JUDICIAL REVIEW AND HOUSING
SOME CURRENT ISSUES

1. These notes highlight some current issues in judicial review of potential relevance to housing cases. They then look at the recent allocation case where some of these points have been developed.

Who can be judicially reviewed?

R (McLeod) v Peabody HT [2016] EWHC 737 (Admin) Williams Davis J

2. Peabody was not reviewable when it refused to deal with a request by M for a mutual exchange with another tenant in Scotland.

3. *R (Weaver) v London and Quadrant Housing Trust [2010] 1 WLR 363* and R *(McIntyre) v Gentoo Group Limited [2010] EWHC 5 (Admin)* distinguished. There was an insufficient public element because [20]:
   (a) The properties had formerly been with the Crown Estates Commissioners and the judge was not satisfied they were a public body.
   (b) Peabody did not act in close co-operation with a local authority.
   (c) The properties had been bought using funds raised on the open market and not via a subsidy or grant.
   (d) The properties were not "pure" social housing although they were let at below market rents.
   (e) Rents were not subject to the same level of statutory regulation as social housing in general.

When will the court intervene?

The classic approach:

4. The Court will defer to the local authority as decision maker. A recent example of the current approach is *R* (*O) v LB Lambeth* [2016] EWHC 937 (Admin) Helen Mountfield QC. This issue was whether O's mother was destitute since this in turn

would determine whether O was in need and whether the provision of support under s. 17 Children Act 1989 was triggered. On this issue the judge set out the general approach as being:

"[17] Whether or not a child is 'in need' for these purposes is a question for the judgement and discretion of the local authority, and appropriate respect should be given to the judgements of social workers, who have a difficult job. In the current climate, they are making difficult decisions in financially straitened circumstances, against a background of ever greater competing demands on their ever diminishing financial resources. So where reports set out social workers' conclusions on questions of judgement of this kind, they should be construed in a practical way, with the aim of seeking to discover their true meaning (see per Lord Dyson in *McDonald v Royal Borough of Kensington & Chelsea [2011] UKSC 33* at [53]). The way they articulate those judgements should be judged as those of social care experts, and not of lawyers. Nonetheless, the decisions social workers make in such cases are of huge importance to the lives of the vulnerable children with whose interests they are concerned. So it behoves courts to satisfy themselves that there has been sufficiently diligent enquiry before those conclusions are reached, and that if they are based on rejection of the credibility of an applicant, some basis other than 'feel' has been articulated for why that is so."

5. She held there was a corresponding duty on an applicant to "give as much information as possible to assist the decision-maker in forming a conclusion on whether or not they are destitute" [18]. Specifically in this case that related to the fact that previous sources of funds were said no longer to be available but without any real explanation as to why that was:

"*if* sufficient enquiries have been made by the local authority and *if* as a result of those enquiries an applicant fails to provide information to explain a situation which prima facie appears to require some explanation, then the failure by an applicant to give sufficient information may be a proper consideration for the local authority in drawing the conclusion that the applicant is not destitute: see per Mr Justice Leggatt in *R(MN) v London Borough of Hackney [2013] EWHC 1205 (Admin)* at [44]. But that does not absolve the local authority of its duty of proper enquiry".

Getting the court to look closer

Legality

6. Is what has been done properly within the language of the statute?

7. Linked to the *Padfield* principle:

"It is a general principle of administrative law that a public body must exercise a statutory power for the purpose for which the power was conferred by Parliament, and

not for any unauthorised purpose. An unauthorised purpose may be laudable in its own right, yet still be unlawful. The issue is not whether or not the public body has acted in the public interest, but whether it has acted in accordance with the purpose for which the statutory power was conferred. Where a statutory power is exercised both for the purpose for which it was conferred and for some other purpose, the public body will have acted unlawfully unless the authorised purpose was its dominant purpose".

R (Attfield) v Barnet London Borough Council [2013] PTSR 1559, para 38:

8. *Winder v Sandwell MBC* [2015] PTSR . The purpose of council tax subsidy is to alleviate financial need. It cannot be used to further a policy of discouraging movement into the area and a consequent burden on the resources of the authority.

