IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 456 (Admin)

No. CO/3538/2021

Royal Courts of Justice

Friday, 4 February 2022

Before:

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
TRX — Claimant

- and -

NETWORK HOMES LIMITED — Defendant

MR J. BURTON QC appeared on behalf of the Claimant.

MISS A. HALL appeared on behalf of the Defendant.

J U D G M E N T
(Via Microsoft Teams)

MRS JUSTICE ELLENBOGEN:

1 This judgment follows the 'rolled-up' hearing of the Claimant's application for judicial review of the Defendant's decision made on 12 July 2021 to refuse her application for a management transfer to alternative accommodation ("the Decision") under its Allocations and Lettings Policy ("the Policy"). Six grounds of review (as amended) are advanced and were considered over a full day's hearing. Pragmatically, with the exception of ground 6, the Defendant did not contend that any of those grounds was not arguable with a realistic prospect of success and I am satisfied that each of grounds 1 to 5 clearly crosses that threshold. I address below the question of permission for ground 6 and the substantive merit in all grounds following a summary of the salient background facts. Whilst the latter are not in dispute, the relevance and/or significance to the grounds of review of certain matters is in issue and will be considered when addressing the grounds of review as necessary. In resisting each ground of review, the Defendant's overarching contention is that the Decision is not amenable to judicial review because, in making it, the Defendant was not exercising a public law function.

Background facts

2 Since 2018 the Claimant has been an assured tenant of a two-bedroom property ("the Property") let to her by the Defendant in which she lives with her three children, respectively aged 11 years, 7 years and 5 months. Her former partner, with whom she was in a relationship for six years, until 2014, is the father of the two older children. They have never lived together. The Claimant had applied to the local authority in 2009 for accommodation as a homeless person and the Property was allocated pursuant to Part VI of the Housing Act 1996. The Defendant is a registered provider of social housing which, pursuant to an agreement with the local authority, makes properties available for allocation by the latter. It describes itself as being *"one of the largest registered providers in England, managing homes across 36 local authorities with an active development programme. It owns and manages a range of general needs stock, sheltered schemes, temporary accommodation and private sector units"* (see para.1.2 of the Policy).

3 In February 2020, the Claimant commenced bidding for alternative, three-bedroom, properties, in the same area, under the Defendant's Allocations and Lettings Policy on the basis of over-occupation of the Property. For the purposes of that process, she was granted a Band C rating. On 2 March 2021, she made an oral request of the Defendant for a management transfer, in effect, to increase her priority status from Band C to Band A on the basis that she was at risk of ongoing domestic abuse by her former partner, ("X"). In the course of their telephone conversation, Mr Justin Kyem, Network Neighbourhood Officer, advised the Claimant that the Defendant did not have any empty properties available and that her best option would be to relinquish her tenancy and approach another local authority as a homeless person. The Claimant stated that she had waited many years to obtain an assured tenancy and did not want to relinquish it. Mr Kyem agreed to refer her case to a panel and asked her to provide supporting evidence, including a police report of the abuse which she had suffered. He reiterated his advice, that she seek assistance from a local authority. The Claimant approached a local authority, which advised her to seek a management transfer from the Defendant.

4 Later that day, the Claimant provided Mr Kyem with a letter dated 12 February 2021 from her independent domestic violence adviser at the Asian Women's Resource Centre ("AWRC"), described as a specialist women's organisation providing support for BME women and children across London, providing a free, confidential, non-judgmental and professional service via the provision of advice and information, outreach and emotional

support services and tackling the many inter-related issues surrounding abuse, including immigration, homelessness, welfare benefits and legal issues involving children. That letter set out the history of the Claimant's circumstances. In so doing, it recorded that: (a) the last incident of physical abuse had taken place in 2014, when X had grabbed the Claimant by her clothes and screamed in her face in the presence of their children; (b) in February 2019, whilst their children had been staying with his mother, X had telephoned her, been verbally abusive and accused her of abusing the children, claiming that the police and social services had said that she should not have contact with them. Later inquiries of both agencies by the Claimant had revealed that no report had been made about her; (c) the Claimant had informed AWRC that X had breached a court order, issued on 27 February 2019, which had prohibited harassment and threats towards her by X; (d) X had continued to harass and intimidate the Claimant during recent proceedings relating to child contact; (e) X knew where the Claimant lived; and (f) X had recently changed religion and had been imposing his religious ideas on the children. Recently he had informed the older of their two children that she would not need to attend school the following year because he, they and their paternal grandmother would be in their new home, in Heaven, but that her mother would not be there as she had not converted to his new religion. Amongst the actions said to have been taken by AWRC were (a) the conducting of a thorough risk assessment and safety plan; (b) the referral of the Claimant's case to MARAC *"due to the high risk and asked for a MARAC letter in support of her case"* (MARAC is the acronym for Multi-Agency Risk Assessment Conference, in which the agencies involved discuss high risk domestic abuse cases and develop a safety plan for the victim and her or his children); (c) referral of the Claimant to family law solicitors; and (d) referral of the children to a safeguarding team *"due to risk by the father of the children"*. The letter concluded with the following statement:

> "We judge [the Claimant's] case to be high risk in terms of both the history of domestic violence and the current risk to [the Claimant] and her children. As [the Claimant] disclosed to us, she and her children are not safe in the current placement as [X] knows the address and has been threatening her many times.
>
> If you require any further information, please do not hesitate to contact me."

5 By email dated 2 March 2021, Mr Kyem asked the Claimant to confirm whether she was being supported by social services and the police and asked her to provide documents from both agencies advising about her case. She replied stating that she was being supported by both, giving the latest police reference number, stating that the police had referred her to social services and that she would obtain the report from her social worker. On 3 March 2021, the Claimant sent a further email to Mr Kyem, stating that the social worker was still completing the supporting letter, that the police had said that she could use their referral to social services and asking whether the referral letter could be used. Mr Kyem replied on 5 March 2021, stating, *"Please forward any documents you feel will support your case."*

6 On 18 March 2021, the Claimant obtained an *ex parte* non-molestation order, under s42 of the Family Law Act 1996, effective until 18 June 2021, or further order in the meantime. As set out in her supporting witness statement, her application had been prompted by X's repeated calls, on 6 February 2021, relating to child contact. It was said that, when their eldest daughter had answered a call, X had "manipulated her into stating that she did not want to see her half-siblings. He was aware that she had become frustrated by his persistent phone calls, so he said, "If you don't ever want to see your brother or sister again, let me know and I won't call you", to which she agreed. He then said, "You'll never see them again" and "I'm not going to call you". Thereafter, the Respondent gave my phone number

to his friends and family members, who began contacting me regarding the situation." By that order, X was forbidden to use or threaten violence against the Claimant, and to intimidate, harass or pester her. The orders made included a zonal order prohibiting X from: (a) going to, entering or attempting to enter the Property, or any property where he knew or believed the Claimant to be living; and (b) going within 100 metres of such property, except that he *"may go to the property without entering it for the purpose of collecting the relevant child[ren] for, and returning them from, such contact with the child[ren] as may be agreed in writing between the applicant and the respondent or in default of agreement ordered by the court"*. A return date of 9 April 2021 was listed.

7 On 12 May 2021, the Claimant sent an undated letter from her social worker, Ms Lewis, on behalf of the London Borough of Brent Children and Young People's Service, addressed "To Whom it May Concern". The letter included the following text:

> "The reason I am writing to you is that the Local Authority is extremely worried about the family living at the above-mentioned address. Brent Children Service has known [the Claimant] and her children since she separated from the father of the children because of persistent and escalating domestic violence.
>
> The children have witnessed the acrimonious relationship between their parents, which includes the abuse of their mother by their father and this has affected their emotional wellbeing, leaving them traumatised. Therefore, [the Claimant] and her children are in need of urgent housing as there have been ongoing threats of violence made to her and her children's life by the father of the children, [X].
>
> **Background history:**
> [The Claimant] and her children have had a long history of experiencing domestic violence since 2010, which includes verbal and physical violence perpetrated by [X].
>
> [The Claimant] is a British National who lives with her two daughters in London. [The Claimant] had been in a very abusive relationship with her ex-partner, [X], for 6 years and they separated in 2014. [X] is the father of the children. [The Claimant] informs that during this time in their relationship she has experienced physical and emotional abuse by [X].
>
> In 2008, [X] punched her in the face, which left her with chronic jaw pain. In 2009, [X] broke entry to locked bathroom window, while she was getting ready to go out, shattering the windows. [X] accused [the Claimant] of cheating and threatened to kill her with a hammer.
>
> There was an incident in 2011 in which [the Claimant] called the Police – 18/09/2011 (CAD no: …)
>
> The physical abuse continued in 2014, when [X] grabbed her by her clothes and screamed in her face in front of their children.
>
> In 2014, Children Social Care and Police became involved and concerned for the oldest child… when father reported a sexual assault incident to mother [the Claimant]. It was reported that a maternal child uncle touched [the oldest child] inappropriately - father did not take part in the

investigation and withdrew his allegations. The Police found it bizarre that a father would jeopardise the children's safety in such manner. A Section 47 investigation was carried out and found that the allegations made by father were unsubstantiated. The case was managed under a Child in Need plan due to emotional abuse and closed in 2015.

[The Claimant] stated that in September/October 2018 [X] stopped contact with the children, [X] does not pay Child Maintenance.

In January 2019, [X]'s mother contacted [the Claimant] and asked to see the children for a few hours.

In February 2019 she requested to see the children for a few days. [The Claimant] agreed to both of these requests. On the 22.02.2019, while the children were with his mother, [X] called [the Claimant] and was verbally abusive towards her.

