



Neutral Citation Number: [2024] EWHC 249 (Admin)

Case No: CO/2864/2023/  
AC-2023-LON-002356

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 8 February 2024

**Before:**

**Mr Jonathan Glasson KC sitting as a Deputy Judge of the High Court**

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**Between:**

**THE KING**

**Claimant**

**On the application of**

**MS PATRICIA HELEN ROMAN MONTAÑO**

**- and -**

**THE LONDON BOROUGH OF LAMBETH**

**Defendant**

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**Mr Matthew Ahluwalia (instructed by GT Stewart Solicitors) for the Claimant**  
**Ms. Catherine Rowlands (instructed by London Borough of Lambeth Legal**  
**Services) for the Defendant**

Hearing date: 12<sup>th</sup> December 2023

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**Approved Judgment**

This judgment was handed down remotely at 10.30 a.m. on 8 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**MR JONATHAN GLASSON KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT:**

1. Mrs Patricia Montaña (“the Claimant”) seeks to challenge the ongoing failure of the London Borough of Lambeth (“the Defendant”) to make a decision in relation to a request made by the Claimant on 15 March 2023 to backdate the qualifying date of her housing register account. The Claimant alleges that the Defendant has a discretion to backdate the qualifying date of her housing register account to 15 September 2017. The Defendant denies that it has any such discretion under its “*Housing Allocation Scheme 2013*” (“the Scheme”).
2. The Claimant’s case is put on two alternative bases. The first is predicated on the basis that the Defendant has a discretion under the Scheme to backdate the registration date and the second is put on the basis that if, contrary to the Claimant’s primary submission, the Defendant has no such discretion, then the policy is unlawful. Thus, the Claimant’s Amended Detailed Facts and Grounds sets out five grounds of review:
  - (a) The failure to consider exercising the discretion to backdate the Claimant’s registration date.  
  
*If there is no discretion within the Scheme then:*
  - (b) The Scheme is unlawful and contrary to the Equality Act 2010.
  - (c) The Scheme is discriminatory contrary to Article 14 ECHR.
  - (d) The Scheme is irrational.
  - (e) The Scheme unlawfully fetters a public body’s basic duty not to fetter its discretion.
3. The Claimant was granted permission to rely on her Amended Statement of Facts and Grounds (which had added the fifth ground referred to above) by Lang J on 6 October 2023 when she granted permission for judicial review. Lang J also gave the Claimant permission to rely on her Reply to the Defendant’s Summary Grounds as well as the further witness evidence that the Claimant had filed with the Reply.
4. For the purposes of the hearing, I was presented with a bundle of documents and correspondence as well as a bundle of authorities. Both parties submitted skeleton arguments in advance of the hearing and made detailed oral submissions. I am grateful to counsel as well as those instructing them for their assistance.
5. For the reasons which I give below I have concluded that the Scheme does contain a discretion to backdate the registration date. That being so, and reflecting the agreement of the parties, I have not determined the alternate bases upon which the Claimant had argued her case and nor do I analyse the evidence that the Claimant submitted in support of grounds (b) – (e).
6. The judgment is divided into the following sections:
  - a) The factual background
  - b) The procedural history
  - c) The statutory framework and the Defendant’s Scheme

- d) The Claimant's evidence
- e) Does the Defendant have a discretion to backdate the registration date?
- f) The duty of candour
- g) Disposal and relief

#### A) THE FACTUAL BACKGROUND

7. The Claimant applied to join the Defendant's housing register in September 2017 after her third child, Patricia, was born. At that time the Claimant and her family were living in private rented accommodation. Mr Freddy Mamani, the father of the Claimant's children and the Claimant's former husband, was also living with the Claimant at that time. The application form was filled out by the Claimant, but the applicant was named as Mr Mamani. The Claimant says in her witness statement that "*[w]e thought it would be simpler if the application was in Freddy's name, as it would be easier to prove income if necessary*". The Claimant was named in the application, and she was the "*only person who logged in and used this account. Freddy doesn't even know the password and has never used it*". It was the Claimant who bid on properties using that account. The account had the reference number 24284232 ("the Old Account"). The priority band awarded under the Old Account was "Band D".
8. In October 2022 the Claimant and her family were evicted from their private rented accommodation, after their landlord obtained possession pursuant to section 21 of the Housing Act 1988 (a so-called "no fault eviction"). The Claimant made a homelessness application to the Defendant. The family were initially placed in accommodation near Basildon in Essex. During this time the relationship between the Claimant and her husband broke down and they separated. The Claimant's husband left the household in November 2022.
9. On 14 February 2023 the Defendant determined that the Claimant was homeless and that it owed the Claimant the "main housing duty" under section 193 of the Housing Act 1996. The Defendant also provided her with a new housing register account in her own name with the following account number: 24321653 ("the New Account"). The Claimant's priority banding was updated to "Band C1" but the registration date for the New Account was recorded as 8 February 2023. The Claimant's household still includes her three children. There is no dispute that had the Old Account been in the Claimant's name then the registration date would have remained the same, i.e. 21 September 2017.
10. On 15 March 2023 the Claimant's solicitor wrote to the Defendant requesting the Defendant to exercise its discretion "*to back date her housing waiting list account to when she made a homeless application with her ex-partner on 21.09.17.*" The Claimant's solicitor stated: "*[w]e ask that the council uses its discretion to backdate our client's account to 15.09.17. If the council fails to do so, then we submit that the council's behaviour would be irrational and discriminatory. To not award the requested backdate would be irrational as it means severe disadvantage can be experienced by families just because there has been relationship breakdown. It is noted that the same does not occur if the family household changes in other ways, such as death of an existing household member or birth of a new household member. Failing to backdate our client's account would also be indirect*".