9. How to determine the purpose:

"Julius v Bishop of Oxford 5 App Cas 214 is itself authority for going behind the words which confer a statutory power to the general scope and objects of the Act in order to find what was intended. In the words of Lord Cairns LC in Julius's case, at pp 222–223,

"there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty …"

47 The importance of *Padfield's case [1968] AC 997* was its reassertion that, even where a statute confers a discretionary power, a failure to exercise the power will be unlawful if it is contrary to Parliament's intention. That intention may be to create legal rights which can only be made effective if the power is exercised, as in *Singh (Pargan) v Secretary of State for the Home Department [1992] 1 WLR 1052*. It may however be to bring about some other result which is similarly dependent upon the exercise of the power."

M v Scottish Ministers [2012] 1 WLR 3386v per Lord Reed.

Expanding common law unreasonableness and the quality of reasons

10. The court may now intervene on a basis similar to ECHR proportionality and can assess "suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages" [*Kennedy v Information Commissioner* [2015] AC 455 @51 per Lord Mance]. See also *Pham v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 19 @ 51-5; *R (Edwards v Birmingham CC)* [2016] HLR 11 @81-4]
    (a) "it is a truism that the scrutiny is likely to be more intense than where other interests are involved" [Ibid @54].
    (b) "It is for the court to assess how broad the range of rational decisions is in the circumstances of any given case. That must necessarily depend on the significance of the right interfered with, the degree of interference involved. And notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision-maker was called on to make given the subject matter…. In some cases, the range of rational decisions is so narrow as to determine the outcome" [Lord Sumption in *Pham* @83].
11. But:
    (a) "importance..is necessarily a relative concept. Vulnerable as the homeless may be those rights [to an inquiry and interim accommodation] are not in the same category of importance as some other rights, e.g. the right to life" [Edwards @84(i) per Hickinbottom J].

12. Contrast *FM v SSHD* [2016] 1 WLR 1439 where Silber J held that a decision whether to recognise somebody as a victim of trafficking engaged their fundamental rights (as did their right to have the claim properly investigated §100) and so was something that required rigorous scrutiny particularly since the subject matter of the claim was whether a fair procedure so that the matter was within the province of the court's decision-making expertise (§103). In practice that meant "the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account" (§104).

13. Note the detailed analysis that that entailed (§§108-175 including (§154 and §156) an obligation to "recognise the conclusions of the report, engage with them and explain,

however briefly, why she disagreed with them" and (§§172, 174) a duty to consider whether inconsistencies might be attributable to something other than lying.

14. Where a decision-maker has not followed guidance then they must have clear reasons for doing so and "it must be clear from the decision that proper consideration has been given to the relevant matters required by the Act and the Code" – *Nzolameso* 31-6.

Convention cases and justification.

15. Defendants in challenges based on qualified Convention rights normally point to the wide margin of discretion that they have. In particular they often say that the test is whether the measure is "manifestly without reasonable foundation". The general applicability of this standard is questionable and currently the cases give the following answers about whether it applies to the final question whether the measure strikes a fair balance:
    (a) Yes in discrimination involving socio economic issues – *MA v SSWP* [2014] PTSR 584.
    (b) But ? where children are concerned –*Mathieson v SSWP* [2015] 1 WLR 3250, *SG v SSWP* [2015] 1 WLR 1449.
    (c) No in education – *Tigere v SSBIS* [2015] UKSC 57.
    (d) No in Article 1 Protocol 1 except in deciding whether the measure pursues a legitimate aim .
    (e) MA awaited in the Supreme Court

The High Court as fact-finder

16. Although the Court normally defers to the authority as decision maker there are some cases where it has to make a decision itself.

    (a) Where there is an issue of precedent fact – In *Edwards* (above) Hickinbottom J rejected the suggestion that this applied to the decision whether an authority had "reason to believe" that somebody was homeless.

(b) Where there is a dispute about what happened procedurally – *Edwards* is an example of this. To determine whether or not there was a systemic breach the court had to decide how individual applications had been dealt with.