In February 2019, Children Social Care became concerned for the safety and wellbeing of the children when Police raised concerns that [X] had taken the children against their will and accused [the Claimant] of physically abusing them.

During this period, [the Claimant] did not have contact with the children as they refused to have contact with their mother. When the social worker interviewed the children, they reported physical chastisement against their mother. The children returned to their mother's care after 2 weeks. Children Social Care closed the case in March 2020 after the Section 47 investigation found the allegations were unsubstantiated.

In March 2020 [the Claimant] tried to work things out with [X] for him to have contact with children, she applied for contact arrangements through the courts. Children Social Care prepared the Section 7 report and it was recommended that the children resume contact with their father. [The Claimant] informed that she did not want to come between the children's decision to have contact with their father, so that there are no resentments between them, therefore she accommodated the contact.

In November 2020, Children Social Care received a referral from the Police raising concerns that father had told the children that they would not be going to school next year, as they will be in heaven.

Children social care became involved again following the above referral and assessed that [X]'s mental health is unstable. [X] has recently converted to "Judaism" and has been imposing his religious ideology on the children. This has left the children experiencing high anxiety, afraid of hearing about death and dying. The children stated that they were forced against their will to draw pictures of what their homes would look like in heaven. The children reported that they cried whilst drawing the pictures.

[X] has since then sent images of a documentary on Netflix to [the Claimant], which refers to the "antichrist" for the children to watch. [The Claimant] felt this was not appropriate for the children to view

given their ages 7 and 10 years old. This situation has left the children traumatised by the ordeal and they have refused to have contact with their father.

The family continue to receive high volumes of abusive and threatening calls from the father and his family. Although [the Claimant] has, a non-molestation order in place the family is fearful for their lives living at this address as [X] and his family know their whereabouts.

Both children are receiving counselling to address their high anxieties and the trauma they have experienced throughout their young lives.

Children Social Care are extremely concerned about the safety of this family as [the Claimant] has continued to report harassment and feel their lives cannot progress for fear that [X] continues to watch and monitor their family home surroundings.

[The Claimant] has worked well with Children Social Care to get support to safeguard and protect her and the children.

Children Social Care are very concerned for the children living at this address due to the ongoing risks of the children being exposed to their father's behaviour.

[X] has made threats to kill and threats to take the children at any opportunity.

I believe the family are no longer safe at this address therefore I recommend and support the family to a Housing move so they can be safe and comfortable in their home environment so that the children can begin their recovery in a home where the address is not known to their father.

[The Claimant] is working with the Brent IDVA and the police, the current home is flagged up with the police so that if they are called to the address they will respond based on the domestic violence risk to occupants.

I look forward to a prompt response in this matter, therefore, if you require any further information please do not hesitate to contact me on the details above."

8 On 7 June 2021, the family court made a child arrangements order under s.8 of the Children Act 1989, at a final hearing on notice to X, who did not attend and was not represented. The recitals to that order included those set out below:

"…

AND UPON the father failing to attend the hearing, despite the Court making attempts to contact him, nor did the father respond to an email sent by the Court which contained a link to join today's hearing;

> AND UPON the Court noting that the father also failed to attend the hearings of 5th July 2019, 3rd February 2020 and 23rd December 2020;
>
> AND UPON the Court hearing from Counsel for the mother, who invited the Court to dismiss the father's application;
>
> AND UPON the Court being informed that the children no longer wish to have contact with their father, it being explained on behalf of the mother that she remains concerned about the father imposing his newfound religious beliefs on the children in a way that is harmful to them;
>
> AND UPON the Court being informed that the children have explained to Brent Children's Services that they had witnessed arguments between the father and his current partner and that the father had made derogatory remarks about the mother and had been discussing matters relating to these proceedings during previous contact;
>
> …"

The court ordered that X's application be dismissed, with no order for contact, and that, as a final order, their children should live with the Claimant.

9 On 11 June 2021, Mr Kyem informed the Claimant that he would go through the documentation and make contact by 16 June. A decision was chased on 18 June. By letter dated 1 July 2021, Mr Kyem informed the Claimant that he had looked through all of the documentation which she had provided and would present it to the panel on 8 July 2021. He stated:

> "You advised you are already in contact with the police, but cannot see any supporting documentation from the police. If you have this, please send this over to me urgently. I have also requested information from the police regarding your case to ascertain where they are at with the investigation. I must advise you if you are in fear of your life and feel you can no longer reside at your property you can present yourself to any local authority across England, Scotland & Wales, advise them of your situation and they will be able to offer you emergency accommodation. Network Homes do **NOT** offer emergency accommodation. Therefore, we have provided other alternative rehousing options below for you to consider…
>
> …
>
> If you would like to discuss the contents of this letter, please do not hesitate to contact me."

10 On 5 July 2021, the Claimant asked Mr Kyem whether he had contacted her social worker regarding the police referral. In an email, copied to Ms Lewis, of the same date, Mr Kyem replied, *"During our last conversation I advised you that I had carried out my own police disclosure and that if you were able to provide me with supporting documentation from the police. Please try and get this to me by tomorrow as I am presenting your case to panel on Thursday this week."* The Claimant responded, *"Sorry, Justin, I must have misunderstood. I have spoken to [Ms Lewis] and she will do so today."* In reply to a further email of the same date from Mr Kyem, enquiring as to her desired outcome, the Claimant stated:

"…

> Safety. A safe, stable home environment at a new address/area unknown to my ex-partner. I have children and cannot be looking over my shoulder every day and wondering who's at the door. My daughter is at an age where she could go to school on her own in September and I feel I cannot take that risk. I have taken the steps from trying to house swap to bidding on Locata, but no success. I ask that I am put on a management transfer and a higher banding so I can move as quickly as possible without distressing my children any further."

11 On 6 July 2021:

a. Mr Kyem replied to the Claimant, stating, *"…I will use the below as part of your request for a management transfer. Please be advised, depending on the outcome, the process will be you having to bid, as we do not offer direct offers. Network Homes do not offer emergency accommodation, nor do we have empty properties. I would advise you to continue exploring all options that have been provided to you, but also if you feel you and your family are not safe you can present yourself homeless to any local authority who have a duty of care in supporting you…"* ;

b. Ms Lewis wrote to Mr Kyem in response to his request for the police referral information. There followed a summary of the information which had been provided in November 2020, which was consistent with the information previously relayed. Ms Lewis concluded her email:

> "There are still custody concerns between mother and father, in my opinion. Further contact should be made with the children to ensure they are not scared or being confused into believing they are unsafe with their mother and there is nothing more sinister in the remarks made by the father. His passion for his religion may be blurring the lines of what is acceptable learning and information for a child.
>
> Children Social Care are highly concerned for this family living at this home environment as their concerns for Father are concerns for Father's unstable mental health."

In a further email of the same date, Ms Lewis informed Mr Kyem that he should not hesitate to contact her if there were any further enquiries;

c. Within an exchange of various emails, the Claimant asked Mr Kyem to mention to the panel that she needed to be on a higher banding, *"as we all know bidding is not successful on such low banding"*; Mr Kyem stated, *"To be clear, whatever the panel decide regarding banding, (whether A, B, C or declined) you will be bidding like everyone else. There is no higher level. Everyone's needs are different."*; the Claimant stated, *"…I understand you may not have empty homes to avail, but at the same time you must read what I write and not misconstrue. After you asked me what I wanted out of this, I answered and I clearly stated I have been exhausting options (and will continue to try) and a change in banding would help. If I have to bid, I understand that and will bid no problem. Everyone's needs are different and mine different to someone else's in that same breath. I didn't ask for a higher level, I asked for a change in banding for success in bidding. Whether A, B, C or Declined I plan to keep bidding.*

Once successful, I can move to a new home."; and Mr Kyem stated, *"Often residents are given the wrong information by different professionals with an expectation that they will be moved immediately or things will happen quickly when, in fact, they do not. I want to be clear with no false hope given to you, hence, why I have advised you of the other options available to you. I have presented many cases to panel when supporting residents and will always present what is available to me, hence, why I have asked for as much documentation as possible and have also carried out my own police disclosure. Please be advised all documentation, including email correspondence from AWRC and* [Ms Lewis] *have also gone into the file, which has been submitted for the panel to review."*

12 By email dated 12 July 2021, Mr Kyem informed the Claimant of the panel's decision. His email is reproduced in full, below:

> "Dear…
>
> I hope all al is well.
>
> I write to you with an update following the management transfer panel held last week.
>
> I presented your case with the evidence you and your support team provided but also with the information provided to me by the police.
>
> Please see the panel's comments & decision below;
>
> **The panel did ask that the resident seek legal advice around the custody of the children and the possibility of obtaining a 'non-molestation' order.**
>
> **A Non molestation order offers a degree of protection for the resident and it is a court order – if this is breached then the police will need to be informed and the perpetrator arrested and charged. As advised by the police, the perpetrator has not visited the home address.**
>
> **We advise that the resident should report to the police and possibly request that the police to put them on a heightened alert list so that the police attend their home within a few minutes of receiving a call from that property.**
>
> **If the resident deems their property and situation unsafe, we would advise they contact any local authority of their choice for immediate temporary re-housing.**
>
> **We are unable to offer any band increase.**
>
> **If there are new incidents and a supporting letter from the police deeming these cases a high risk or a MARAC report then we may reconsider our stance.**
>
> Should you like to discuss the above, please do not hesitate to contact me.

Kind regards…"

13 On 28 July 2021, the court made a final non-molestation order, on notice to X, who had appeared in person. Its effect was to continue the *ex parte* order previously made until 27 July 2022, or further order in the meantime.