*discrimination under S.19 Equality Act 2010. Single parents are particularly disadvantaged if they are not allowed to keep the start date from an account they shared with their ex-partner.”*

11. No response was received to that request and on 17 April 2023 the Claimant’s solicitor wrote again to the Defendant requesting it to exercise its discretion. No reply was received.

**(B) THE PROCEDURAL HISTORY AND PRELIMINARY ISSUES RAISED AT THE OUTSET OF THE HEARING**

12. On 25 April 2023 the Claimant’s solicitors sent the Defendant a letter before claim for judicial review. It asked for a response to be provided by 9 May 2023. The letter was acknowledged by the Defendant on 25 April 2023, but no substantive response was sent. Accordingly on 16 May 2023 the Claimant’s solicitors wrote to the Defendant indicating that if no response was received by 18 May 2023, then the Claimant would be advised to issue proceedings without further notice. Again, no response was received.
13. On 19 May 2023 the Claimant’s solicitors wrote to the Defendant once more asking for a response. No reply was received. On 5 July 2023 the Claimant’s solicitors wrote to the Defendant informing it that the Claimant had now received legal aid funding and asking the Defendant to respond to the request to backdate her registration date and to the pre-action letter.
14. No response was received and accordingly the Claimant issued judicial review proceedings on 1 August 2023.
15. On 9 August 2023 the Claimant’s solicitors received a response from the Defendant to a request made under the Freedom of Information Act 2000. The Claimant had made that request on 5 July 2023. The reply stated:

“Request:

I am writing for the purpose of submitting an FOI in relation to the social housing waiting list.

Can the council please provide all policy, guidance and information regarding the process to be followed by housing officers when calculating the qualifying date (also known as registration date) for applicants housing waiting list accounts? In particular, this should also include situations where a person has been granted a housing waiting list account when a homeless duty has been accepted. If any part of the process of determining qualifying dates is automated, can we please be provided with the algorithm/calculation that the automated system uses.

Response

On Northgate, the Registration Date of an application is automatically set as the date when the applicant or officer creates the application on line.

The Registration Date is translated into the Qualifying Date on Home Connections.

There is no other information that can be provided”.

16. This response prompted the Claimant's legal team to amend the Grounds to include the fifth ground (unlawful fettering of discretion) on the basis that the response could be interpreted as suggesting that the automated registration date could not be changed under any circumstances.
17. The Defendant filed Summary Grounds on 23 August 2023. Inter alia, the Defendant asserted that "[t]he scheme does not provide for any discretion in the registration date" (paragraph 16) and "although there are various areas in which the Defendant enjoys a discretion, changing the date of registration is not one of them. That is a hard fact" (paragraph 22).
18. In response to the Summary Grounds the Claimant filed a Reply in which she stated that the Defendant's position "is at odds with the evidence and the experience of other applicants to Lambeth's housing register scheme. That evidence is set out in the witness statements accompanying this Reply". The evidence was in the form of a witness statement from the Claimant's solicitor and from Ms Köskal of Housing Action Southwark Lambeth and is discussed in detail below.
19. When granting permission on 6 October 2023, Lang J gave detailed case management directions.
20. On 17 October 2023 the court notified the parties that the substantive hearing would take place on 12 December 2023. The Defendant's deadline for filing evidence and Detailed Grounds was 10 November 2023 but no evidence or Detailed Grounds were served. Nor did the Defendant inform the court and the Claimant that its Summary Grounds would stand as its Detailed Grounds (as provided for in CPR 54A 9.1(1)).
21. On 20 November 2023 the Claimant filed her skeleton argument in accordance with Lang J's directions. On 28 November 2023 the Defendant filed its skeleton argument and the following day, on 29 November 2023, at 7.50 p.m. the Defendant served an application seeking "permission to join the hearing on 12 December 2023." In support of that application, the Defendant filed a witness statement from Ms Mary Ojukwu, a barrister employed by the Defendant. In the statement Ms Ojukwu said:
  - “10. The Housing Allocations Scheme is framed so as to secure that the categories of applicants set out in section 166(A) of the Housing Act 1996 are given reasonable preference. The Council operates a Choice Based Lettings Scheme where all vacant properties are advertised to the Council's Housing Register on a website.
  11. The Council recognises that there may be some exceptional circumstances not covered by the Scheme. In such instances, the Director of Housing will have delegated authority to make decisions, as he considers appropriate.”
22. The Claimant put a number of questions to the Defendant in response to the witness statement, drawing attention to the fact that paragraph 11 of Ms Ojukwu's statement seemed entirely contrary to the Defendant's position that there is no discretion available to backdate her registration date. The Claimant's email, dated 5<sup>th</sup> December 2023, stated as follows:
  - “Your witness statement states at paragraph 11 that the Director of Housing has 'delegated authority' to exercise discretion. We need disclosure on:

- How the delegated authority at paragraph 11 works, and all documents related to it?
- Why this extra discretion is not part of the published allocations scheme?
- How are applicants able to access this discretion?
- How are decisions taken in relation to this discretion?
- Why the Claimant's case was not referred for consideration for this discretion?
- Considering there is this discretion, why were the Claimant's requests for discretion never responded to?

This information should be provided in accordance with the council's duty of candour.”