(c) Where the case is inextricably linked with a best interests issue? – *F v LB Barking and Dagenham* [2015] EWHC 2838 (Admin) – LA would not provide accommodation or assess where a child was accommodated separately and Family Court did not grant residence because mother had no accommodation. JR claim transferred to the Family Court so that "the High Court Judge will be in the best position to look at the interests of J in the round and make the appropriate order in this claim and the family proceedings" [26]. But see

(d) Where Convention rights are in issue?

i. It is well established that the judgment whether there has actually been a breach of convention rights is a matter for the court. This may, for example, require it to ask whether the decision actually does strike a fair balance where the issue is the proportionality of a measure (see *Belfast City Council v Miss Behavin' Ltd* [2007] 1 W.L.R. 1420 §§13-16, 23-24, 27, 31, 37-39, 46-48, 88-90, 94-97, 103). This may require the court to receive information that was not before the original decision-maker.

ii. This may also require the court to decide hard edged questions such as whether a person was subjected to torture or whether something happened within the jurisdiction of the court - *R(Al-Sweady) v SSD* [2010] H.R.L.R. 2 §§15-29.

iii. It is less clear whether the court can undertake a direct fact-finding role where the question is, for example, whether conditions actually do amount to an Article 3 breach - *R(Limbuela) v SSHD* [2006] 1 A.C. 396 or whether they actually do prevent family life continuing so as to amount to a breach of Article 8 - *Anufrijeva v Southwark LBC* [2004] Q.B. 1124 §43.

iv. Cases like *Belfast City Council* suggest that the court must decide the issue and this was the conclusion reached by Lang J in *R(Almeida) v RBKC* [2012] EWHC 1082 (Admin) §§69-84 and see also *R (L) v CC Cumbria Constabulary* [2014] 1 W.L.R. 601 §27.

v. However, these cases also say that the court is not the primary decision maker and some LAs argue that it is always for them to determine the primary facts (including those requiring some evaluation judgment) – for example as to whether a child is in need because s. 6 of the HRA requires a public authority not to act incompatibly and this focuses on the statutory function that the authority performs. In the Children Act 1989 example it is for the authority to decide what services to provide and to whom. The Court has no decision-making role under the Act and its only function is to review decisions that have been made. It can only do so on the basis of the factual determination made by the authority.

Policies and fetters

17. Even where the statute does not require it (as with a housing allocation scheme) public bodies may need to have a policy to ensure consistency when they apply broad statutory discretions or judgments. They must make any such policy public:

R (WL (Congo) v the Secretary of State for the Home Department [2011] UKSC 12, [2012] 1 AC 245, at [34, 35].

18. But the policy cannot be a fetter on the proper exercise of discretion. Whether it is or not depends on the statutory scheme and the nature of the discretion being exercised. In some cases it is enough for there simply to be a power to consider exceptional cases. But in other cases – particularly where there is a duty of individual assessment – then an over-rigid policy can more easily be struck down.

19. In *CTMU v Southwark* [2016] EWCA Civ 707 the argument was that the authority had unlawfully benchmarked payments to be made under s. 17 to child benefit rates. The argument failed on the facts because there had been a series of individual

assessments that had resulted in payments being made of varying amounts. But the court went on to consider whether a policy to tie support to other rates would be unlawful. It concluded [consistently with *PO*] that the authority could not do so since rates payable under such provisions serve a different purpose [30]. It would also be impermissible to take such rates a starting point and suggestions to the contrary in *R (Mensah) v Salford CC [2015] EWHC 3537 (Admin)* were "not endorsed" [29]. The context was the duty in s.11 of the Children Act 1989 which Sir Ernest Ryder described as one that:

"casts the evidential net rather wide so that a decision based on an assessment undertaken for the purposes of section 17 CA 1989 should identify how the local authority has had regard to the need to safeguard and promote the welfare of children both individually (i.e. the subject children as regards the claim) and collectively: see, for example *Nzolameso v Westminster City Council* [2015] UKSC 22, [2015] PTSR 549 at [24] to [27] per Baroness Hale of Richmond DPSC" [15].