14 On 10 September 2021, the Claimant's solicitors sent a pre-action protocol letter challenging the Decision, to which the Defendant's solicitors replied on 30 September 2021. Within that letter, they stated:

> "…
>
> The Defendant does not hold a stock of empty properties available for emergency accommodation and as such any request for a management move can only ever be granted in exceptional circumstances. The Claimant did not fulfil this criteria as she was unable to provide any evidence of threats to life or limb as requested by the Defendant and those threats were not severe or immediate. Further, it was clear that there were other options available to the Claimant in that she could approach the police or local authority to take more immediate and effective action.
>
> The Defendant advised the Claimant to approach the local authority and signposted her to the relevant agencies who could help her, but the Defendant notes that the Claimant does not appear to have sought assistance from the local authority to be re-housed.
>
> …"

The Policy

15 The Policy (last reviewed in December 2020 and next due to be reviewed in December 2023) sets out the framework within which the Defendant allocates, lets and manages voids for all of its properties. Its allocations and lettings policy is at section 3 and includes the following material content:

a. (at para.3.1) *"This document explains how Network Homes allocates and lets its properties. The overall aim of the allocations & lettings policy is to ensure fairness, transparency and regulatory compliance in all key areas of allocations and lettings…"*;

b. At para.3.8:

> "**3.8 Allocations**
>
> 3.8.1 Network Homes works across several local authority areas, each with different nomination arrangements and allocation policies. The priority is to work in partnership with Local Authorities to meet local housing need, provide choice and create sustainable communities.
>
> Network allocates properties through the following routes:
>
> - Local authority arrangements

- Waiting lists for transfers, older person units, move on referrals from agency managed stock, keyworker and intermediate rented stock.
- Specialist referral arrangements including move on.

The Allocations and Lettings Service maintain a record of its allocations for the year to ensure they meet their obligations and can provide a breakdown of their activity at the end of it.";

c. At para.3.10 (sic)

"**3.10.1 Transfers**

Tenants wishing to transfer are subject to an assessment process. They can only qualify after they have held their tenancy for 1 year and they must hold a permanent tenancy. Applications are reviewed every 3 years except management transfers which are reviewed every 6 months. Transfer applicants who refuse three reasonable offers will be suspended for a period of 1 year. With the exception of …, the remainder of the organisation operates a banding system.

Band	Categories
Band A	Life threatening medical; homeless with no temporary accommodation; social services nomination for adoption/fostering purposes; life threatening violence; ex LA service tenancy; urgent decant or CPO; adapted property; under occupier of 1 or more bedrooms.
Band B	Urgent social or medical needs; harassment or threat of violence; homeless; move on quota; decant; statutory overcrowded.
Band C	Social or medical needs; overcrowded; non priority homeless; social services nomination.
Band D	Applicants not in the above bands.

3.10.1.1 Reasons for internal transfers are summarised in the table below.

Reason	Activity Covered
…	…
Management Transfers	Qualifying exceptional circumstances are: • There is a severe or immediate risk to life or personal safety of a Network resident because of domestic violence, harassment, hate crime, safeguarding issues or victim of a serious crime. • Network Homes cannot take any other action to resolve the problem and it is not possible for the police, or the local authority housing or social services department to take quicker or more effective action. • Any other exceptional circumstance must be approved by

	the panel.
…	…

….

3.10.2 Management Transfers

3.10.2.1 A management transfer is where a resident needs to move because of an exceptional circumstance. Exceptional circumstances are set out in the table in 3.10.1.1.

3.10.2.2Making the application:

- If a resident needs to move because of one of the reasons specified above they must contact their Neighbourhood Officer and fill in a Transfer Application stating the Policy grounds that the management transfer is based on. Supporting evidence will need to be required, such as from the police, social services etc. In Hertford a Safeguarding visit and form will be completed.
- Exceptions on rent arrears will be made provided an arrangement is in place.

- The management panel/Safeguarding Panel (including senior staff members from Income, Neighbourhood and Voids and Lettings) will decide who is accepted for a management transfer. The panel will let the Neighbourhood Officer know the decision by writing and let Lettings know to update Northgate.

3.10.2.3 Approval of the management transfer:

- If the management transfer application is approved the resident will get the highest priority to be moved and added to the management transfer list which is held by the Lettings Team in Locata.

- The residents can only bid for a 'like for like' properties in terms of size. Exceptions will be made for under occupation or overcrowding.

- Where there is a real and immediate threat and Network Homes does not have a property available we will work with the local authority to find suitable alternative accommodation.

- Network Homes will only rehouse the household members named on the tenancy.

- Area consideration will have to be factored in if there is a likelihood of the perpetrator finding the survivor. The resident will receive one direct offer only. If this is refused the resident can continue to bid for 6 months then their priority will be reviewed.

- Management transfers are reviewed every 6 months by a management panel to ensure that the applicant is bidding in accordance with their elevated priority.

- Where a management transfer is reviewed by the panel, their priority will either remain the same or be changed. If changed there banding can be changed and they'll be notified.

3.10.2.4 Management transfer not approved:

- The panel can either ask for additional information to make a decision on a management transfer or not accept the management transfer.

- The panel will have to give a reason for this case and they'll let the resident know why. If circumstance change they can re-apply.

Witness evidence

16 In support of her application the Claimant relied upon her own witness statement dated 30 November 2021 and upon statements by Farah Nazeer, Chief Executive of Women's Aid Federation of England, a national charity working to end domestic abuse against women and children, dated 20 December 2021, and Rebecca Goshawk, Head of Partnerships and Public Affairs at Solace Women's Aid, a provider of services for survivors of violence against women and girls in the UK, and Helen Mowatt, the Claimant's solicitor at Public Interest Law Centre, by whom she has been represented since 25 August 2021, each dated 10 January 2022. The Defendant relied upon two witness statements by Mr Kyem, respectively dated 20 December 2021 and 24 January 2022.

The Grounds of Review (as amended, with the leave of Swift J, on 21 January 2022)

17 As pleaded, the Claimant contends that the Decision is unlawful on each and all of the following grounds;

a. Ground 1: It was inadequately reasoned; it did not address the criteria set out in the Policy, nor explain why they had not been met. The Defendant's pre-action response advanced matters no further, in essentially repeating no more than the criteria. In the presence of credible evidence from AWRC and Ms Lewis, it had been incumbent on the Defendant to provide reasons sufficient to allow the Claimant to understand why whose and her own representations had not been accepted. It had not done so;

b. Ground 2: The decision-maker had misapplied the Policy. The Defendant's pre-action response appeared to restrict domestic violence to acts of physical violence. That differed from the published Policy. Acting in accordance with an unpublished policy which contradicts published policy is unlawful (*Lumba v Secretary of State for the Home Department* [2011] UKSC 12);

c. Ground 3:The Decision is irrational, on two bases:

(i) There was nothing to substantiate the observation in the pre-action response letter that the Claimant *"could approach the police or local authority to take more immediate and effective action"*: the local authority had confirmed, via Ms Lewis, that it supported the Claimant's application for a management transfer and there was no suggestion that it could, or would, accommodate her instead; had that been the Defendant's view, it should have made an inquiry of Ms Lewis, but did not do so. The role of the police is entirely reactive; a complaint made after the event could not rationally be "more effective" than preventing its occurrence by rehousing the Claimant; and

(ii) Insofar as the reason for the Decision was that the criteria in the Policy were not met because the Claimant had obtained a non-molestation order and X had not visited her home address, that was irrational. There had been a history of X committing acts of domestic abuse, including physical abuse and threats thereof, away from the Claimant's home and by other means, such as telephone; X had breached previous court orders designed to protect the Claimant and her children; social services did not consider the family to be safe at the Property, despite the non-molestation order; the Claimant's home had already been flagged with the police; and, although X would be arrested and charged if he were to breach the order, by then the abuse would have taken place;

d. Ground 4: The apparent application of a policy requiring survivors of domestic violence to make themselves homeless is an irrational policy in placing them in the invidious position of having to choose between existing stable accommodation and taking their chances with precarious, unidentified accommodation which the local authority might provide. By contrast, a management transfer would be to another property, having equivalent security of tenure. Whilst the Defendant was entitled to set criteria which prioritised cases rationally, a policy which forced a choice between homelessness and remaining at risk was not rational. Further, as the Policy explains, *"where there is a real and immediate threat and Network Homes does not have a property available we will work with the local authority to find suitable alternative accommodation."*;

e. Ground 5: The requirement that domestic violence be reported or the subject of supporting evidence is an irrational policy. The Decision discloses a sub-policy which requires that domestic violence be reported to the police or referred to MARAC: *"If there are new incidents and a supporting letter from the police determining these cases are high risk or a MARAC report then we may reconsider our stance"*. That echoes paragraph 3.10.2.2 of the Policy: *"supporting evidence will need to be required, such as from the police, social services, etc"*. It is well known that many survivors of domestic violence do not report it to the police or other public authorities, as recognised in the Homelessness Code of Guidance, at 21.14 and 21.24. Whilst the Defendant is not subject to that code, it illustrates the widely acknowledged principle that domestic abuse survivors should not be required to corroborate their experiences with police, other organisations or persons, owing to the particular difficulties which they face in obtaining such evidence. Accordingly, the Defendant's sub-policy risks overlooking cases of domestic violence for lack of a report and is an irrational and self-defeating fetter. Alternatively, requiring MARAC or police evidence, in particular, is irrational; the absence of either is not a reliable indicator of risk;

f. Ground 6: The requirement (imposed by paragraph 3.10.2.2 of the Policy) that domestic violence be reported or corroborated is irrational and constitutes unlawful indirect discrimination, contrary to ss.19 and 29 of the Equality Act 2010 ("the EqA"). In allocating social housing, the Defendant is acting as a service provider, or is exercising a public function. *"Women are disproportionately likely to face domestic violence, ... often not reported at all, still less to relevant authorities. Therefore, whilst it may be rational to require evidence from the police or other relevant authorities when considering applications for transfers not based on domestic violence, the requirement places victims of domestic violence at a particular disadvantage. Moreover, this requirement is not a proportionate means of achieving a legitimate aim - it is not rationally connected to the objective of protecting survivors of domestic violence; on the contrary, it defeats the purpose."*