23. In response the Defendant disclosed its “*Guidelines for Officers: Exercising Discretion under the Housing Allocation Scheme 2013*”. It offered no explanation as to why that document had not been disclosed earlier and did not respond to the questions set out above.
24. The Claimant also asked:
- “- how was the Defendant able to backdate the registration date in all those other cases which we have provided examples of (see third witness statement of [the Claimant’s Solicitor] and the witness statement of Isabelle Köksal)?
  - explanation for why the Defendant did not backdate the registration date in the Claimant's case (or consider backdating), when they had in the other instances detailed
  - why were we not sent the discretionary guidance earlier?
  - why is this discretionary guidance not publicly available?”
25. The Claimant indicated that it was considering making an application to the court under CPR Part 18 requiring the Defendant to provide responses to these questions if they were not voluntarily provided. In the event the Claimant received no substantive response to these requests but did not issue an application.
26. The Claimant opposed the Defendant’s application to join the substantive hearing applying the three-stage test in *Denton v White* [2015] EWCA Civ 906.
27. On 8 December 2023 Hill J allowed the Defendant’s application to participate in the substantive hearing. In her reasons for the order, Hill J noted that “[a]lthough it is asserted that the absence of detailed grounds means that the Defendant may not participate in the hearing of the claim, the provision to that effect in CPR 54.33 applies to environmental claims. Notwithstanding paragraph 10.1.5 of the Administrative Court Guide there is no similar provision in section 1 of CPR 54 which applies to general judicial review claims such as this one. It does not therefore appear that the Defendant requires relief from sanctions or permission to participate in the hearing of the claim. However to the extent that the same is necessary I consider both courses appropriate, principally in light of the assistance the court is likely to receive from such participation and the lack of prejudice to the Claimant, given the costs order at [4] above”.
28. Hill J ordered that the consequences of paragraph 11 of Ms Ojukwu’s statement should be addressed so far as was possible ahead of the hearing. Hill J noted that: “[i]t is said by the Claimant in the response that [11] of the statement filed in support of the application changes the evidential picture in respect of the substantive claim and that further disclosure

*on this issue may be required. The parties should address this as a matter of urgency given the proximity of the hearing.”*

29. At the outset of the hearing the Claimant argued that the Defendant had been in breach of its duty of candour in its conduct of the case. Mr Ahluwalia argued that the state of the evidence before the court was unsatisfactory. He said that, to the extent that this was the case, the court should draw adverse inferences. Mr Ahluwalia confirmed that the Claimant had decided not to make an application for further disclosure nor was the Claimant making an application for the hearing to be adjourned. However, Mr Ahluwalia invited the court to consider making an order under CPR Part 18 of its own motion.
30. Ms Rowlands for the Defendant accepted that there were things that the Defendant should have done differently, but she did not accept that it had acted in breach of its duty of candour. She argued that the court had sufficient evidence before it in relation to the question as to whether or not there was a discretion to backdate the registration date. In any event, the question of what the Defendant’s Scheme meant was a question of law. Ms Rowlands thought that it was unnecessary and inappropriate for the court to make any order under CPR Part 18.
31. Having heard those submissions, I indicated that I did not consider it appropriate to make any order for disclosure of the court’s own motion. Neither party had applied for the hearing to be adjourned and an order for disclosure would inevitably mean adjourning the substantive hearing. Whilst such a course might be appropriate in some circumstances (see for example *R (MP) v Secretary of State for Health and Social Care* [2018] EWHC 3392 (Admin) at [9]; *R (T) v Secretary of State for Education* [2018] EWHC 2582 (Admin) at [101]– [102]) I did not consider it was necessary in this case. The significance or otherwise of the absence of evidence from the Defendant, particularly in response to the Claimant’s evidence as to other instances where the Defendant had backdated the registration date, was something which would fall to be addressed in submissions and determined, if necessary, in this judgment. I address later the question of whether or not there has been a breach of the duty of candour by the Defendant.

## **(B) THE STATUTORY FRAMEWORK AND THE SCHEME**

32. Section 166A (1) of the Housing Act 1996 (“the 1996 Act”) provides that “(e)very local housing authority in England must have a scheme (their “allocation scheme”) for determining priorities, and as to the procedure to be followed, in allocating housing accommodation. For this purpose “procedure” includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken.”.
33. The 1996 Act requires that the scheme shall be framed so as to secure that reasonable preference to certain categories of person (specified in s.166A(3)). S.166A(14) of the 1996 Act provides that a “local housing authority in England shall not allocate housing accommodation except in accordance with their allocation scheme”.
34. The Aims of the Scheme are explained at the outset:

- “To meet the Council’s statutory duties in allocating Council housing and making nominations to housing associations and other Councils
- To meet the Council’s aims in respect of equality and choice
  - To help build and sustain diverse and balanced communities
  - To enable properties to be relet quickly, and so make efficient use of housing

resources

- To maximize opportunities for mobility among tenants of social housing
- To minimize the cost of homelessness to the Council and to council tax payers
- To work with other providers and agencies to make the best use of affordable housing from all sources to meet needs”.

35. The Scheme states that:

“Applicants must notify the Council if there is a relevant change of circumstances affecting their application, including changes that may affect their level priority, eligibility or size of property they can be offered. An applicant’s priority band or level may increase or decrease following a change of circumstances.”

36. At p.22 of the Scheme, the Defendant sets out the policy in relation to homeless persons owed the full housing duty under the 1996 Act:

“Homeless persons owed a full housing duty under Part 7 of the Housing Act 1996 will normally be placed in Band C, Level 1 (see Band C – Medium Priority).

....

The Council may at its discretion award additional priority to homeless persons, or make direct offers of housing in discharge of the full housing duty, in exceptional circumstances, or where it is advantageous to the council.”

37. The Scheme operates by placing applicants within “bands”. At p.23 of the Scheme, it provides that

“The Council may at its discretion in exceptional circumstances place an applicant in a higher or lower priority band, or level within a band.”

38. The Scheme has four bands which are summarised in a table at p.13 of the Scheme:

**“BAND A – EMERGENCIES AND STRATEGIC PRIORITIES**

- Emergency transfers due to risk of violence
- Life threatening medical emergency
- Care leavers
- Decants of council tenants
- Where housing is required to prevent significant harm to a child
- To facilitate discharge of child from care
- To facilitate discharge from residential care or hospital
- Council and housing association tenants downsizing

Band A is divided into Level 1 and Level 2. Applicants will normally be placed in Level 2 but the Council may at its discretion place exceptionally urgent cases in Level 1.