20. After referring to the Guidance in *Working Together to Safeguard Children,* DfE, March 2015 he went on:

"[17] There are no categories or sub-divisions of 'children in need' in the statutory scheme. That is hardly surprising given the enormous range of circumstances in which children present to the authorities with needs that may require assessment. That is why there is a generic assessment framework with identifiable factors that is the object of the central Government guidance that has been issued. A local authority can be expected to evidence that due regard has been had to the framework dimensions and that there has been a proper appreciation of the potential impact of the decisions that have been made on the best interests of the individual children. The decision maker would be expected to demonstrate that the impact on the individual child's welfare is proportionate given the other factors to which they are entitled to have regard, for example, the needs of other children and the resources of the local authority.

[18] In this case it is now common ground that the local authority do not have a written policy in relation to the assessment of children of families who have no right of recourse to public funds. Without hearing detailed submissions on the question, I venture to suggest that to have a separate policy outside the published guidance for just one category of children in need (i.e. those who do not have a right of recourse to public funds) would in the nature of this statutory scheme be difficult given that each child's needs are to be individually assessed by reference to the framework."

…

"[21] Given that the legislative purpose of section 17 CA 1989 in the context of section 11 CA 2004 is different from that in sections 4 and 95 IAA 1999, it would be difficult for a local authority to demonstrate that it had paid due regard to the former

by adopting a practice or internal guidance that described as its starting point either the child benefit rate or either of the IAA support rates. The starting point for a decision has to be an analysis of all appropriate evidential factors and any cross-checking that there may be must not constrain the decision maker's obligation to have regard to the impact on the individual child's welfare and the proportionality of the same"

21. In contrast the court in CTMU approved the judgment of John Howell QC in *PO* at 43 where he said:

"It would be administratively absurd (if not impossible), and productive of unnecessary expense, if the amount required had to be assessed in each individual case without any guidance as to what is normally appropriate. Moreover, in practice, such an approach devoid of any general guidance would inevitably lead to unjustifiable and unfair differences in the amounts paid to different families in a similar position depending on the views of the individuals making or approving such assessments."

22. The Court of Appeal described that as "simply to re-state in practical terms the need for a rational and hence consistent approach to decision making".

Factors requiring special consideration

The best interests of children and children's welfare

Domestic law

23. S. 11 Children Act 2004 and *Working Together to Safeguard Children,* DfE, March 2015

(a) Duty to "promote" as well as safeguard – *Nzolameso v City of Westminster* [2015] PTSR 549 @27.

(b) *JO and Others v. SSHD* [2015] INLR 481 McClosky J:

"11 I consider that, properly analysed, there are two guiding principles, each rooted in *duty* . The first is that the decision maker must be properly informed. The second is that, thus equipped, the decision maker must conduct a careful examination of all relevant information and factors. These principles have a simple logical attraction, since it is difficult to conceive how a decision maker could properly have regard to the need to safeguard and promote the welfare of the child or children concerned otherwise. Furthermore, they reflect long

recognised standards of public law. Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations. This balancing exercise is the central feature of cases of the present type. It cannot realistically or sensibly be undertaken unless and until the scales are properly prepared".

24. UNCRC Art 3(1) –the best interests of the child must be a primary consideration in any decision affecting them.

25. General Comment 14 (2013), On the right of the child to have his or her best interests taken as a primary consideration:

"The Committee underlines that the child's best interests is a threefold concept:

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

(b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

26. Given effect in spirit if not the precise language by s. 11 of the 2004 Act – *ZH (Tanzania) v. SSHD* [2011] 2 AC 166. As to what it requires in any given case see e.g. *Zoumbas v SSHD* [2013] 1 WLR 3690.

27. Will apply where the interests of children are engaged in a Convention case – and where EU rights are in issue – where dealing with free movement rights [Charter of Fundamental Rights Art 24 and Art 7 United Nations Convention on the Rights of Disabled Persons - European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009/1181.

28. *R (Ghulam) & Ors v SSHD* – forthcoming.

PSED

29. The principles were summarised by McCombe LJ in *R Bracking v SSWP* [2013] EWCA Civ 1345

(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213; [2006] EWCA Civ 1293* at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154* at [26 – 27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin) at [23 – 24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), as follows:

> i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in R (Meany) v Harlow DC[2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC [2011] EWCA Civ 1586* at [74–75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941* at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

"[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.
[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89–90]

"[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014* and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):
'….the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
[90] I respectfully agree…."

