for inclusion on its housing register because she did not fulfil the residency requirement in its allocation scheme; in doing so, he had rejected an argument that the 'exceptional circumstances' discretion provided for in the scheme should be applied to her, holding that that dispensation applied only to applicants who satisfied the qualifying conditions (including residency).

59. The defendant in *HA* submitted that the process could not permit examination of individual circumstances in each application to see whether an applicant fell within a reasonable preference category. It also submitted that, in practical terms, given the demand for social housing, almost no London borough could adopt residence criteria that made exceptions for those in reasonable preference categories, in particular homelessness (§ 20). Goss J rejected that argument and held the allocation policy to be unlawful:

> "21. In fact, four London boroughs, each with residence criteria, have adopted policies that do. Islington, Newham, Redbridge and Waltham Forest have policies that provide a form of exception to residence criteria where the applicants are owed a homelessness duty under Part VII of the 1996 Act that the authority has accepted. True it is that they form a small subset, but it is evidence of the ability to frame a housing allocation policy in a way that includes a residence requirement yet ensures that the reasonable preference duty is complied with.
>
> 22. The inability of the policy to identify those who meet the 166A(3) criteria but who do not fulfil the residency criteria highlights the consequences of the exceptionality provision. In this case, the claimant's application was, on the evidence, automatically rejected because she did not meet the residency criteria. No consideration was given to the 166A(3) criteria under the exceptionality provision, nor could it be under the defendant's policy. It is noteworthy that in *R (Jakimaviciute) v Hammersmith and Fulham London Borough Council* [2015]

> PTSR 822 and *R (Hillsden) v Epping Forest District Council* [2015] 3 All ER 490 it was not argued that the exceptionality provision could save the authority's policy. Moreover, para 21 of the 2013 statutory guidance identifies in the section dealing with the need for the provision of exceptions from a residency requirement that "In addition, authorities retain a discretion to deal with individual cases where there are exceptional circumstances". A distinction, therefore, is drawn between general exceptions for people in preference categories and individual applicants in exceptional circumstances.
>
> 23. Although a residency requirement is an entirely appropriate and encouraged provision in relation to admission onto a social housing list, it must not preclude the class of people who fulfil the "reasonable preference" criteria. The defendant's policy does not provide for the giving of reasonable preference to prescribed categories of persons as required by section 166A(3) of the Act. In this respect the policy is unlawful."

60. Goss J also held that the defendant had failed to apply its policy lawfully, because no consideration had been given to whether the claimant's circumstances were exceptional (§ 38).

(F) DISCUSSION: ISSUE 1 (REASONABLE PREFERENCE)

61. The Claimant's claim in relation to this issue is founded on the proposition that it is unlawful for a scheme to disqualify persons falling with a reasonable preference category, based on a past residence rule, thereby giving those persons no preference at all. Such unlawfulness is said to follow from the principles summarised above, and the decision in *HA*, which the Claimant says is materially indistinguishable from the present case. The Claimant submits that although the objection in *HA* was that a person owed the main homelessness duty was excluded, whereas in the present case Lewisham's scheme provides an exception for such persons, the same principles apply to applicants in any other reasonable preference category e.g., here, applicants in overcrowded housing.

62. The Claimant also submits that, whilst the residual 'exceptional circumstances' discretion is not sufficient to render Lewisham's scheme as a whole lawful, it could have been exercised in the Claimant's favour, and in the circumstances no reasonable authority would have refused to do so.

63. The Claimant makes no broader challenge based on the particular characteristics of the Defendant's past residence rule. She does not allege that if, contrary to her case, it can be lawful for an allocation scheme to disqualify persons falling within a reasonable preference category by applying a past residence rule, then the Defendant's scheme was nonetheless unlawful in excluding her particular category of situation, or in doing so for a five-year period.

64. It is clear from *Jakimaviciute*, in particular, that the power to set disqualify criteria is subject to the reasonable preference requirement. It does not, however, follow that there can be no disqualification of any person in a reasonable preference category. That

would in substance be inconsistent with *Watters*, where it was held permissible to refuse to allocate housing to a person with substantial rent arrears, even though that person fell within a reasonable preference category.