**BAND B – HIGH PRIORITY**

- Severely overcrowded households (lacking two bedrooms)
- Those with an urgent medical need to move
- Those threatened with homeless who are working with us to prevent homelessness

**BAND C – MEDIUM PRIORITY**

- Homeless households
- Those who are overcrowded (lacking one bedroom) and those sharing bathroom/kitchen facilities
- Those with a less urgent medical need

Band C has two Levels. Statutory homeless households owed a full housing duty are in Level 1 of Band C. All others are in Level 2 of Band C.

#### BAND D – LOW PRIORITY

Band D consists of those not in other bands, including those who are adequately housed.”

39. At p.31 the Scheme states in relation to Band C that

“There are two Levels of priority within Band C: Level 1 and Level 2 (Level 1 is higher). Households who are homeless and have been accepted as statutory homeless and owed a full housing duty by Lambeth Council under s193(2) or s192(3) of Part 7 of the Housing Act 1996 will be placed in Level 1 of this Band. All other applicants, including homeless households not owed a full housing duty, will be placed in the lower Level 2.”

40. The Scheme sets out details of its “*choice based lettings system*”:

“To enable applicants to exercise greater choice over where they live, the Council operates a choice-based lettings system. Properties are advertised and applicants express an interest in the properties they would like to be considered for by bidding for them. Applicants will generally not be considered for properties they have not bid for, unless they are being made a direct offer (see Direct Offers).

The advertisement will show details such as:

- The location of the property
- The type of tenancy (e.g. fixed-term or not)
- Details of the property in terms of property type, number of bedrooms, size etc
- Rent and service charges
- Any restrictions on households to whom the property may be offered (e.g. size of household, sheltered housing for older people, properties suitable for those with disabilities etc)
- The housing list or priority band that will be given priority for the property if applicable
- Where available, a photograph will be displayed. Note that photographs may be representative of the street or block and may not necessarily be the particular property that is available.

...

Unless otherwise stated in the advertisement, bidders in Band A have highest priority, followed by Band B, C and D in that order. The Council may determine that a property may be offered to transfer applicants ahead of other applicants, or vice versa, in which case this will be stated on the advertisement. Unless otherwise stated, transfer applicants and other applicants will be considered on equal terms.

Priority between applicants in the same Band will be based on their Level if applicable, and then registration date.

We will shortlist the highest priority bidders who meet any additional criteria as set out in the advertisement, such as age criteria or need for disability adaptations, and who is available to be shortlisted. Applicants can only be shortlisted for one property at a time, so if an applicant is already shortlisted for another property they are not available to be shortlisted for further properties.

The property will normally be offered to the highest priority shortlisted bidder who attends the viewing and wishes to take the property. If the highest priority bidder attending the viewing does not want the property, then it will be offered to the next highest priority, and so on.”

(Emphasis added)

41. The Scheme sets out the Defendant’s policy in relation to joint tenancies:

“Both applicants for a joint tenancy must individually qualify to join the housing or transfer list and be authorised for an offer. Adding to or removing a joint applicant from your housing application will require closing the current application and submitting a new one, and may therefore result in loss of priority based on registration date.

When one or two joint tenants give notice to the Council to terminate the tenancy, the Council may at their discretion offer the property (or an alternative property) as a sole tenancy to one or other of the joint tenants.”

(emphasis added)

42. As noted earlier, shortly before the substantive hearing the Defendant disclosed a document called “*Guidelines for Officers Exercising Discretion under Housing Allocation Scheme 2013*”. The introduction to the Guidelines states:

“In the Council’s Housing Allocation Scheme 2013, a number of matters are stated as being at the discretion of the Corporate Director. The Corporate Director can delegate the decision to another Council officer, or a Panel of officers in line with these guidelines.

The Schedule of Delegation (see the Appendix) has been agreed by the Corporate Director. It sets out the officers who can take decisions on her behalf. People who are formally acting up into the positions mentioned, or who are formally undertaking the duties of the posts, may also take these decisions. The Schedule of Delegation sets out who can make decisions. Their line manager(s) are also delegated to make such decisions or to consider reviews of these decisions. Before you make a decision you should check that it is one that you have the power to make.

This Guidance must be read alongside Housing Allocation Scheme 2013.”

43. The introduction to the Guidelines goes on to summarise the “*Requirements of Lawful Decision-making*” and sets seven principles to be applied in all cases. In relation to discretion, the Guidelines state:

“You must not fetter your discretion. Whatever Council policy may say, it must not be followed slavishly or unthinkingly – there has to be room for exceptions. If the only

reason you can find for making a decision is “Council policy says so”, and the underlying reasoning behind the policy is unclear to you, or if it doesn’t seem reasonable or fair to apply the policy to the individual case you are dealing with, then you are probably on dangerous ground in following the policy!”

**(D) THE CLAIMANT’S EVIDENCE RELATING TO THE BACKDATING OF THE REGISTRATION DATE**

44. As noted earlier, the Claimant submitted evidence with her Reply. In that evidence the Claimant’s solicitor and Ms Köksal gave examples of cases where the Defendant had backdated the registration date.

45. Mr Sheldon, the Claimant’s solicitor, gave four examples of such instances in his third witness statement. Three of those were clients of his and one example was drawn from research he had undertaken.

46. The first example was the case of Z:

“In the case of Z, I assisted her to take a complaint to the Local Government and Social Care Ombudsman (LGSCO) regarding a number of issues that had occurred before I had been instructed. She had been living in a domestic violence refuge with her baby daughter in the Defendant’s area. In November 2016 the refuge referred my client to the Defendant, who then arranged her private rented accommodation. My client did not know she needed to make an application to join the housing register, and so she made the application a year later and was placed on the housing register in January 2018.”