The Summary Grounds of Defence and Detailed Opposition (pre-dating the Amended Statement of Facts and Grounds)

18 It is the Defendant's position that, as a registered provider of social housing, it may be treated as a public body, but that, in the management of its stock and internal transfers, it is acting as a private landlord, in accordance with the Policy. Without prejudice to that contention, in relation to the grounds of review it further contends that:

a. Ground 1: The Decision confirmed the panel's view that the Claimant benefited from the protection of a non-molestation order and that, if X were to breach that order, he would be arrested and removed from the Property. The Defendant had been advised by the police that X had not visited the Property. The Claimant was advised that, if she still considered the Property and situation to be unsafe, she should contact any local authority of her choice for temporary re-housing. Ms Lewis' undated letter had not been addressed to the Defendant and, presumably, had been intended for the Claimant to use when applying for temporary re-housing from any local authority which she deemed to be appropriate. Further, the Defendant had confirmed that, if there were any new incidents and a supporting letter from the police or a MARAC report, it might reconsider the Decision. As such, the Decision had not been final. The reasoning behind it, as communicated to the Claimant, had been more than adequate and fully compliant with the Policy;

b. Ground 2 - The Defendant made its decision in accordance with the Policy, none of the exceptional circumstances identified in which applied in the Claimant's case;

c. Ground 3 - The Decision was not irrational and had been made in accordance with the Policy, having full regard to the Claimant's circumstances. The existence of the non-molestation order enabled the police to act pre-emptively, were X to attempt to go within 100 metres of the Claimant's home. Were the Claimant to have considered herself to have been in immediate danger she could also have applied to any local authority for temporary housing which would not have operated automatically to end her tenancy agreement;

d. Ground 4 - It is not a requirement of the Policy that a survivor of domestic violence relinquish her accommodation before approaching a local authority for temporary re-housing. The Defendant's suggestion that the Claimant approach the local authority for immediate rehousing in an emergency situation did not contain any advice that she would have to relinquish her tenancy to do so. The contention made by Ground 4 is incorrect;

e. Ground 5 - There is no requirement, or sub-policy, that domestic violence must be reported. Rather, the Defendant had issued "an invitation" to the Claimant that, should her circumstances change and she provide evidence of such change of circumstance, it might reconsider its decision not to provide any band increase for her application for a management transfer. The request for evidence when making any decision can never be irrational as without such evidence the Defendant would lack the ability to make an informed decision. The guidance quoted by the Claimant was aimed at local authorities when considering homelessness applications and not at registered providers of social housing when operating their own allocations and lettings policies. The requirement that applicants provide evidence was neither irrational nor self-defeating;

f. Ground 6 - Requesting police reports or other evidence of the alleged attacks on the Claimant was not to set an "unlawfully high evidential threshold", nor had the

Defendant discriminated, directly or indirectly, against the Claimant on the grounds of sex. Accepting that women comprise the greater proportion of domestic abuse survivors, asking for evidence to support an application for a management transfer cannot be considered in any way unfair or discriminatory. It was denied that the Defendant had a policy which requires an unlawfully high evidential threshold for the consideration of the housing needs of domestic abuse survivors. Indeed, it was evident from the wording of the Policy that domestic abuse survivors are treated more favourably than other applicants as they constitute an identified category of those exceptionally to be considered for a management transfer. Reliance on the Policy was not discriminatory, nor did it render the Decision illegal, irrational or procedurally unfair. If the Claimant considered the Defendant to have discriminated against her as alleged, it was open to her to issue a claim against it, as a civil matter.

g. Even if the Defendant had made the decision to award the Claimant a higher priority banding, she might still be waiting for re-housing as the Defendant had only a very limited supply of empty properties at any one time. Accordingly, in relation to all grounds of review, the court was asked to consider whether the outcome for the Claimant would have been substantially different if the conduct of which she complains had not occurred.

Amenability to Judicial Review
The Claimant's Submissions

19 It is the Claimant's position that there is no material distinction advanced or apparent between this Defendant and the defendant in *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587 such that the court is all but bound to conclude that the Decision is amenable to judicial review. In *Weaver*, the Divisional Court and the Court of Appeal had held that the trust's act of terminating an assured tenancy of social housing was not a private act for the purposes of s.6(3)(b) of the Human Rights Act 1998 ("the HRA") and was amenable to judicial review. Whilst Elias LJ had stated [37] that, *"although the case law on judicial review may be helpful, it is certainly not determinative"* of whether an act is private pursuant to s.6(3)(b), he had also held [83] "*that in this case the two questions had to be determined the same way"*. Indeed, the contrary had not been argued before the Court of Appeal and is the usual position: *R (Beer) v Hampshire Farmers Market Ltd* [2004] 1 WLR 233 per Dyson LJ [39]:

> "On the facts of this case, and I would suggest on the facts of most cases, the two issues march hand in hand; the answer to one provides the answer to the other."

Key to the decision in *Weaver*, submitted Mr Burton, was the court's approach to the relationship between the functions being exercised by the body in question and the particular decision in issue. Although Elias LJ had recognised that [28*]: "Once it is determined that the body concerned is a hybrid authority, in other words that it exercises functions at least some of which are of a public nature. The only relevant question is whether the act in issue is a private act"*, he had explained that [41], *"the character of an act is likely to take its colour from the character of the function of which it forms a part"* and [55] "*that in order to determine whether the act of termination is a private act or not it is necessary to focus on the nature of the act in the context of the body's activities as a whole."* Applying that approach, he had concluded as follows [76]:

> "In my judgment, the act of termination is so bound up with the provision of social housing that once the latter is seen, in the context of this

> particular body, as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts. The grant of a tenancy and its subsequent termination are part and parcel of determining who should be allowed to take advantage of this public benefit. This is not an act which is purely incidental or supplementary to the principal function, such as contracting out the cleaning of the windows of the Trust's properties. That could readily be seen as a private function of a kind carried on by both public and private bodies. No doubt the termination of such a contract would be a private act (unless the body were a core public authority.)"

20 The Defendant concedes that it is a hybrid authority for the purposes of s.6 of the HRA and (see *Weaver* [66] to [72]), submits Mr Burton, it plainly exercises public functions when providing social housing. Accordingly, the question is whether there is any relevant difference between decisions regarding the termination of an existing social housing tenancy and those affecting the transfer of such a tenancy, to which the answer must be no. Each is inextricably linked with the provision of social housing. Indeed, a transfer constitutes an "allocation" under the Policy. As had been argued, but rejected, in *Weaver*, it might be said that the termination of a contractual right to occupy a particular property was *"par excellence the exercise of a private power"* [65]. If the invocation of a contractual right to terminate a social housing tenancy is not a private act, it is inconceivable that a decision concerning the transfer of a social housing tenancy is a private act, submits Mr Burton. That had been the view taken by the High Court in *R (McIntyre) v Gentoo Group Limited* [2010] EWHC 5 (Admin) [27]:

> "In my judgment, therefore, the decision in *Weaver* is directly applicable. The declaration granted by the Divisional Court in that case, that the defendant was amenable to judicial review on conventional public law grounds in respect of decisions taken in the performance of its function of managing and allocating its housing stock (or perhaps more accurately, as the majority of the Court of Appeal thought, its stock of social housing), applies not merely to decisions concerning the termination of a tenancy of social housing but also to those concerned with the mutual exchange of such tenancies."

21 The reasons advanced by the Defendant in support of its argument on amenability went no further than asserting that it was not operating any statutory or delegated powers when making the Decision. That might be correct, but was merely the starting point in the analysis and far from conclusive (see, for example, *R (Beer)* [12] to [14]). The Decision and the policies relating to transfer which are the subject of this claim are amenable to judicial review. Further, it is clear that they are public functions for the purposes of the HRA and, therefore, s.29 of the EqA.

The Defendant's Submissions

22 Miss Hall, frankly, conceded that she was inviting a difficult finding as to amenability and that a number of post-*Weaver* authorities appeared to be taking this court in a particular direction. Nevertheless, she maintained that the exercise of a public function for the purposes of s.6 of the 1998 Act is intended to be wider in ambit than for judicial review and that this claim does not encompass a human rights challenge. Accordingly, the Claimant must first satisfy the court that the Defendant is amenable to judicial review in as much as the Decision

amounts to the exercise of a public function pursuant to CPR 54.1(2)(ii) rather than for the purposes of s.6: per Elias LJ in *Weaver* [37]:

> "…it is only of limited significance that the function will be subject to the principles of judicial review. The purpose of attaching liability under section 6 of the 1998 Act is different to the purpose of subjecting a body to administrative law principles, and it cannot be assumed that because a body is subject to one set of rules it will therefore automatically be subject to the other. So although the case law on judicial review may be helpful, it is certainly not determinative: see Lord Hope in *Aston Cantlow* [2004] 1 AC 546, para 52, cited with approval by Lord Mance in *YL* [2008] AC 95, para 87."