30. Approved by Lord Neuberger in *Hotak v LB Southwark* [2015] 2 WLR 1341 @73. In the context of s. 202 reviews it requires [@78]:

"the reviewing officer to focus very sharply on (i) whether the applicant is under a disability (or has another relevant protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is as a result "vulnerable".".

31. The result will be that a decision that may pass muster under the benevolent approach in *Holmes-Moorhouse case [2009] 1 WLR 413* , paras 47–52. The same will be true of decisions to accommodate pending review or as to the discharge of the limited housing duty under s. 190(2) Housing Act 1996.

Principles in practice – Allocation cases

32. The Localism Act 2011 amended the allocation provision in Part VI of the Housing Act 1996 to empower authorities to decide "*what classes of persons are, or are not, qualifying persons" (s. 160ZA(7)).* This is subject to any nationally determined rules set out in statute or Regulations. An authority can only allocate accommodation to a qualifying person. The amended provisions retain the duty to have an allocation scheme (s. 166A) and to secure that a reasonable preference is given to certain groups.

R (Hillsden) v Epping Forest [2015] EWHC 98 (Admin)

33. Epping Forest introduced a residence requirement for qualifying persons that needed 2.5 year's residence in the C's case which she did not have. She argued that her circumstances were exceptional but D refused to do so arguing that it was entitled as regards qualification to have "clear rules that left no room for doubt about whether an individual qualified in the first place" [8].

34. McCloskey J rejected C's claim that this was an unlawful fetter on the basis that the authority was entitled to frame the qualification criteria in such a way that there was no room for the exercise of discretion. LAs were not required by statute to allow for discretionary admission to the scheme and the principle in British Oxygen Co Limited – v- Minister of Technology [1971] AC 610 did not apply because the drawing up of the scheme did not involve the exercise of a statutory discretion [31]. Nor could the failure to include exceptional discretionary provision be described as irrational given the wide discretion available to the authority (see *R (Ahmad) v LB Newham* [2009] UKHL 14).

35. The judge also rejected a challenge on the basis that the authority had not followed statutory guidance because "it is not for the Council to demonstrate that the Ministerial Guidance was taken into account in devising and adopting the impugned Scheme. Rather, the onus rests on the Claimant to establish the converse. This is a matter of evidence and proof. The Claimant invokes no evidence in support of her assertion and I am satisfied that the failure which she advances cannot properly be inferred from the evidence available" [42]. He also considered that the scheme was not inconsistent with the guidance which had only encouraged authorities to include a discretion.

36. Even in its own terms the first basis for the decision arguably fails to give proper effect to the overall purpose of the Act although as an isolated matter it is not irrational to frame a scheme with no exceptions (see e.g. *R (Sandiford) v SSHD* [2014] 1 WLR 2697). It is difficult to reconcile this conclusion now with *Jakimaviciute* (which was cited in post hearing submissions) because that case shows that the reasonable preference duty applies at this stage and that that duty is owed to all

members of the relevant reasonable preference class. In a case where the interests of children or people with protected characteristics are concerned then a scheme with no discretion might also fail to have due regard to the duties under s.11 of the 2004 Act or s. 149.

R (Jakimaviciute) v Hammersmith & Fulham LBC [2015] PTSR 822.

37. The Court of Appeal held that the reasonable preference duty in s. 166A(3) of the Housing Act 1985 applied to setting of qualification criteria as well as to the decision as to what preference to give once a person did qualify. The scheme operated by the D excluded (with some exceptions) people who were owed the full housing duty but who were accommodated in "long term suitable temporary" accommodation. It failed to give a reasonable preference because it created a sub-group of a class entitled to a reasonable preference (on the facts 87% of them). The argument here succeeded because it was possible to cast it as not permitted by the statutory scheme rather than as a challenge to the reasonableness of the discretion (as the LA sought to argue).

R (Alemi) v Westminster CC [2015] PTSR 1339

38. A was found to be owed the full housing duty and placed on the register but the allocation scheme provided that she was eligible only for private sector accommodation for the first 12 months. HHJ Blair QC held that the scheme excluded a sub-group from the "allocation" of social housing because for 12 months they were not eligible for it, even though the chances of actually being allocated such accommodation within 12 months were remote. He also rejected an argument that the claimant did have a reasonable preference over a period because the 12 month period was arbitrary [31].