47. Mr Sheldon exhibited the decision of the LCGSCO which records:

*“41 ... The Council accepts the failure to take a homelessness application and make enquiries was fault*

*....*

*43. Where a person is homeless the Council should advise them to apply to its housing register. I have seen no evidence that it did so. Mrs X says there was a discussion about priority band B but the Council has no record of this. There is no record that the Council considered an application to its housing register and issued a decision letter. The Council accepts the failure to consider whether Mrs X was eligible for its housing register was fault ...*

***Agreed action***

*75...*

*c. Award Mrs X priority band B on its housing register, back-dated to 6 December 2016, which is when it accepted the referral from the refuge. This is on the basis that when we remedy injustice we try to put the person back into the position they would have been in but for the fault identified”*

48. Mr Sheldon goes on to say that:

“From the information provided to me by the LGSCO, the Defendant did not state during this case that they had no powers to backdate Z’s housing register account.

Instead, they agreed to the above remedial action. Although the decision refers to backdating Band B priority, in effect this means the Defendant was agreeing to backdate the registration date; as there is no other date that effects priority on the waiting list. I can confirm that the council backdated the registration date of Z's housing register account to 06.12.16 in response to the above LGSCO decision. There have been no changes to the relevant parts of the Defendant's allocation scheme since the above case."

49. The second example is the case of Y. It is a close parallel to the Claimant's case. Mr Sheldon explains:

"In the case of Y, I was assisting her with a homeless application. At the time of the application, she had a housing register account in her own name with a start date in 2020. When taking instructions I discovered that she had previously had a housing register account with her ex-partner, which had a start date in 2017 and was in the ex-partner's name. In 2022 I sent a request to Ms Wilson of the Defendant, asking that Y's housing register start date was backdated to when she first had an account with her ex-partner. The emails from myself explicitly request that the council use its discretion to backdate Y's account. My original email also states that to not backdate Y's account would be discriminatory and irrational. In response, Ms Wilson decided that it would be "*equitable to backdate*" Y's account to 2017 when the account with her ex-partner started. ...This case is recent and shows the Defendant used its discretionary powers to backdate an account in relation to relationship breakdown."

(Emphasis added)

50. The third example, the case of X, is even more recent:

"In the case of X, I was assisting him with a homeless application to the Defendant. The most recent homeless application was requested in August 2022 by HASL on behalf of X, and a negative homeless decision was made. I was then instructed to assist with a homeless review under s.202 Housing Act 1996. The main housing duty under s.193(2) Housing Act 1996 was awarded in August 2023 and X was granted a housing register account. This email attaches a decision letter and states that X's housing register account will be "*backdated accordingly*". This is further evidence that the Defendant routinely backdates housing register accounts."

51. The final example given by Mr Sheldon related to an instance where the Ombudsman found the Defendant was "*at fault for giving incorrect advice, for failing to properly consider whether the temporary accommodation was suitable, and for not doing enough to consider alternate options once it was aware the temporary accommodation was unsuitable.*" The Ombudsman's report has a section on "agreed action" to be taken, which included that Lambeth could consider backdating the complainant's housing priority.
52. The Claimant also relied on a statement from Ms Köksal who is the group co-ordinator of Housing Action Southwark London (HASL) which she explains is a "*volunteer-run community group who support each other with housing and homelessness problems*". Ms Köksal gives four examples in her statement of cases that HASL has been involved with and in which the Defendant has backdated the registration date.
53. The first example was a case in 2015:

“In the case of A, she attempted to do a housing register application in October 2015 and then made a homeless application in March/April 2016. She then completed the housing register application in August 2016. After the housing waiting list account was opened she asked for the start date to be backdated. The council agreed to backdate the start date to when the homeless application was opened.

54. The second example is one which has some similarities to the Claimant’s case:

“In the case of B, she came to the group after being awarded the full homeless duty and living in temporary accommodation. The homeless application had been made in her husband’s name and therefore he was the main applicant on the housing register account. We helped her to look at her housing register account and understand it. We realised the start date did not reflect the time the family had been in temporary accommodation. They had been given a start date of 05.09.16 which was the date the main homeless duty was accepted. However, they were first placed in temporary accommodation on 02.07.14. We helped her to make a complaint to the Defendant and at stage 2 of the complaints process they agreed to backdate the account to 20.06.23 when the family first approached the Defendant as homeless. Produced and shown to me marked Exhibit IK1 is the stage 2 review decision letter dated 21.12.18. In October 2022, our member and her partner separated and he left London to live in Spain. B remained in the temporary accommodation with their children. We helped B to update Lambeth council’s housing department about this change of circumstances. A housing officer explained that because the homeless application was in her partner’s name, B would need to make a new homeless application in her own name. We were concerned about this because we were worried that this could mean that she could lose the family’s original bidding account/start date of 02.07.14. We emailed the council on her behalf and Housing Advice Support Team Leader Kieron Robinson replied “*We will need to take a fresh homeless application from B, accept the relief duty (she is technically homeless at present) and take things from there. If/when we accept the main duty, we can backdate her list date to the same as the one on the existing application so that she has not been disadvantaged by the process*”.

55. The third example is very recent:

“In the case of C, her family had been homeless and rehoused in private rented accommodation. She came to the group with 3 housing register account numbers. She was confused, because they each had different information. She sent us screenshots so we could try and understand and we helped her to get her housing file to understand the situation. Her first housing register account had a start date in October 2014, and her most recent and up to date account had a start date of August 2020. We helped her to make a formal complaint to the Defendant on 15.06.23. We received the stage 1 complaint response on 02.08.23 stating that the council would backdate the start date of her most recent account to August 2014 to reflect the date that the first housing register application was made. The stage 1 complaint response is produced and shown to me marked Exhibit IK3.