23 Whilst the similarity between the wording of CPR r.53.1(2)(ii) ("… the exercise of a public function") and s.6(3)(b)of the HRA ("any person certain whose functions are functions of a public nature") might result in the amenability question being answered in a similar way (see Elias J in *Weaver* [83]), the HRA was intended to promote the observance of human rights and the protection and enforcement of those Convention rights by the courts. That purpose results in a broader interpretation of "public function" for the purposes of s.6 than for the purposes of CPR Part 53: *YL* [93].

24 Nevertheless, given the similarities, submitted Ms Hall, she would address the main factors considered in *Aston Cantlow* and *YL*, along with the summary gleaned from the case law at paragraph 3-052 of De Smith's **Judicial Review, 8th Edition**:

a. **Public funding**: Whilst this is a helpful starting point (*Weaver* [68]) the fact that a body receives substantial funding from Government to carry out its activities is only of marginal relevance in determining whether it is carrying out a public function. Many cultural organisations are heavily subsidised from taxation but that does not, in and of itself, make them susceptible to judicial review: *Mullins v Board of Appeal of the Jockey Club* [2005] EWHC 2197 (Admin) [35].

b. **Regulation** (see *Weaver* [71])/**Statutory Underpinning**: Whilst the Defendant accepts that it is a hybrid authority and subject to regulation, Part 7 of the Housing Act 1996 requires a local housing authority, not a registered provider of social housing, to provide accommodation for those who are homeless, or threatened with homelessness. Those duties have not been delegated to the Defendant by the London Borough of Brent (and, even if the Defendant were carrying out some of those functions on behalf of the local authority, for example pursuant to a contract, the Defendant would not be exercising a public function (see *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366)).

c. Linked with the above submission, the court should consider the "but for" test, i.e. whether, but for the existence of a non-statutory body, the Government would itself almost inevitably have intervened to do or regulate the activity in question. The Defendant accepts that, as a housing association, it works in "close harmony" with local government, in line with *Weaver* [69]. However, on the specific challenge, the court should not fall foul by looking at the body, rather than the function. It is the local housing authority which retains the particular statutory function, being the provision of emergency housing through some form of allocation policy, as is clear from the wording of the Policy.

d. **Public interest** (again, see *Weaver* [71]): The Defendant repeats the submissions at paragraph 24(b), above.

e. **Absence of consensual submission**: The Defendant concedes that the tenancy agreement did not entirely regulate the relationship between the parties, given that, for example, the Defendant has powers and duties outside that agreement ,as a hybrid authority.

f. **Extensive or monopolistic powers**: It is not clear to what extent this category could be relevant here, save that the Policy makes clear that the Defendant will only act in the most drastic of circumstances and, then, only when the local authority or the police are not better placed to carry out that function.

25 As set out in *Weaver* [72], it is important then to consider whether all of the circumstances, including the factors set out above, make the function challenged one which is public in nature. The court should carry out a broad and flexible approach, as set out in De Smith's **Judicial Review 8th Ed.** at para.3-059:

> "Undue reliance upon any one of [the above criteria], while perhaps helpful in promoting certainty in this area of law, should be avoided. The test of public function should be overriding and the qualities enumerated in the criteria should be weighed and balanced in the context of each specific case."

26 In *Weaver*, the act of termination of the tenancy was found to have been so bound up with the provision of social housing that, once the latter was found to be amenable to a human rights challenge, the acts which were necessarily involved in its regulation were also amenable to that challenge [76]:

> "The grant of a tenancy and its subsequent termination are part and parcel of determining who should be allowed to take advantage of this public benefit. This is not an act which is purely incidental or supplementary to the principal function…"

The position in this case is different, submitted Ms Hall. Here, there is no regulation of the tenancy by the landlord. In obtaining a management transfer, the Defendant's role is limited to the prioritisation of applicants, so as to make for a fair process on transfer for all tenants engaging with the scheme; the move itself results from a bidding process and transfer between tenants. It is not even giving or withholding consent, as in *R (McIntyre)*, noting that, in that case, the withholding of consent had been part of the contract between the parties and, accordingly, akin to the management of the tenancy. More significantly, at no time has the Defendant held itself out as having a role akin to Part 7 duties for the provision of emergency housing, in the event that an applicant were homeless or threatened with homeless for any reason, including as a result of domestic abuse. That is reflected in the Policy.

27 In summary, it was the Defendant's position that it should not be amenable to judicial review, because:

a. in all circumstances, any move will take place after a period of bidding by a tenant, or by the tenant applying to his or her local housing authority;

b. the Policy envisages only a limited internal management transfer scheme, in exceptional circumstances, with no direct offers of emergency accommodation and no empty properties available for allocation under the Policy;

c. effectively, the Claimant's application was for emergency alternative housing and no homelessness or other powers/duties to grant temporary or other emergency housing have been delegated by the local housing authority to the Defendant; and

d. accordingly, the Defendant is not acting as a public landlord, but a private one.

28 In any event, the claimant had not exhausted her rights prior to the issue of judicial review proceedings, submitted Ms Hall. Her claim is premature and should not be considered as she retains an adequate route for an alternative remedy (see *R v Secretary of State for the Home Department Ex p. Swati* [1986] 1 WLR 477), as she was notified of her ability to submit further evidence to the Defendant, if she so wished. Instead, she has submitted such evidence to this Court, but not as part of a fresh application to the Defendant.

Discussion and Conclusion on Amenability

29 In my judgment, the Decision and Policy are clearly amenable to judicial review and, in making the Decision, the Defendant was exercising a public function for the purposes of the HRA and, by extension, s.29 of the EqA.

30 Starting with the Policy, para.3.1 makes clear that its overall aim is to ensure fairness, transparency and regulatory compliance in all key areas of allocations and lettings. Paragraph 3.8 indicates the Defendant's priority to work in partnership with local authorities, the purposes of which including the meeting of local housing need and the provision of choice. Amongst the routes identified are transfer arrangements.

31 Further, there is no challenge by the Defendant to the accuracy of the following evidence of Ms Mowatt, at paragraphs 5 to 8 of her witness statement:

> "5. The Defendant provides over 20,000 homes for people across London, Hertfordshire and the South East, they are a member of the G15 Group of London's Housing Associations and work in 36 local authority areas [Exhibit HM/2]. The Defendant is the largest housing association in terms of homes managed in the London Borough of Brent and in East Hertfordshire, with further larger concentrations of homes in Westminster, Lambeth, Harrow, Hackney and Barnet [HM/2]. It is a charitable Registered Society (registration number RS007326) under the Co-operative and Community Benefit Societies Act 2014 and is regulated by the Regulator of Social Housing (Registration number 4825)1
>
> 6. In 2017, the Defendant signed a strategic development partnership with Mayor of London to deliver 1,752 homes in London between 2016 and 2021 with 60% of all the homes built for affordable housing [Exhibit HM/3]. It received an allocation of over £122 million to deliver 1,000 new affordable homes in partnership with the Greater London Authority (GLA) as part of the new London Affordable Homes Programme [Exhibit HM/4].
>
> 7. The Defendant has numerous nomination agreements with many different Councils [permission bundle 125-129]. It also owns and

manages shelter accommodation [Exhibits HM/5, pp28-33, and HM/6]. The vast majority of its stock is social housing.

8. The Defendant's Annual Report and Financial Statements for the year 2020/2021 [Exhibit HM/7], detail its capital structure [at p13], social housing grants [at pp69 and 71], 'amortised government grants' [at pp 48-49, 72), as well as government funding and assistance [at p78]. These statements also provide information and statistics on its social housing stock [at p80]. More information regarding the Defendant's social stock can be found here [SDR_2019_to_2020_additional_tables_v1.0_-_FINAL.xlsx (live.com)]."

32 At paragraph 3 of his second witness statement, Mr Kyem states:

> "With respect to paragraph 5 – 8 of Helen Mowatt's Witness Statement, dated 10/01/2021, Network accepts that when operating many of its functions it operates as a Public Body. On the other hand, Network does not accept that the Defendant has a duty to provide emergency housing to victims of domestic abuse and does not accept that it is acting as a Public Authority with respect to its Allocations Policy. By the date of the Claimant applying for a management transfer, she had already been granted an assured tenancy of the Property and the Defendant was taking no steps to manage or alter that arrangement, either as a public housing authority or at all. The Policy that the Claimant is relying upon is a discretionary policy that it provides to its tenants as a responsible Registered Provider of Social Housing. The Defendant simply is not set up to provide emergency accommodation and does not have the stock, facilities or expertise to provide this service. Those responsibilities lie with the local housing authority, not the Defendant."

