



Allocation Schemes and the Equality Act 2010

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Part 6 HA 1996 - Overview

- a local housing authority must comply with the provisions of Part 6 HA 1996 in allocating housing accommodation: section 159(1) HA 1996
- a local housing authority must have a scheme for determining priorities and the procedure to be followed in the allocation of housing stock: section 166A(1) HA 1996
- in determining priorities, the scheme must be framed so that reasonable preference is given to prescribed categories of applicants: section 166A(3) HA 1996
- the authority may only allocate housing to eligible and qualifying persons: section 160ZA HA 1996
- The power to set qualification criteria in section 160ZA (7) is subject to the reasonable preference requirement in section 166A (3)



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SECTION 166A (5)

(5) The scheme may contain provision for determining priorities in allocating housing accommodation to people within subsection (3); and the factors which the scheme may allow to be taken into account include—

- (a) the financial resources available to a person to meet his housing costs;
- (b) any behaviour of a person (or of a member of his household) which affects his suitability to be a tenant;
- (c) any local connection (within the meaning of section 199) which exists between a person and the authority's district.



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CODE OF GUIDANCE

- a local housing authority shall in the exercise of its functions have regard to such guidance as may from time to time be given by the Secretary of State a local housing authority shall not allocate housing accommodation except in accordance with their allocation scheme: section 169 HA 1996
- Paragraph 3.26 of the Code of Guidance :

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



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THE ALLOCATION SCHEME

R (Ahmad) v Newham LBC [2009] UKHL 14

Local authorities have a wide discretion as to the principles on which their scheme should be framed and the way in which housing accommodation should be allocated

“... such a policy [an Allocations Scheme] must comply with the statutory requirements and with the general public law requirement of rationality. It must, of course, be lawfully and fairly operated, for example without unlawful discrimination.”



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ALLOCATION SCHEME REQUIREMENTS

- a local housing authority shall not allocate housing accommodation except in accordance with their allocation scheme: section 166A(14) HA 1996

R (Flores) v Southwark LBC [2020] EWCA Civ 1697

“Section 166A(14) requires a local authority to comply with the Allocation Scheme which it is established, not only when deciding which applicant should be selected or nominated for a particular property, but also when deciding where on the waiting list an applicant should be placed.”



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INTEPRETATION OF SCHEME

- The meaning of a housing allocation scheme, like that of any other comparable policy document, is for the court to determine but in interpreting the meaning of an allocation scheme, a court should adopt a practical, common sense, non-legalistic approach which allows a degree of flexibility for individual cases

R (Ariemuguvbe) v Islington LBC [2009] EWCA Civ 1308



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INTERPRETATION: NUR V BIRMINGHAM CC [2020] EWHC 3526 (Admin)

The First Claimant's household comprised of the First Claimant and her three adult daughters

The Second Claimant has cerebral palsy with spastic diplegia

The Occupational Therapy Service assessed the Second Claimant as requiring an adapted property

Policy

To enable the best use of the Council and partner registered provider stock, properties will be allocated to those applicants who need that size and type of property.

As such, preference for houses with two or more bedrooms will be allocated to families with dependent children.

Sheltered housing and extra care accommodation will be allocated to older people.

Properties with adaptations will be allocated to persons with a physical or sensory disability."



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INTERPRETATION: NUR V BIRMINGHAM CC [2020] EWHC 3526 (Admin)

As a result of the Second Claimant's disability, the Claimant was only permitted by the Defendant to bid on four-bedroom properties that were adapted or adaptable.

In 2019 Council stated that in the exercise of its discretion the First Claimant was now eligible to bid for three bedroomed property

The First Claimant made a bid and as of 7 July 2019 was listed on the website as being at bid position one The Defendant then withdrew the First Claimant's bid.

Your client's children are all adults, and therefore she is classed as not having dependent children. Your client continues to be eligible to bid for accommodation, including bids for flats and maisonettes.



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INTERPRETATION: NUR V BIRMINGHAM CC [2020] EWHC 3526 (Admin)

- The local authority had acted unlawfully and in breach of its own allocation policy by skipping the claimant's bid for the adapted property because she had no children in the family unit. The true construction of the scheme was to give families with children a head start in being considered for a house.
- However, it had been operated unlawfully so that the absence of children in a family was treated as decisive for any allocation decision.
- Nothing in the scheme explained what weight should be allocated to families with children in comparison with other applicants. That lacked transparency and predictability, and had led unsurprisingly to an effective automatic decision in favour of any family with children.
- Further, the local authority had allocated adapted housing to families with children who did not need the adaptations, cutting across its duty to make reasonable adjustments towards disabled people. The local authority had misunderstood its own scheme and acted unlawfully in its implementation .



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ACADEMIC CLAIMS: NUR v BIRMINGHAM CC

- The claimants had permission to review the lawfulness of the allocation scheme, in particular to determine whether the local authority was acting lawfully in preferring applicants with children over applicants with dependent disabled adults.
- The claimants did not cease to have standing under [CPR Pt 54](#) as a result of the discretionary offer of accommodation.
- Further, a public body could not avoid legitimate examination of the lawfulness of its decision-making process by making an exception for an individual affected by that process, and then argue that the challenge to the process should not proceed because it was rendered “academic” by the exception it had made.
- Claim for damages and declaratory relief.