56. The final example has some similarities with the Claimant’s case:

“In the case of D, she came to group (sic) while living in temporary accommodation with the full homeless duty. From discussing her case we discovered that she had two bidding accounts, one from 2015 when she first made a housing register application, and another up to date one from 2020 when she made a homeless application. The recent account had her correct priority and her correct personal details. We assisted

her to make a complaint to get her account backdated. On 12.01.23 the Defendant made a stage 1 complaint response agreeing to backdate her housing register account to 01.07.15; this was later confirmed to involve backdating the start date of her most recent account from 2020.”

**(E) DOES THE DEFENDANT HAVE A DISCRETION TO BACKDATE THE REGISTRATION DATE?**

*The parties' arguments*

57. The Claimant argued that the Defendant had failed even to consider her application to backdate her registration date. Relying on Lord Hoffman in *Stovin v Wise* [1996] AC 923, the Claimant argued that a public body always has a duty in public law to consider whether it should exercise its discretion. Mr Ahluwalia relied on R (*Imam*) v *The London Borough of Croydon* [2021] EWHC 739 (Admin), (“*Imam*”), where, at paragraph 108, Mr Gullick QC (as he then was), sitting as a Deputy Judge of the High Court, held that:

“In my judgment, the Defendant acted unlawfully in failing to take any decision in response to the two express requests made by the Claimant that she should be moved into Band 1. Ms Steinhardt is, in my judgment, correct in her submission that the Defendant was under an obligation, as a matter of public law, to consider and decide those requests. It did not do so. In the circumstances, it is unnecessary to consider whether the Defendant was under a separate duty to reconsider the issue of its own motion: specific requests for re-categorisation were made by the Claimant and were, it appears, ignored by the Defendant.”<sup>1</sup>

58. The Claimant argued that the Defendant’s Scheme contained express powers to backdate the registration date. Mr Ahluwalia relied on the references in the Scheme that “*the Council may at its discretion add additional priority to homeless persons*” (page 22 of the Scheme, cited above at paragraph 36) and that “*the Council may at its discretion in exceptional circumstances place an applicant in a higher or lower priority band, or level within a band*” (page 23 of the Scheme, cited above at paragraph 37). Mr Ahluwalia also relied upon the reference to the approach to Joint Tenancies at page 30 of the Scheme, cited above at paragraph 41. The Claimant argued that this was consistent with the evidence of Mr Sheldon and of Ms Köksal. It was also consistent with the reference in the Guidelines to the exercise of discretion set out in paragraph 46 above. Mr Ahluwalia emphasised that all that the Claimant was seeking was the backdating of her registration date, she was not arguing that property should be allocated to her.
59. Mr Ahluwalia argued that if, contrary to his primary submission, there was no express power, it was necessary to read the Scheme as containing a general residual discretion. He relied on the observations of Briggs LJ (as he then was) in *Holley v Hillington LBC* [2016] EWCA Civ 1052; 2017 PTSR 127, (“*Holley*”) at [27] and argued that allocation schemes are required to contain a residual discretion to make extraordinary decisions in appropriate cases. He nonetheless acknowledged that in R (*Hilsden*) v *Epping Forest DC* [2015] EWHC 98. (“*Hilsden*”), McCloskey J (as he then was) concluded that there was no obligation to have a residual discretion. Mr Ahluwalia noted however that the issue in *Hilsden* was whether there was a discretion in relation to someone being admitted to a scheme which was not the issue here.
60. At the hearing, Mr Ahluwalia responded to the Defendant’s assertion in its Skeleton Argument that the cases cited in the Claimant’s evidence (referred to in section C above)

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<sup>1</sup> The judgment was reversed in part on appeal but the reasoning on this aspect was undisturbed: [2023] UKSC 45

fell only within a specific category of cases whereby a public authority had a discretion to remedy injustice or unfairness (*R (GE) (Eritrea) v Secretary of State for the Home Department and another* [2014] EWCA Civ 1490, [2015] 1 W.L.R. 4123, “*(GE) Eritrea*”). Mr Ahluwalia noted that there was no evidence from the Defendant supporting that assertion. Even if it was correct, then Mr Ahluwalia argued that the Claimant’s case fell within such a discretion. The local authority’s error was in not backdating the Claimant’s account to the date she had filled in the application form in 2017.

61. The Defendant’s position, as noted earlier, was that “[t]he scheme does not provide for any discretion in the registration date” (paragraph 16) and “although there are various areas in which the Defendant enjoys a discretion, changing the date of registration is not one of them. That is a hard fact.” (paragraph 22).
62. Ms Rowlands relied on *Hilsden* in arguing that there was no requirement for there to be a residual discretionary duty in a housing allocation scheme. She argued that the observations of Briggs LJ were obiter in contrast with the fully reasoned judgment of McCloskey J.
63. The Defendant argued that the Scheme needed to be looked at as a whole. Ms Rowlands said that where there is a discretion in the Scheme then that is expressly stated. There is no express reference to a discretion to backdate the registration date. She relied on the judgment of the House of Lords in *Ahmad* to the effect that the court should only interfere in a housing allocation scheme where it failed to comply with statutory requirements or where it was plainly irrational.
64. Ms Rowlands asserted that the cases relied upon in the Claimant’s evidence all fell within the discretion for any local authority to remedy injustice as explained in (*GE) Eritrea*:

“54. I accept that a local authority may use its discretionary powers to make good any unlawfulness that it has committed in the past and may, in some circumstances, be obliged to do so. In *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546 this court drew attention to the fact that the Secretary of State had a residual discretionary power to grant indefinite leave to remain to someone no longer entitled to refugee status as such; that the grant of indefinite leave might provide a remedy for unfairness; and that it was open to the court to determine that a legally material factor in the exercise of the discretion was the correction of injustice. In an extreme case the court could hold that the unfairness was so obvious, and the remedy so plain, that there was only one way in which the Secretary of State could reasonably exercise his discretion. (That appears to be what Thirlwall J decided in *R*). The Court recognised that the Secretary of State's decision would fall to be made on the basis of present circumstances but “those circumstances might include the present need to remedy injustice caused by past illegality”: [47].