33 It is necessary to consider the merit in that position, and in the submissions advanced by Ms Hall, having regard to relevant caselaw. *Weaver* was helpfully summarised by John Howell QC, sitting as a Deputy Judge of the High Court, in *McIntyre* [21]:

> "In *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587 the Court of Appeal considered whether a decision by a registered social landlord to terminate a tenancy of social housing was one required to be taken compatibly with Convention rights and whether it was also amenable to judicial review on conventional public law grounds. It was common ground in that case that a registered social landlord was a person some of whose functions were functions of a public nature. The Court of Appeal held by a majority (Elias and Lawrence Collins LJJ, Rix LJ dissenting) that the decision by a registered social landlord to serve a notice to quit on one of its assured tenants occupying social housing was an act which would be unlawful under section 6 of the Human Rights Act 1998 if it was incompatible with Convention rights as it was an act done in the discharge of its public function of managing and allocating social housing and accordingly that the nature of the act was not "private" the purpose of subsection (5) of that section. The majority in the Court of Appeal also accepted as correct the concession made by counsel for the Housing Trust that, if the act was one to which section 6 of the 1998 Act applied, it was also one also governed by public law and thus susceptible

of judicial review on conventional public law grounds (as the Divisional Court had held): see eg per Elias LJ at [5] and [83]"

34 In *McIntyre*, the Claimants were assured tenants of a property who had brought proceedings for judicial review of their then landlord's refusal of consent to their exchanging homes with another of that landlord's assured tenants. Subsequently, the landlord gave conditional consent to that exchange. In effect, the claim sought judicial review of that decision. The defendant was a not-for-profit company, limited by guarantee which was a registered social landlord, to whom ownership of the relevant property had been assigned by the original landlord, which was one of its subsidiaries. Counsel for the Defendant sought to distinguish *Weaver* and to contend that the decision in *McIntyre* was not one governed by public law and amenable to judicial review, on three main grounds [23]: (i) that a decision to refuse consent to the mutual exchange of a tenancy does not result in the individuals who may be concerned becoming homeless which a decision to terminate a tenancy may do; (ii) that assignment of a secure tenancy by way of exchange falls outside the cases governed by Part VI of the Housing Act 1996 dealing with the allocation of housing accommodation; and (iii) that registered social landlords are not obliged by any enactment to deal with applications for mutual exchange on any particular basis, unlike local housing authorities which must deal with applications for such exchanges in accordance with section 92 of the Housing Act 1985. At [24] to [27], the court held:

> "24. Each of these three points is correct. But they do not serve, either individually or collectively, to distinguish this case from Weaver. Whether an exchange of social housing should be permitted involves a decision to be taken in the discharge of what the majority in the Court of Appeal regarded as the public function of managing and allocating social housing. This is not merely because (as the Tenants' Handbook in this case recognises) such an exchange may result in a property becoming overcrowded or under occupied. It may also involve questions about how best to meet not only the need for social housing of those tenants wishing to exchange and their families but also the need of others for it. Like a decision to terminate a tenancy, in some cases it may also engage an individual's right to respect for his or her private and family life.
>
> 25. Thus the fact that registered social landlords may have greater freedom than local housing authorities have in responding to applications for mutual exchange does not mean that such applications do not require them to take decisions in the discharge of what the Court of Appeal regarded as their public function of managing and allocating social housing. Nor did the majority of the Court of Appeal intend to limit that function to the doing of those things that are governed in the case of a local housing authority by Part VI of the Housing Act 1996 which regulates the allocation of housing by such an authority. Indeed a decision to terminate a tenancy by a local housing authority is not governed by those provisions: see section 159(2) of the 1996 Act. The fact that such a decision may result in an individual becoming homeless was not the basis for regarding that decision in Weaver as not constituting an act of a private nature. The decision was so regarded because it was one taken in the discharge of what the Court of Appeal regarded as a registered social landlord's public function of managing and allocating social housing. That explains why it also was considered susceptible to a claim for judicial review. Such a claim is one to review

the lawfulness inter alia of "a decision, action or failure to act in relation to the exercise of a public function": see CPR Part 54 rule 54.1(2)(a)(ii).

26. [Counsel for the defendant] had a further argument why NSHC's decision in this case was not amenable to judicial review. The condition it imposed, he submitted, was no more or less than a requirement to comply expressly with a condition set out in the Claimants' assured tenancy as a condition which might be imposed on a consent to a mutual exchange. Although NSHC had a choice whether or not to impose that condition, its decision to do so had no public law element. It was merely the exercise of an existing contractual right. It simply involved the application of a condition relating to the payment of outstanding rent which was specifically envisaged in the Tenants' Handbook. Mr Grodzinski's submission assumes that the condition imposed fell within that description, an assumption which I do not accept for reasons which I shall explain. But, even if that assumption had been well founded, NSHC was not obliged to impose that condition. It had a discretion whether or not to do so, a discretion which fell to be exercised as part of its function of managing and allocating social housing. Indeed it is the Defendant's case that imposing the condition which NSHC did in this case (and others like it in other cases) was a reasonable and proportionate way of managing such social housing. What makes public law applicable is that the decision was one taken in relation to the exercise of a public function. There is no additional requirement that the specific decision impugned has itself to have some other and further "public law element" (whatever that might mean and involve).

27. In my judgment, therefore, the decision in Weaver is directly applicable. The declaration granted by the Divisional Court in that case, that the defendant was amenable to judicial review on conventional public law grounds in respect of decisions taken in the performance of its function of managing and allocating its housing stock (or perhaps more accurately, as the majority of the Court of Appeal thought, its stock of social housing), applies not merely to decisions concerning the termination of a tenancy of social housing but also to those concerned with the mutual exchange of such tenancies."

35 In *Weaver*, the Court of Appeal had held [55] to [57], [66] and [76]:

"55. … in order to determine whether the act … is a private act or not, it is necessary to focus on the nature of the act in the context of the body's activities as a whole. In most, if not all, cases that is likely to require a consideration of the nature of the function or functions to which the act is contributing. Plainly the power to seek an ASBO was of no assistance in answering whether the termination of the tenancy was a private act or not.

56. By contrast, the question whether the provision by the Trust involved the exercise of a function of a public nature was in my view, highly material to that question. In short, in my judgment the scrutiny which the Divisional Court gave to the housing functions of the Trust was relevant to the question whether the act of termination was private or not…

> 57…. The important point, in my view, is to consider the act of termination in the wider context of the housing function being carried on by the Trust, whatever shorthand is used to describe that context.
>
> …
>
> 66. The essential question is whether the act of terminating the tenancy is a private act. When considering how to characterise the nature of the act, it is in my view important to focus on the context in which the act occurs; the act cannot be considered in isolation simply asking whether it involves the exercise of a private law power or not. As Lord Mance observed in YL, both the source and nature of the activities need to be considered when deciding whether a function is public or not, and in my view the same approach is required when determining whether an act is a private act or not within the meaning of section 6(5). Indeed, the difficulty of distinguishing between acts and functions reinforces that conclusion.
>
> …
>
> 76. In my judgment, the act of termination is so bound up with the provision of social housing that once the latter is seen, in the context of this particular body, as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts. The grant of a tenancy and its subsequent termination are part and parcel of determining who should be allowed to take advantage of this public benefit. This is not an act which is purely incidental or supplementary to the principal function, such as contracting out the cleaning of the windows of the Trust's properties. That could readily be seen as a private function of a kind carried on by both public and private bodies. No doubt the termination of such a contract would be a private act (unless the body were a core public authority.)"

36 I accept Mr Burton's submission that, so analysed, there is no material distinction between the position in this case and the position in *Weaver* and *McIntyre*. The Defendant, rightly, accepts that the provision of social housing to the Claimant in this case constituted the exercise of a public law function. It cannot sensibly be said that the consideration, and refusal, of a transfer under the Policy is other than part and parcel of determining the allocation of that housing and Mr Burton is right to place reliance upon the fact that a transfer constitutes an "allocation" under the Policy. It is not an act which is purely incidental or supplementary to the principal function. Consistent with the view taken of a property exchange in *McIntyre*, it can involve questions about how best to meet not only the need for social housing of the particular applicant and her family, but also the need of others for it. The analysis set out at para.24 to para.27 of *McIntyre*, with which I respectfully agree, applies equally to the circumstances of this case. None of the points made by Ms Hall affords an answer to it. I also accept Mr Burton's submission that the position in this case, in which no contractual right is being invoked, is *a fortiori*. As in *Weaver*, in this case the amenability to judicial review and the character of the act in question for the purposes of s.6 of the HRA and, thus, s.29 of the EqA, fall to be determined the same way.

37 Ms Hall's alternative contention that the Claimant has not exhausted her rights prior to the issue of Judicial Review proceedings, was not advanced with any vigour and may be taken shortly. The Claimant's right to make a fresh application in the event of a change in

circumstance does not equate with an alternative remedy in relation to the Decision challenged. Instead, it would trigger a fresh decision on different facts. I reject the contention.

The Grounds of Review

38 I therefore turn to consider the six grounds of review, including the question of permission in relation to ground 6. As matters developed in the course of the hearing, certain grounds fell away, or were reduced in scope. Where that is the case, it is indicated below.

Ground 1

39 Mr Burton's submissions as to ground 1 may be briefly stated; the Decision did not address the Policy criteria, nor explain why they had not been met. This was despite the requirement in para 3.10.4 that reasons should be provided for a refusal. The Decision contained merely generic advice, with a single observation that X had not visited the Property and an explanation of the circumstances in which X "might" reconsider its "stance". That was inadequate and contrary to the requirement that reasons should permit the reader to determine whether the Decision is challengeable (*Stefan v GMC* [2003] UKHL 39, at [7]; *South Buckinghamshire DC v Porter (No 2)* [2004] UKHL 33, at [36]). Indeed, it had led to the need to challenge such reasons or policies as might have been in the Defendant's mind by proceedings for judicial review. In the presence of evidence before the decision maker of a severe and current risk to the life/personal safety of the Claimant and her children and the assessment of risk made by social services and the Defendant's knowledge that neither the local authority nor the police was assisting the Claimant with her accommodation, nor had her own efforts been successful, the Defendant had been obliged to provide sufficient reasons as to why her application and supporting materials had not been accepted. The submission made by the Defendant, in its detailed grounds of opposition, at para.24, that, *"It is clear from the Decision letter that the Claimant's circumstances do not meet the threshold of 'immediate risk to life or personal safety', having taken into account the evidence in support, including the information supplied by the police that the Perpetrator had not visited the home address and there was, by the date of the Panel meeting, a non-molestation order in place preventing the Perpetrator from coming within 100 metres of the Property"*, was not tenable in circumstances in which neither the criteria applied nor the relevance of X not having visited the Property was explained and the only reference to a non-molestation order in the Decision related to that which the panel considered the Claimant could do, as distinct from that which she had already done.