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Allocations scheme and the Equality Act 2010

- Direct discrimination: [s.13](#)
- Discrimination arising from disability: [s. 15](#)
- Indirect discrimination: [s.19](#)
- Discrimination by failing to make reasonable adjustments: [s. 21](#)
- PSED: [s149](#)



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Part 3: Services and public functions

- Exercise of public function / provision of services – **s.29**
- **Section 29(6)** a person must not in the exercise of a public function must not do anything that constitutes discrimination
- **Section 29(7)(b)** a duty to make reasonable adjustments applies to a person who exercises a public function/service provider



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Indirect discrimination: section 19

- A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's
- a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:
 - A applies, or would apply, it to persons with whom B does not share the characteristic
 - it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it
 - it puts, or would put, B at that disadvantage, and
 - A cannot show it to be a proportionate means of achieving a legitimate aim.
- “Disadvantage” is not defined in the EqA. It includes a denial of choice and “it is enough that the person can reasonably say that they would have preferred to be treated differently” (paragraph 5.10 EHRC Services Code).
- Under paragraph 2(5) of Schedule 2 ““Being placed at a substantial disadvantage in relation to the exercise of a function means ... if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment.



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Reasonable adjustments: section 20

- Where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then A is under a duty on to take such steps as it is reasonable to have to take to avoid the disadvantage.
- Paragraph 2(2) Schedule 2 provides that the reference in section 20(3) to a disabled person is to disabled persons generally
- For the purposes of section 20 EqA 2010, "substantial" means more than minor or trivial (*section 212(1) EqA 2010*).
- "Disadvantage" is not defined in the EqA. It includes a denial of choice and "it is enough that the person can reasonably say that they would have preferred to be treated differently" (paragraph 5.10 EHRC Services Code).
- Under paragraph 2(5) of Schedule 2 "Being placed at a substantial disadvantage in relation to the exercise of a function means ... if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment



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Failure to make reasonable adjustments: section 21

- Failure to comply with the duty to make reasonable adjustments constitutes discrimination
- If a Part 3 claim there can be an anticipatory duty to make reasonable adjustments.
- If a part 4 claim then duty applies only if A "*receives a request from or on behalf of the tenant or a person entitled to occupy the premises to take steps to avoid the disadvantage*" sch. 4 paras. 2(6) and 3(5).



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PCP

- PCP not defined in the Equality Act 2010.
- In *Ishola v Transport for London* [2020] EWCA Civ 112 it was held that:
 - Provision, criterion or practice were ordinary English words
 - *All three words carry the connotation of a **state of affairs** (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that practice here connotes some form of continuum in the sense that it is **the way in which things generally are or will be done.***
- Allocations policies qualify as a PCP



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Essop v Home Office [2017] 1 WLR 1343

- Don't have to show reason why a PCP puts one group sharing a PCP at a disadvantage; enough that it does .
- Protected characteristic need not be the reason for the less favourable treatment, needs a causal link between the PCP and the disadvantage suffered.
- Aim is to achieve a level playing field – where people sharing particular PC are not subject to requirements which many of them cannot meet but which cannot be shown to be justified. Aim is to achieve equality of results.
- Reasons why one group may find it harder to comply with the PCP than others are many and various.
- Reason for disadvantage need not be unlawful in itself
- No requirement that every member of a group be put at a disadvantage.
- Commonplace for particular disadvantage to be established on the basis of statistical evidence.
- Always open to Respondent to show that PCP is justified



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Adverse impact: burden of proof

- S136:
 - “(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred*
 - (3) *But subsection (2) does not apply if A shows that A did not contravene the provision*”
- First stage: evidential burden on claimant to demonstrate *prima facie* case on all the facts/evidence
- Burden then shifts to defendant to demonstrate no discrimination on balance of probabilities
- Court entitled to draw adverse inferences: e.g. *Base Childrenswear v Otshudi* [2019] EWCA Civ 1648 (wholly untruthful reasons for dismissal of Black employee)



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Administrative court /county court?

Hamnett v Essex County Council [2014] 1 WLR 2562

- The clear intention of Parliament is that claims under section 29 must be brought in the county court.
- In general the Administrative Court is not well suited to hear factual disputes of the sort that may arise under section 29 and other similar provisions of the 2010 Act.
- Normally permission would not be granted where there is an adequate alternative remedy.