55. There is no general rule that, wherever it has acted unlawfully, a local authority must undo its past errors to the fullest extent that it can. Much will depend on the circumstances, including whether or not the claimant had sought interim relief and been refused (as here), whether he was guilty of unacceptable delay, and whether and to what extent the authority or the claimant should be regarded as blameworthy. There may be countervailing considerations of public interest which would entitle it to refuse any relief at all. It may be relevant to consider what other remedies are open to the claimant. The matter would be one for the discretion of the local authority, to be determined in the light of whatever application is made and in the circumstances applying when it is invoked.”

65. Ms Rowlands said that all of the examples cited by the Claimant showed that there had been some fault on the part of the Defendant. In the Claimant's case she was unable to point to any fault on the part of the Defendant and therefore there was no possibility that the (*GE*) *Eritrea* would be applicable to the Claimant's case.
66. *Imam*, Ms Rowlands argued, could be distinguished as in that case there was a discretion which the defendant had failed to exercise. She accepted that if, contrary to the Defendant's position, the court did find that there was a discretion to backdate the registration date then the Defendant would have acted unlawfully.

### *Discussion*

67. I start with what should be my approach to the correct interpretation of the Scheme. The approach to such a question was summarised by Males LJ in *R (Flores) v Southwark LBC* [2020] EWCA Civ 1697; [2021] H.L.R. 16 ("*Flores*") at [39]-[40]:

"39. The meaning of a housing allocation scheme, like that of any other comparable policy document, is for the court to determine (cf. in a planning context, the well-known passage from Lord Reed's judgment in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983 at [18] and [19]), but the court's approach to its interpretation should be in accordance with the guidance given by this court in *R (Ariemuguvbe) v Islington LBC* [2009] EWCA Civ 1308, [2010] HLR 14. Sullivan LJ said:

"24. ... since this is a local authority housing allocation scheme and not an enactment, it has to be read in a practical, common sense, and not in a legalistic way."

40. Lord Neuberger MR added: "31. ... While any document prepared for public consumption should be as clear, short and simple as possible, it is particularly true of housing allocation schemes required to be prepared under [what was then] Section 167, and published under Section 168, of the Housing Act 1996. They are intended to be read by, and administered for, the benefit of people who require public housing and their families, and they are intended to be applied in multifarious different circumstances in which great difficulties can often arise. ... It is plainly right for the court to apply a common sense and a practical approach to the interpretation of the scheme, and indeed an interpretation which allows a sensible degree of flexibility when it comes to dealing with individual cases. That this approach is appropriate is reinforced by the wide discretion given to local housing authorities ..."

68. There is no explicit reference in the Scheme to a discretion to backdate the registration date. However, looking at the Scheme as a whole, and applying the approach set out by the Court of Appeal in *Flores*, it seems to me that two of the three passages relied upon by the Claimant demonstrate that there is in fact a discretion in the Scheme to backdate the registration date.
69. The first passage relied upon by the Claimant is set out at paragraph 36 above: "[the Council may at its discretion award additional priority to homeless persons". This passage has to be read in the context of how the "choice based lettings system" operates whereby "[p]riority between applicants in the same Band will be based on their Level if applicable, and then registration date" (see paragraph 30 above). A mechanism by which "additional priority" may be given is to backdate the registration date.

70. That there is a discretion in relation to the registration date is also clear from the reference to Joint Tenancies in the Scheme that has been relied upon by the Claimant. As noted at paragraph 41 above, “[a]dding to or removing a joint applicant from your housing application will require closing the current application and submitting a new one, and may therefore result in loss of priority based on registration date” (emphasis added). That passage is significant in two respects. First, it makes clear that the date of registration adds priority to an applicant for housing which reinforces the interpretation I have given to how the discretion to “award additional priority to homeless persons” may be exercised. Secondly, it makes plain that the Defendant has a discretion as to whether submitting a new application results in the “loss of priority based on registration date”. The Scheme says that such action “may” (rather than “shall”) result in “loss of priority based on registration date”.
71. The final passage relied upon by the Claimant is set out at paragraph 36 above. In my judgment that passage – stating “*the Council may at its discretion in exceptional circumstances place an applicant in a higher or lower priority band, or level within a band*” - does not materially assist the Claimant. The meaning of “band” and “level” are clear. The bands are the categories that are summarised in the table at p.13 of the Scheme, and which are defined in the Scheme. Equally “level” refers to defined sub-categories. However, this passage does not undermine in any way my interpretation of what the Scheme means when it refers to a discretion to give “additional priority” to an applicant.
72. The interpretation which I have given to the Scheme is one which accords with “*common sense and [is] a practical approach to the interpretation of the scheme, and indeed an interpretation which allows a sensible degree of flexibility when it comes to dealing with individual cases*” (Flores, [40]). It is also consistent with the evidence that the Claimant has served which demonstrates that the Defendant has, as a matter of fact, exercised a discretion to backdate the registration date in a number of different cases. The interpretation is also consistent with the Guidelines and the overarching approach set out to the exercise of discretion and which I have set out above in paragraph 43.
73. I do not accept the Defendant’s assertion that the Claimant’s evidence only demonstrates that there is a discretion on the local authority to backdate the registration date in circumstances where there has been injustice or unfairness (consistent with (*GE Eritrea*). First, I note that the Defendant makes this point by assertion only and without any supporting evidence. Secondly, the Claimant’s evidence does not indicate that the discretion to backdate the registration date may only be exercised where there has been prior unlawful action leading to injustice. Some but not all of the cases would fall within such a description. Moreover, the cases of Y and B referred to above are very close parallels to the Claimant’s circumstances. Indeed, the language used by the Claimant’s solicitor in requesting the Defendant to backdate Y’s registration date mirrors the language that he used in his (repeatedly ignored) requests to backdate the Claimant’s registration date. The decision to backdate the account was taken because it was “*equitable*” to do so. B’s case demonstrates the Defendant backdating the registration date so that B was not “*disadvantaged by the process*” in similar circumstances to those that obtain in the Claimant’s case.
74. For completeness, if I am wrong in my analysis of the Scheme and that the Defendant is right that the discretion arises only to remedy “*unfairness*” by the Defendant, it is arguable that the Claimant’s case falls within such a category to the extent that the Defendant should at least consider exercising its discretion.
75. Finally, having interpreted the Scheme in the way that I have done, I am not required to

determine whether the Claimant is correct that *Holley* requires that a general discretion is to be implied in the Scheme.