65. Equally, reasonable preference does not mean that every person in a reasonable preference category must have priority over every person who does not. It is permissible for particular groups of applicant falling outside the reasonable preference categories to be given greater priority than persons within the reasonable preference categories, provided that the former do not dominate the scheme at the expense of the latter (see *Lin v Barnet LBC*, above §§ 42-43). The defendant's scheme in the present case includes some groups, outside the statutory reasonable preference categories, who are given priority in this way: including council tenants with an urgent need to move because their homes are due to be demolished in the next 24 months, and certain council tenants living in homes larger than they need or with special adaptations which they do not need.

66. The Court of Appeal in *Jakimaviciute* drew a distinction between:

i) attempting to thwart the statutory scheme by redefining it, which is impermissible, and

ii) adopting a rule excluding individual applicants by reference to factors of general application, *"such as lack of local connection or being in rent arrears"*, which is permissible.

67. The rule held to be invalid in *Jakimaviciute* excluded from registration:

> "Homeless applicants placed in long term suitable temporary accommodation under the main homelessness duty, unless the property does not meet the needs of the household or is about to be ended through no fault of the applicant." (Judgment § 2)

It is not difficult to see how such a rule undercut the reasonable preference category in section 166A(3)(b) of the Act:

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

The rule was materially at odds with that provision, because it restricted the preference accorded by the council's policy to the small subgroup (about 13% on the evidence) falling within section 166A(3)(b) who were in short-term or unsuitable accommodation. It went against the evident policy underlying section 166A(3)(b), which was to give reasonable preference in terms of housing allocation to this group of homeless persons, thus moving them from temporary to permanent housing. The rule in substance fundamentally undercut the statutory purpose.

68. By contrast, the use of a qualifying criterion based on residence is not fundamentally at odds with the gist or purpose of section 166A(3). Instead, it is a rule excluding

individual applicants by reference to a factor of general application, namely local connection, of the kind which the Court of Appeal in *Jakimaviciute* in principle considered to be acceptable. Further, the criterion of local connection is a factor with legitimate relevance to housing allocation, and is one which the December 2013 statutory guidance quoted earlier urges housing authorities to adopt. The fact that (even on the Claimant's estimate) the excluded portion of the relevant category of applicants is a minority of about a third (see § 23), by contrast with the position in *Jakimaviciute*, is also consistent with the view that the qualification criterion does not fundamentally cut across the relevant reasonable preference category. Moreover, the shortage of permanent social housing is such that most of the categories of applicant eligible for housing allocation under the Defendant's scheme would appear to fall within the section 166A(3) reasonable preference categories. If a residence requirement could not lawfully be applied in such cases, there would seem to be relatively little scope for the practical operation of such a requirement: a result that would be at odds with emphasis on local connection in the December 2013 statutory guidance.

69. I do not accept the Claimant's submission that a disqualification criterion of this kind can lawfully be applied only on a case by case basis, involving individual assessment of the circumstances of each applicant.

i) As a matter of principle, there is no reason why local connection should not be taken into account through the adoption of a general rule. The Defendant cites in this regard *British Oxygen Co v Minister of Technology* [1971] AC 610, where it was stated that the Minister was entitled to exercise his discretion by making a general rule, so long as he remained *"always willing to listen to anyone with something new to say – of course I do not mean to say that there need be an oral hearing"* (ibid., p. 624G-625E). I consider that a general rule may equally be adopted in the present context.

ii) The present Claimant highlighted the individualised consideration which the Appeal Panel in *Watters* gave to the circumstances of the applicant. Nonetheless, the Panel's task there remained one of applying a rule of general application, the content of which was as quoted in § 34 above. *A fortiori*, Parliament has now conferred an express power to make rules of general application in the form of qualification criteria.

iii) There is a range of types of rule which, one can envisage, could rationally be made in this regard: relating for instance to financial resources, rent arrears and behaviour, in addition to local connection. Whilst section 166A(5) makes express provision for such criteria to be used when prioritising housing allocation among people falling within one or more of the reasonable preference categories, that does not prevent their legitimate use as qualifying criteria pursuant to section 160ZA(7).

iv) I do not understand the Court of Appeal's reference in *Jakimaviciute* § 45 to "*individual applicants*" to mean that any qualification criteria affecting persons within a reasonable preference category can be applied only on an individual case by case basis. The court referred in that paragraph to the adoption of *"a rule"* and to *"factors of general application"*. That language is consistent with the use of a general local connection rule such as a years of residence criterion. The contrast which the Court of Appeal was seeking to draw in using the phrase

> "*excluding individual applicants by reference to factors of general application*" was, as I understand it, with an impermissible rule purporting in substance to redefine the reasonable preference category by drawing the line in a different place from that chosen by Parliament.