R (HA) v Ealing BC [2016] PTSR 16

39. HA moved to Ealing to escape domestic violence. She was refused entry onto the housing register because that required 5 years residence except in (unspecified) exceptional circumstances. Goss J accepted a challenge to the effect that so framed the policy did not give reasonable preference to prescribed categories of persons as

required by section 166A(3). The policy excluded homeless people if they did not have 5 years residence and Defendant could not rely on the exceptional circumstances provision apparently because no consideration was given to C as an exceptional case "nor could it be under the defendant's policy" [22]. The judge rejected an argument that it was impractical to carry out an individual assessment of each Part VI application to see if the individual concerned fell within a reasonable preference category, noting that 4 authorities did just that.

40. The policy was also held to be unlawful on the grounds that it indirectly discriminated against women who were more likely to be victims of domestic violence. The authority could not justify the difference in treatment between women and men [30].

41. A challenge under s.11 Children Act 2004 also succeeded because "there is nothing to show that the defendant made arrangements to ensure that it discharged its functions having regard to the need to safeguard and promote the welfare of children either in terms of formulating the policy or, more particularly in applying it to the individual circumstances of the claimant and her children in her case" [§36].

R (H) v LB Ealing [2016] HLR 20

42. 20% of available lettings were reserved for working households (defined as one which included a person who had been employed for at least 24 hours a week during 12 of the previous 18 months) and model tenants. CC argued that the former "working" condition indirectly discriminated (under s. 19 of the Equality Act 2010) against women, the elderly and the disabled, all of whom were disadvantaged in the labour market and had to compete for a smaller pool of accommodation.

43. HHJ Waksman QC allowed the claim:

    (a) Under s. 19. Significantly he decided that the discriminatory impact of the 20% quota was not to be balanced against the fact that women the disabled and the elderly were more likely to be allocated the remaining 80% of available stock. The discrimination was justified because the authority had not adopted the "least intrusive means" since "there is no reason why the Council

could not have introduced some sort of "safety valve" for those groups, whether by an exceptional discretion and/or qualification by reference to some other community contribution". Other authorities had done so. The judge distinguished *Ahmad v LB Newham* because that did not involve discrimination.

(b) For the same reasons the scheme unlawfully discriminated for the purposes of Article 14 taken together with Article 8 (a summary of the current state of the law on the "ambit of" Art 8 for these purposes is at paras 79-88).

(c) A challenge under s. 149 also succeeded and the judgment shows how searching the exercise can be. Having held that there was initially a failure to address the discriminatory impact of the scheme he addressed a reconsideration:

"110 The Cabinet minutes on the reasons for adopting the Scheme simply describe the nature of the allocations policy overall—they do not refer to the PSED. The October 2013 paper which says that there has been no adverse impact from the pilot is not impressive. It wrongly states the minimum work requirement as 16 hours when it is 24 hours, the sample itself is over a six-month period only and it was without a full take-up under the Scheme. Finally the figures said to justify the conclusion were not produced.

111 It is true that Ms Parsonage says that she has had training in the PSED but that is no substitute for explaining what she actually did in order to ensure that the Council complied with it. This is all the more surprising given that in para.24 of her WS, she says that the position of some households within the groups of women, the elderly and disabled, would undoubtedly be better if the working households priority did not exist, that the allocations policy would do more to advance equality of opportunity and that the working households priority fails to do this. She did go on to say in para.28 that to remove the discriminatory effect "altogether" would seriously compromise the achievement of the aim of encouraging tenants to work; but that does not follow at all if a more nuanced approach was taken, as suggested above.

112 What is missing in my judgment is any real enquiry into and consideration of the potential discriminatory effects of the working households element of the Scheme in particular.

113 Moreover, the need for this is highlighted by the comparative figures for disabled applicants as between 2010 and 2015, noted in [23], [24] and [52] above. That does not seem to have been taken into account at all".

44. Finally a Children Act 2005 claim also succeeded: “Here, there appears to have been no actual consideration of the interests of children in this context. All Ms Parsonage says now is that she is aware of the s.11 duty but that is obviously insufficient” [117]

MARTIN WESTGATE QC

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