40 Ms Hall's position was that anything set out in the Defendant's pre-action response letter could not afford a ground for review, as not forming part of the Decision. The credibility of the risk to the Claimant's personal safety, as indicated by the supporting materials which the Claimant had provided, was not disputed, but it had been for the panel to decide, subject to public law review, whether that evidence met the Policy criteria; the evidence could not, by itself, found a challenge.

41 The Defendant accepted that it had a duty to give reasons for its refusal, under the Policy itself. Ms Hall relied on *William v Wandsworth LBC* [2006] HLR 42 [18] for the nature of that duty:

> "It is trite law, as Schiemann LJ observed in *R v Brent London LBC, ex p. Baruwa* (1997) 29 H.L.R. 915 at 929, that, where an authority is required to give reasons for its decision, it is required to give reasons which are

proper, adequate, and intelligible and enable the person affected to know why they have won or lost. But he went on to say this (ibid):

> "That said, the law gives decision makers a certain latitude in how they express themselves and will recognise that not all those taking decisions find it easy in the time available to express themselves with judicial exactitude."

To similar effect, she relied upon *R v Croydon LBC ex p. Graham* (1994) 26 H.L.R. 286, at 291–292, and noted the benevolent approach to the interpretation of review decisions to be adopted, per *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7 [50]:

> "…The court should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision. That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions."

42 Ms Hall submitted that the Decision fell to be read in the context of the advice previously given to the Claimant by Mr Kyem and her own knowledge of the Policy following her successful application for priority Band C in February 2020. She knew that the Policy provided that internal management transfers would only be provided in exceptional circumstances. Consistent with her oral submissions before me, Ms Hall made the following submissions, at paras. 44 and 45 of her skeleton argument:

> "44. It is clear from the Decision letter that the Claimant's circumstances do not meet the threshold of 'immediate risk to life or personal safety', having taken into account the evidence in support, including the information supplied by the police that the Perpetrator had not visited the home address and that there was, by the date of the Panel meeting, a non-molestation order in place successfully preventing the Perpetrator from coming within 100 metres of the Property. It will have been clear to the claimant that the reason for refusal was that she did not meet this high threshold, given her particular circumstances.
>
> 45. Further, the Decision also addresses the questions of if there is an increase or perceived increase in risk to the Claimant, with the Claimant (i) to immediately contact the local housing authority for 'immediate temporary re-housing', which the Claimant could not in any event provide given its housing stock, and (ii) to ask for a reconsideration of her present application."

Discussion and Conclusion

43 I am satisfied that this ground of review succeeds. Nothing in the Decision, whether or not in the context of earlier correspondence between the parties and/or the Claimant's familiarity with the Policy (in a different context), satisfied the duty to give reasons, as set out in the caselaw on which the parties relied. The Decision comprises a mixture of generic assertion and advice as to what the Claimant should do, followed by a statement that the panel was unable to offer any band increase and a further statement as to the circumstances in which it might reconsider its stance. Even accepting that part of its rationale may be discerned from the statement, *"A Non molestation order offers a degree of protection for the resident and it is*

a court order – if this is breached then the police will need to be informed and the perpetrator arrested and charged. As advised by the police, the perpetrator has not visited the home address", the latter is not related to the Policy criteria, nor explained in their light. That issue is the more acute in light of the evidence which the Claimant had provided in support of her application and her stated and explained desired outcome. The Decision did not explain why, notwithstanding that material, the Policy criteria were considered not to have been satisfied.

44 That is not to nit-pick, or to seek to construe the Decision as if it were a piece of legislation, or a judgment; it is to recognise that the issue lies not with the language used, but with the absence of proper and adequate substantive rationale enabling the Claimant to understand why her application had been refused. The explanation given in the Defendant's solicitors' letter dated 30 September 2021 (see para. 14 above) is not itself the Decision and serves to highlight that the stated rationale cannot be discerned from, and is not explained in, the latter.

45 I shall address the question of relief, having first considered the surviving grounds of review.

Ground 2

46 Mr Burton's essential submission here was that the Defendant's solicitors' response to the pre-action protocol letter demonstrated that the Defendant operated a restricted view of the scope of domestic violence, limiting the latter to acts of physical violence ("threats to life and limb") which was not required by the Policy itself, nor consistent with the definition of "abusive behaviour" adopted by s.1(3) of the Domestic Abuse Act 2021 or *Yenshaw v Hounslow LBC* [2011] UKSC 3. In any event, a risk to personal safety extended beyond physical safety, he submitted. The Defendant knew that the Claimant's children had been traumatised by their father and it had been made aware of acts of emotional and psychological abuse. In the absence of a reasoned decision, the Defendant's solicitors' letter of 30 September 2021 is the closest one comes to the provision of reasons and indicates a misapplication of the Policy by the panel.

47 Ms Hall's submission was that nothing in the Policy itself, the Decision, or the letter of 30 September 2021 indicated a misapplication of the Policy. The issue was not the definition of domestic violence (which the Defendant acknowledged was not limited to physical violence), but whether there were exceptional grounds for a management transfer in accordance with the Policy; a question of fact for the panel. The question went to the level of risk posed, not to the presence or absence of domestic violence per se. The Claimant had been found not to have satisfied the relevant test. The Defendant had not followed an unpublished policy contradicting the Policy. In any event, some generosity needed to be accorded to the language used in solicitors' correspondence.

Discussion and Conclusion

48 Ground 2 fails. The basis upon which ground 1 has succeeded is my acceptance of the Claimant's case that it is simply not possible to discern the reasons for the Defendant's decision. It would be inappropriate to do so by reference to later pre-action solicitors' correspondence, the language of which does not inexorably lead to the conclusion invited, in any event. It is not possible to conclude that the Defendant followed an unpublished policy contradictory of the Policy and I do not do so.

Ground 3

49 During the hearing, Ms Hall confirmed that it had never been the Defendant's position that the Claimant's application had been rejected because it had been open to her to approach the

local authority to take more immediate or effective action. Accordingly, Mr Burton confined his submission on the first limb of ground 3 to the Defendant's view that she could approach the police in such connection. A reactive measure could not, rationally, be more effective than one which was preventative (rehousing the Claimant), he submitted.

Discussion and Conclusions

50 I need not set out the competing submissions in relation to this ground, as narrowed. Suffice it to state that both limbs of ground 3 fail for essentially the same reasons as ground 2. Where the reasons for the Decision are not apparent from it, it is not appropriate for a reviewing court to seek to construct them from subsequent pre-action correspondence, pleadings and/or assertions subsequently set out in the evidence of someone (Mr Kyem) other than the decision-maker, in order to determine whether those constructed reasons are rational. Nor is it for this court to form its own view on the merit in the application submitted by the Claimant, as both counsel accepted. Going forward, no doubt the Defendant will have well in mind the points advanced by Mr Burton as to the relevance (or otherwise) of a non-molestation order and the history and nature of X's conduct towards the Claimant and their children.

Ground 4

51 This ground has fallen away, on confirmation by Ms Hall that: (1) there was no policy or requirement applied to the Claimant that, as a survivor of domestic violence, she must make herself homeless in order to access accommodation; and (2) the absence of an application to the local authority for emergency accommodation was not a reason for the refusal of a transfer.

Ground 5

52 The essential submission for the Claimant in relation to ground 5 was that the Decision discloses a sub-policy which requires domestic violence to have been reported to the police, or referred to MARAC. That is said to be an irrational policy in light of the widely acknowledged fact (evidenced by Rebecca Goshawk and Farah Nazeer) that many survivors of domestic abuse do not report it to the police, or other authorities. A requirement to report, which permits of no exceptions, risks overlooking cases of domestic violence for lack of a prior report or referral and, hence, an applicant's inability to provide corroborative evidence by an external agency. Whilst a MARAC report might indicate a high risk, its absence cannot be taken to establish an absence of risk. It is said that Mr Kyem's second witness statement suggests that a perceived failure to obtain evidence from the police counted against the Claimant. It is acknowledged that, read as a whole, the evidence given by Mr Kyem on this point (in both statements) is "somewhat confused".

53 Ms Hall submits that it cannot be irrational for a registered provider of social housing to require evidence in support of an application for a transfer, given the scarcity of housing resources. It is not the case that supporting evidence is required from the police, or in the form of a MARAC report, in every case. The request for such documentation in this case had followed from the Claimant's indication that it would be available and to give her an opportunity to provide it in circumstances in which the Defendant had not been satisfied from the material of which it had been made aware that the required exceptional circumstances had not been made out. She had been given an opportunity, not subjected to a blanket requirement. Neither could the Defendant gain assistance from the wording of para.3.10.2.2 of the Policy, which merely cited non-exhaustive examples of supporting evidence which could be provided. There was no reason why such evidence could not take the form of a credible interview or statement by an applicant to his or her housing officer.

Discussion and Conclusions

54 This ground of review fails. I am satisfied that, in the particular circumstances of the Claimant's case, in which a police report and MARAC referral had been made, it could not be said that a request for the related information was irrational. It enabled the Defendant to obtain a full picture, in the context of which to apply the Policy. It is rational for a decision-maker to wish to have regard to all available evidence which touches on the matters with which it is concerned. That is not synonymous with an immutable requirement that a police or MARAC report be provided in every case.