70. I also do not accept the Claimant's suggestion that there is a fundamental distinction between 'nullifying' a reasonable preference on the basis of rent arrears and on the basis of lack of local connection. The Court of Appeal in *Jakimaviciute* § 45 appeared to view those two criteria as relevantly similar. Further, as the Defendant points out, section 166A(3) does not specify what factors may or may not diminish or nullify a reasonable preference (and nor does section 160AZ relevantly limit the types of qualification criteria that can be applied). Neither provision states or implies that any such factor must relate to the applicant's conduct. It is therefore a matter for a local housing authority's judgment to make a rational decision as to what factors may be taken into account (cf *R(Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190 §§ 116-118).

71. It is true that the statutory guidance quoted in § 10 above warns housing authorities to:

> "… avoid setting criteria which disqualify groups of people whose members are likely to be accorded reasonable preference for social housing, for example on medical or welfare grounds"

adding that they may, however, wish to adopt:

> "criteria which would disqualify individuals who satisfy the reasonable preference requirements. This could be the case, for example, if applicants are disqualified on a ground of antisocial behaviour" (§ 3.30)

However, I do not read the first passage quoted above as meaning that authorities should avoid criteria that would result in the disqualification of <u>any</u> person within a reasonable preference category. That would, as I have noted, leave little scope for local connection criteria to operate in practice. It seems more likely that the passage is aimed at discouraging criteria which, whilst at face value seeming unobjectionable, will in practice be likely to have a disproportionately adverse effect on persons within a reasonable preference category. The second passage quoted above may or may not be directed at individualised case by case assessment, but even if it is, it does not in my view implicitly preclude rule-based disqualification criteria.

72. Goss J in *HA* accepted in principle that residence conditions were not unlawful *per se* and could be applied in cases involving reasonable preference (§ 19). However, he concluded that Ealing's residency requirement was unlawful because such a requirement *"must not preclude the class of people who fulfil the "reasonable preference" criteria"* (§ 23). The latter statement must, I think, be interpreted as meaning that a residence requirement must not exclude <u>any</u> person falling within a reasonable preference category (since there will clearly have been many people in the relevant reasonable preference category whom Ealing's resident requirement did not exclude). I therefore understand Goss J to have held that a residence requirement imposed as a qualification provision pursuant to section 160ZA(7) cannot lawfully apply to persons within a reasonable preference category. On that basis, I do not

consider that *HA* is distinguishable from the present case, and I should therefore follow it unless convinced that it is wrong (*R v Manchester Coroner ex p. Tal* [1985] QB 67, 81; *Willers v Joyce* [2016] UKSC 44 § 9: *"puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so."*).

73. It is not clear to me how, if so understood, the conclusion reached in *HA* can be reconciled with the approach taken in *Watters* (rent arrears), or the Court of Appeal's recognition in *Jakimaviciute* that reasonable preference does not preclude rules excluding individual applicants by reference to factors of general application such as lack of local connection or being in rent arrears: save, perhaps, on the unsatisfactory basis that such rules must not merely include an 'exceptional circumstances' proviso but actually require specific case by case consideration of each would-be applicant's particular facts (as to which see § 69 above). Regrettably, therefore, I am driven to the conclusion that, in so far as *HA* holds that a residence requirement imposed as a qualification provision pursuant to section 160ZA(7) cannot lawfully apply to persons within a reasonable preference category, it is incorrect. I do not suggest that the outcome of *HA* was incorrect on the facts: it may be that the residency condition in question did not provide reasonable preference to the extent that it applied to homeless persons fleeing domestic violence, and in any event Goss J held the policy to be unlawful on several other grounds.