## F) THE DUTY OF CANDOUR

76. The duty of candour and co-operation with the court in judicial review proceedings is well established. In *R (Quark Fishing Limited) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 Laws LJ emphasised at [50]:

“[T]here is... a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide.”

77. In *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 [2018] 4 W.L.R. 123 Singh LJ explained at [106]:

“(2) One of the reasons why the ordinary rules about disclosure of documents do not apply to judicial review proceedings is that there is a different and very important duty which is imposed on public authorities: the duty of candour and co-operation with the court. This is a “self-policing duty”. A particular obligation falls upon both solicitors and barristers acting for public authorities to assist the court in ensuring that these high duties on public authorities are fulfilled.

(3) The duty of candour and co-operation is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. As I said in *Hoareau* at para. 20:

“... It is the function of the public authority itself to draw the Court’s attention to relevant matters; as Mr Beal [leading counsel for the Secretary of State in that case] put it at the hearing before us, to identify ‘the good, the bad and the ugly’. This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.”

...

(5)The duty of candour is a duty to disclose all material facts known to a party in judicial review proceedings. The duty not to mislead the court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact.”

78. In my judgment, Ms Rowlands’ admission on behalf of the Defendant that there were things that the Defendant should have done differently did not go far enough.
79. In its Summary Grounds, the Defendant categorically asserted that it was a “*hard fact*” that there was no discretion to change the date of registration. It made no mention of cases where the date of registration had in fact been backdated. In response, the Claimant filed detailed evidence demonstrating that in a number of cases the Defendant had exercised a discretion to backdate the registration date. In my judgment at that point the Defendant’s duty of candour and co-operation operated such that it should have filed evidence to assist the court with a “*full and accurate explanation*” in response. Instead,

it responded simply by way of assertion in its Skeleton Argument. It did not answer any of the reasonable requests made by the Claimant for clarification of Ms Ojukwu's statement which I have referred to earlier in this judgment. Equally unsatisfactorily, it failed to serve the Guidelines until prompted to do so by its eleventh-hour application to the court for permission to take part in these proceedings.

80. That a public authority is hard pressed and has scarce resources cannot excuse it from compliance with its duty of candour and co-operation. Notwithstanding these regrettable omissions by the Defendant, I am however satisfied that I have been able to determine the claim fairly on the evidence that has been before me.

**(G) DISPOSAL AND RELIEF**

81. The Claimant's claim succeeds on her first ground of challenge. That being so, it is agreed that it is unnecessary for me to determine the alternate bases upon which the claim had been argued.

82. In her claim form the Claimant sought declaratory relief. When circulating this judgment in draft I invited the parties to agree the appropriate wording of a declaration. In the event agreement could not be reached and each party submitted brief submissions setting out their respective positions.

83. The Claimant's suggested wording was:

*"The Defendant does have a discretion to backdate the registration date / qualifying date of an applicant's application under the Housing Allocation Scheme. The Defendant acted unlawfully by failing to consider exercising their discretion in the Claimant's case. The Defendant should do so as soon as possible."*

84. The Defendant's suggested wording was:

*"a. The Defendant's discretion to award an applicant additional priority can be exercised by backdating the registration date of an applicant's application under the Housing Allocation Scheme.  
b. The Defendant acted unlawfully by failing to consider exercising their discretion in response to the Claimant's request."*

85. The Claimant has argued that qualifying date and registration appear to be synonymous terms used by the Defendant in respect of the Scheme. It is argued that the first sentence reflects the judgment at paragraphs 68-70 and at 72. The Claimant notes that the pleaded case has sought "*declaratory relief as the primary relief*" and "*such other relief*" as the court thinks fit.

86. The Defendant has argued that reference to "*qualifying date*" should be omitted as the term is not used in the Scheme itself. It has objected to the second sentence suggested by the Claimant on the basis it is only when an applicant requests the exercise of the discretion that there is any need to consider it. As to the third sentence it is said to be unnecessary as "*the Defendant will now consider whether to exercise its discretion in this case, and that goes without saying*".

87. An amalgam of the competing texts is appropriate together with references to the reasoning set out above. The declaration which I will make is as follows:

*“The Defendant does have a discretion to backdate the registration date of an applicant’s application under the Housing Allocation Scheme for the reasons given in the judgment at paragraphs 67-72. The Defendant acted unlawfully by failing to consider exercising their discretion in response to the Claimant’s request.”*

88. I will separately order that the Defendant should consider the Claimant’s request within 28 days. The Defendant has said that such an order is unnecessary as Defendant will now consider whether to exercise its discretion in this case, *“and that goes without saying”*. Given the unfortunate history in this case it is however appropriate to make such an order.
89. Finally, I should record that when the draft of this judgment was circulated, the Claimant’s solicitor invited me to consider amending paragraphs 27 and 28 to comment on the correctness or otherwise of the decision made by Hill J. It was said that Hill J was wrong to find that relief from sanctions was not needed. At the hearing Mr Ahluwalia similarly questioned the correctness of the decision but accepted that if he wished to challenge it then he would need to do so by way of appeal. No such challenge was brought, and I see no need for paragraphs 27 and 28 to be amended, not least because Hill J clearly considered the application on the alternative basis that relief from sanctions was required.