55 I am satisfied that para 3.10.2.2 of the Policy (the proper construction of which is a matter for the court to decide for itself: see *Mandalia v SSHD* [2015] UKSC 59 [31]), does not incorporate the blanket requirement for which Mr Burton contends. I repeat the material part below, for ease of reference (now with emphasis added):

> "If a resident needs to move because of one of the reasons specified above they must contact their Neighbourhood Officer and fill in a Transfer Application stating the Policy grounds that the management transfer is based on. Supporting evidence will need to be required, **such as** from the police, social services, **etc.** In Hertford a Safeguarding visit and form will be completed."

56 The emphasised wording makes clear that there is no requirement that a police or MARAC report be obtained in every case. Whilst I acknowledge that the examples given might be interpreted by an applicant to indicate that any application must be supported by evidence

from a third party, I do not consider that the wording itself falls to be so construed – supporting evidence may be provided by the applicant personally, in the form of a statement setting out his or her circumstances, whether independently provided or recorded by the Defendant following an interview or conversation. Whilst the Defendant might consider it appropriate to amend the Policy wording to make that position clear, I am satisfied that the existing wording does not bear the construction advanced by Mr Burton. It follows that the rationality or otherwise of his construction is moot.

Ground 6

57 So far as material, sections 19 and 29 of the EqA are set out below:

By s.19:

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

By s.29:

> "(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—
>
> (a) as to the terms on which A provides the service to B;
>
> (b) by terminating the provision of the service to B; (c) by subjecting B to any other detriment.
>
> …
>
> (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

58 It is the Claimant's contention that, in allocating social housing, D is providing a service to the public, or a section of the public, or is exercising a public function and must not discriminate in doing so. The High Court has jurisdiction to consider that question: (*R (Adath Yisroel Burial Society) v HM Senior Coroner for Inner North London* [2018] EWHC 969 (Admin) at [136]-[143]: *R (Unison) v Lord Chancellor* [2017] UKSC 51).

59 It is said that the mandatory requirement that domestic violence be reported or corroborated is a provision, criterion or practice (PCP) which constitutes unlawful indirect discrimination against women, who are disproportionately likely to face domestic violence. Therefore, whilst it may be rational to require evidence from the police or other relevant authorities or persons when considering applications for transfers not based on domestic violence, the requirement places victims of domestic violence at a particular disadvantage, which is not capable of objective justification.

60 In the course of oral argument, Mr Burton acknowledged that: (1) the Policy relates to applications by victims of domestic violence, on the one hand, and those applying on different bases, on the other; and (2) on his case, all such applicants are subjected to the same neutral PCP requiring the provision of supporting evidence. Whilst he could provide no evidence of the gender composition of the entire cohort to which the relevant provision related, or of the difficulties which applicants on a different basis might face in providing corroborative evidence, he submitted that, on the available evidence, there was reason to believe only that those who were victims of domestic violence were disadvantaged, of which the majority were female. He submitted that the Claimant has discharged her burden to establish a *prima facie* case of discrimination because the court was in a position to infer that only victims of domestic violence have difficulty complying with the neutral requirement and most of those will be female. Mr Burton invited a further inference (acknowledged to be 'more problematic') to the effect that the majority of those applying for management transfers do so by reason of domestic violence. On the assumption that the Claimant had discharged her burden, there could be no justification for the requirement; the simple solution would be for the PCP to be relaxed for victims of domestic violence.

61 In addition to its contentions that the relevant activity does not constitute the exercise of a public function and that the Policy has been misconstrued by the Claimant, the Defendant submitted that the Claimant had failed to identify a relevant comparator group. That group comprises men who have suffered domestic abuse and wish to avail themselves of the Policy. Men and women alike would be required to give evidence in support of their application. There is no suggestion by the Claimant that a man would find it easier to report domestic abuse to the relevant authorities than would a woman, or that men more frequently do so. The fact that a greater number of the victims of domestic abuse are female does not itself establish a claim in indirect discrimination. Indeed, the Defendant's inclusion of domestic abuse within the category of "exceptional circumstances" under the Policy renders priority transfers more available to women.

Discussion and Conclusions

62 The simple answer to this ground is that I have found that the allegedly discriminatory PCP was not in fact a requirement imposed by the Defendant. That is sufficient to dispose of ground 6, but, I would have refused permission to argue it on the basis that there is insufficient evidence, taken at its highest, which could discharge the Claimant's burden to show that the Defendant contravened the relevant statutory provision. There is simply no evidence: (1) of the gender composition of the wider cohort to which management transfers apply; (2) of the difficulties in the provision of third party evidence encountered by those who

apply for a transfer on the basis of harassment, hate crime, safeguarding issues and/or as the victim of a serious crime; or (3) to the effect that the majority of applicants rely upon domestic violence as the basis for their applications. Accordingly, the issue of objective justification would not have arisen and the ground is not arguable with a realistic prospect of success. If I am wrong on the issue of permission, ground 6 fails substantively because the PCP challenged was not in fact imposed by the Defendant.

Relief

63 In the course of the hearing, the parties were agreed that the consequence of a conclusion that ground 1 succeeded would be that the Decision should be quashed and that the matter be remitted for consideration afresh by the Defendant. I so order. To be clear, I reject the Defendant's contention, in its detailed grounds of opposition, that the outcome for the Claimant might not have been substantially different, if the conduct of which she complains had not occurred, because she might still be waiting for an available property. That is to miss the point which is that she would have been granted a transfer in principle and, as Ms Hall acknowledged in oral submissions, a property could become available at any time. By definition, a refusal removes any prospect of a transfer.

64 Given my conclusions in relation to Grounds 2 to 6, no further relief is necessary or appropriate.

65 I shall hear from the parties as to costs.

L A T E R

Costs

66 Mr Burton submits that the Claimant has succeeded in her principal ground of challenge −that the reasons given for the Decision were inadequate (ground 1) − and that costs should follow the event. He submits that grounds 2 and 3 fell away as a result of my conclusions on ground 1, rather than because I rejected their substantive merit, and had been properly raised in circumstances in which alternative reasons for the Decision had been proffered by the Defendant. Given the absence of reasons from the Decision, it had been necessary also to challenge those which were later advanced in pre-action correspondence, and by the Defendant's pleaded case; indeed, it would have been 'irresponsible' (in Mr Burton's language) not to have done so. Ground 4 had fallen away on the basis of a concession made only in the course of the hearing and which could have been made at an earlier stage. Ground 5, it is said, related to the need for supporting evidence, and followed from the matters set out in the Defendant's pleaded case and in the evidence of Mr Kyem, but, in any event, the additional cost incurred in dealing with that material is submitted to have been *de minimis*. Finally, Mr Burton submits, whilst ground 6 (the discrimination challenge) has failed, it, too, added costs which can be considered to be *de minimis*, and the point was reasonably arguable in light of the Defendant's response. In any event, the issue of objective justification engages the same matters which fall to be considered on the question of rationality.

67 Ms Hall acknowledges that the general rule under CPR 44.2(2)(a) is that costs should follow the event, but invites me to exercise my discretion to make a different order, in the circumstances of this case. She submits that the Claimant has succeeded on only one of six grounds of review. Further, the way in which the challenge had been advanced by the Claimant did not accord with the way in which it had been put in pre-action correspondence, in which ground 1 had not featured at all (accepting that it had been resisted by the Defendant when pleaded). The mismatch between the pre-action correspondence and the claim as

advanced, Ms Hall submits, is conduct of relevance generally and particularly to ground 6, for which permission has been refused and which, had it been considered otherwise than at a rolled-up hearing, might have led to a costs order in favour of the Defendant, in so far as the costs incurred in the preparation of the acknowledgement of service related to that ground. Grounds 4 and 5, it is submitted, challenged the rationality of the Policy/any sub-policy itself, rather than the Defendant's application of it, and ground 4 had not been pursued. For all such reasons, Ms Hall submits, there should be no order as to costs. Alternatively, there should be an issues-based costs order, whereby only a small proportion of the Claimant's costs is payable by the Defendant.

68 I am satisfied that it is appropriate to make some reduction to the costs payable by the Defendant to the Claimant, but that it should be a small reduction, reflective of my conclusions in relation to ground 6 and of the part which it played in the Claimant's challenge. In my judgment, the appropriate order is that the Defendant should pay 90 per cent of the Claimant's reasonable costs, to be subject to detailed assessment, if not agreed. In brief, my reasons for so concluding are as follows. The Defendant's overarching position was that neither the Decision nor the Policy was amenable to judicial review because, in essence, *Weaver* and *McIntyre* fell to be distinguished. I have reached the clear view that that position, which consumed a considerable amount of time in written and oral argument, should be rejected. As to the substantive grounds of review, ground 1 represented the meat of the Claimant's challenge and I accept Mr Burton's submission that grounds 2 and 3 followed from the reasons advanced by the Defendant in pre-action correspondence and the need to address those reasons in the alternative to the Claimant's primary case. It was appropriate that they be raised and I further accept Mr Burton's submission that their rejection essentially flowed from the conclusions which I had formed in relation to ground 1. Ground 5 raised a point of construction, to which the evidence of, and matters pleaded by, the Defendant had given rise. I also accept that some of the concessions highlighted in the course of my judgment were not made by the Defendant, or, at least, their extent was not clear, until the oral hearing on Wednesday of this week.

69 That said, I do have sympathy with Ms Hall's submission that the discrimination challenge raised by ground 6 was problematic, need not have been advanced and did not reflect the way in which matters had been put in pre-action correspondence. My conclusions on that ground make it clear that there was no arguable *prima facie* case of discrimination. In my judgment, it is appropriate in those circumstances, exercising my discretion, to make some reduction to the costs which, ordinarily, would be payable and it is on that basis that I have made the costs order which I have made.

CERTIFICATE

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This transcript has been approved by the Judge.