74. As noted in § 63 above, the present case does not raise the question of whether the particular residence requirement here, as applied to persons in the "*overcrowded*" reasonable preference category, is a lawful choice of how and where to apply the residence requirement. That question would entail deciding whether, viewing the matter in the round, the Defendant's scheme – including the qualification criteria – gave reasonable preference to persons in overcrowded accommodation. Determination of that issue would require a wider range of evidence and argument than exist in the present case, and would need to take into account factors such as the Claimant's point that past residence criteria can operate harshly against persons with an unsettled housing history, as well as all the countervailing considerations. Having regard to (a) the shortage of housing as disclosed by the evidence, (b) the range of severity of the housing needs catered for by the Defendant's scheme (in which non-serious overcrowding comes a long way down the priorities list) and (c) the fact that the residence requirement is inherently temporary rather than necessarily permanently excluding the affected individuals, I would have inclined to the view that the 5-year residence requirement is compatible with the reasonable preference duty, at least as applied to non-serious overcrowding cases. I mentioned a concern during oral argument that the requirement might operate harshly in relation to some of the Band 1 and Band 2 emergency and high priority situations listed in § 15 above. Counsel for the Defendant indicated that other answers may be available in such cases, for example pursuant to the main homelessness duty, though the Claimant did not accept that that could provide an answer in the context of housing allocation (as distinct from the provision of temporary accommodation). However, those issues do not arise for determination in this case.

75. For these reasons, I do not accept the Claimant's primary submission of law. It also follows that I do not accept the Claimant's subsidiary point that the exceptional circumstances discretion should have been exercised in her favour: the only ground on

which the Claimant suggests this should have occurred is that the Scheme as applied to her was otherwise unlawful because she fell within a reasonable preference category. However, I have concluded that falling into a reasonable preference category is not sufficient to require the disapplication of a residency requirement. The Claimant's challenge to the review decision fails for the same reasons.

(G) DISCUSSION: ISSUE 2 (THE SIX MONTH RULE)

76. The Claimant submits that, even if the Scheme is lawful, the Defendant's further decision dated 14 October 2020 was nevertheless unlawful because it was made on the basis of a misinterpretation of §2.2.2. As noted earlier, that provision states:

> "**2.2.2 If you do not have a local connection with Lewisham**
>
> If you do not have a local connection with Lewisham, your application will be disqualified for a period of 6 months from the date of our decision.
>
> Local connection means that:
>
> - You are currently resident in Lewisham and have been resident for a period of 5 years
>
> …"

77. The meaning of a housing allocation scheme is a matter of law for the court to determine for itself. The court should recognise that such a scheme is not an enactment and should be read in a practical, common sense, and not in a legalistic way (*R. (Flores) v Southwark LBC* [2020] EWCA Civ 1697 §§39-40). Nevertheless, "*It can be expected that the scheme will have been framed with the express statutory requirements in the forefront of the draftsman's mind. It is appropriate to expect some precision in the way in which those matters are expressed*" (*R(Alam) v L. B. Tower Hamlets* [2009] EWHC 44 (Admin) §41).

78. The Claimant submits that, reading § 2.2.2 in context, it means the disqualification is for a limited period of 6 months only, for the following reasons.

    i) The natural reading of §2.2.2 is that the reference to a 6 month limit describes a limited period of disqualification. By contrast, the Defendant's reading is unnatural as it means there is a twofold consequence of applying but failing the local connection rule: (a) an applicant will continue to face disqualification until the substantive criteria listed in §2.2.2 are met (e.g. 5 years local residence); and (b) in addition the applicant will be prevented from re-applying for a minimum period of 6 months, whether or not the substantive criteria listed in §2.2.2 are subsequently met.

    ii) The Defendant's reading would produce anomalies. An applicant who applied but failed the local connection test would be debarred from re-applying for six months irrespective of any change of circumstances, for example if the applicant needed to move urgently to Lewisham to take up an offer of employment, or to give or receive care or support from a family member in the borough. An

applicant who applied after 4 years and 10 months of residence would face, in effect, a four month penalty for having applied too soon.

iii) The Claimant's reading is confirmed by the other disqualification rules at §2.2.1, §2.2.3 and §2.2.4. In each case the rule provides for disqualification for a fixed period of six to twelve months, after which the disqualification ceases to apply. Thus, if it is decided that an applicant has deliberately foregone resources within the terms of §2.2.1, they are disqualified for "*a period of six months from the date of our decision*" (as in §2.2.2). If the applicant re-applies more than six months later, §2.2.1 cannot operate so that the applicant is disqualified again, or the six month limit on disqualification would be wholly redundant. There is no basis for reading §2.2.2 any differently. It makes no difference that the triggers for the other time-limited qualification rules are one-off events whereas the trigger for disqualification under § 2.2.2 is an ongoing state of affairs: no such distinction is made within the Scheme, which uses the same wording for each of the five qualification rules (including §2.2.2).

iv) The terms "*disqualify*" and "*disqualification*" in §2 of the Scheme plainly derive their meaning from the concept of a "*qualifying person*" in Part VI of the Act. In particular, the basis of §2.2 is section 160ZA, and the power given to the authority under 160ZA(7) to "*decide what classes of persons are not qualifying persons*". Section 160ZA is concerned with qualification for housing. It is not concerned merely with when an application must be considered.

v) The Claimant's reading does not render the past residence rule ineffective: rather, the effect of the rule is to award applicants who satisfy the residence condition an additional preference in the form of a 6 month 'head start', which is entirely in accordance with section 166A(5).

79. I do not accept those submissions. In my view the clear objective of § 2.2.2 is to disqualify persons lacking a "*local connection*", and to treat 5 years' residence in Lewisham as the basic benchmark for such a connection, consistently with the statutory guidance quoted in § 11 above. The Claimant's interpretation would mean that 'local connection' in substance required only 6 months' wait after making an application to join the register, and the 5-year criterion referred to in § 2.2.2 would be virtually redundant. That cannot be what the framers of the Scheme intended.

80. The natural meaning of § 2.2.2 in my view is that 'local connection' is *prima facie* defined as 5 years' residence, subject to the alternative criteria set out in the ensuing subparagraphs (e.g. persons who need to move to Lewisham for work and will suffer hardship if they cannot move). The effect of the provision for a 6-month period of disqualification is not that the 5-year criterion then falls away upon a second application made at least 6 months after the first. Rather, it is that no fresh application can be made at all, for example relying on alternative grounds, within 6 months of the decision on the first application. The 6-month rule may thus be regarded as discouraging excessive repeat applications. Both the 5-year criterion and the 6-month rule form part of the qualification criteria which the Defendant has put in place pursuant to section 160ZA(7).

81. It is true that the 6-month rule could operate harshly in some circumstances, but it remains subject to the Defendant's discretion under § 2.2.7 of the Scheme to reinstate

a disqualified application in exceptional cases. In oral submissions the Claimant also suggested that the 6-month rule may be contrary to section 160ZA(11) of the Act, which provides that *"A person who is not being treated as a qualifying person may (if he considers that he should be treated as a qualifying person) make a fresh application to the authority for an allocation of housing accommodation by them."* It is not necessary to decide whether or not that is the case. If it were the case, then the consequence in my view would be that the 6-month rule would have to be struck down or disapplied, not that the 5 years' residence criterion would fall away.

82. Scheme §§ 2.2.1, 2.2.3 and 2.2.4 include provisions for 6 or 12 months' disqualification where financial assets are deliberately disposed of, where a housing offer is refused, and where applicants repeatedly fail to attend viewings or sign tenancy agreements. By contrast, where an applicant's financial resources exceed the relevant limit, § 2.2.1 provides that they will be *"disqualified from the housing list for so long as your household's income or assets exceed the limits"*. The Claimant suggests that § 2.2.2 would have used the latter type of formulation if the 5-year criterion were intended to apply on any subsequent application. Instead, § 2.2.2 is worded similarly to the other 6 or 12 month disqualification provisions, which apply once only.

83. The 5-year residence is an ongoing state of affairs, unlike the examples referred to in the first sentence of § 82 above. If it stood alone, it could thus have been phrased in a similar manner to the financial resources requirement. However, (i) it does not stand along but sits alongside other tests for 'local connection' including need to move for work, where the *"so long as"* formulation would make less sense; (ii) the Defendant evidently made a deliberate choice to apply to the 5-year criterion (and its alternatives) in additions to the 6-month rule, which is explicable for the reasons indicated above; and (iii) an interpretation based on the similarities and differences of wording used in § 2.2.2 versus §§ 2.2.1, 2.2.3 and 2.2.4 would in any event have to yield to the clear and obvious purpose of § 2.2.1 as indicated in § 79 above.

84. I therefore do not consider the Claimant's second ground to have merit either.

(H) CONCLUSIONS

85. For these reasons, the Claimant's claim must be dismissed.

86. I am grateful to both parties' counsel for their very cogent and informative written and oral submissions.