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Remedies

- The county court has power to grant any remedy which could be granted in proceedings in tort or on a claim for judicial review: section 119(2)
 - Tortious damages for consequential loss, damage and injury
 - Injunctive relief
 - Quashing orders, mandatory orders and declaratory relief
- An award of damages may include **compensation for injured feelings** whether or not it includes compensation on any other basis: section 119(4)
- In cases of unintentional indirect discrimination, the county court must not make an award of damages unless it first considers whether to make any other disposal: sections 119(5) and (6)



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Allocations

R (H) v Ealing London Borough Council [2017]

- The Council's Working Households Priority allocations scheme discriminated inter alia against disabled persons who were less likely to be able to satisfy its requirements of needing to be in work to be eligible for an allocation than non-disabled persons.
- There had been an initial failure to comply with section 149(1) EqA 2010 by failing to provide a proper equality impact assessment. There was no analysis of the number of non-working disabled people who had been overtaken or were at risk of being overtaken by working people lower down the same priority band or on a lower band.



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R (Ward & Others) v Hillingdon LBC [2019] EWCA Civ 692

- a. The court had to be satisfied that an allocations policy did not unlawfully discriminate
- b. In a case of indirect discrimination the comparison was between groups rather than individuals [57]. There was no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage
- c. The groups for comparative purposes consisted of those who shared the relevant protected characteristic and those who did not. The fact that some members of the comparator group were also disadvantaged by the PCP did not negate indirect discrimination if a higher proportion of the protected group suffered that disadvantage
- d. There was no requirement under the Equality Act 2010 for the Claimant to show why the PCP put one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It was enough that it did



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R (Ward & Others) v Hillingdon LBC [2019] EWCA Civ 692

- a. The burden lay on the policymaker to justify the impugned PCP – this it had failed to do by the material it relied on.
- b. The key principle was the goal of equality of outcome. If a PCP resulted in a relevant relative disadvantage as regards one protected group, any measure relied on as a safety valve had to overcome that relative disadvantage.
- c. There was no evidence that the safety valves within the allocation policy had actually operated to eliminate the disadvantage to the protected groups.
- d. The authority had not attempted to justify the indirect discrimination in the sense of acknowledging that there was discrimination and explaining why it was justified.



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R (Ward & Others) v Hillingdon LBC

- Compliance with the public sector equality duty involved a duty of inquiry. In formulating a policy it was not incumbent on a policy maker to assess the potential indirect discriminatory effect on every conceivable group that shared a protected characteristic. By 2016 when a court challenge had been made, the authority ought to at least have considered the position of the protected group and its failure to do so was a breach of the public sector equality duty.



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Nur v Birmingham CC [2021] EWHC 1138

The policy

- *To enable the best use of the Council and partner registered provider stock, properties will be allocated to those applicants who need that size and type of property.*
- *As such, preference for houses with two or more bedrooms will be allocated to families with dependent children.*
- *Sheltered housing and extra care accommodation will be allocated to older people.*
- *Properties with adaptations will be allocated to persons with a physical or sensory disability.”*



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Nur v Birmingham CC – facts

- The Council's Occupational Therapy Service assessed the Second Claimant as requiring an adapted property.
- This meant that her mother, the First Claimant could only realistically bid for adapted accommodation or accommodation that was said to be capable of being adapted.
- There was no adapted accommodation that was not a house.
- The policy was operated by the Council's officers so that the absence of children in a family was treated as a decisive matter for any allocation decision – so a family with children under 18 would always trump a family with a disabled child over 18.



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ONS Report 2020

- Disabled people are far more likely to live in social housing than non-disabled people (24.9% of disabled people as opposed to 7.8% of non-disabled people).
- Disabled people aged 24 and over are significantly more likely to live with their parents than non-disabled people in the same age group. For those between 30-34 years old, 15.5% of disabled people lived with their parents compared to 9.5% of non-disabled people
- Disabled people with autism and those with severe learning difficulties are by far the most likely to live with their parents into adulthood.



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Decision – indirect discrimination s.19

- Council had misunderstood its own policy by treating the presence of children under 18 as decisive when allocating houses.
- No defence to a discrimination claim for the unintentional discriminator to say that they were unaware of the discriminatory effect of the decision making system.
- The comparison was between persons on the register who were applying for properties and had a disabled person in their household and persons who did not have a disabled person in their household.
- Non-disabled households were able to bid for all properties on the Council's list.



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Decision – indirect discrimination: s.19

- Disabled households were only in practice, able to have any chance of bidding successfully for adapted properties.
- The pool of potential properties was further diminished by the rule which gives priority for houses to households with children.
- This was a particular disadvantage.
- Also relevant to take account of the fact that disabled households were less likely to be able to bid successfully for houses than non-disabled households because they were less likely to have a child in their household.



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Decision – indirect discrimination: s.19

- Decision to offer a measure of preference to houses for families with dependent children was a legitimate aim.
- But council had failed to show that proportionate.
 - Obligated to look at how the Council's policy worked out in practice. Not limited to looking at the words of the policy itself.
 - The reasons advanced to justify giving a preference for houses to households with dependent children applied equally to households where a member was a young adult with learning difficulties.
 - No evidence to show that the remaining pool of properties that were available to disabled households left disabled households without children with a reasonable pool of properties they could bid for.
 - **Not an answer to say that the Council retained a discretion to allocate property outside of the bidding system**



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Decision – reasonable adjustments

- Allocation policies fell within Part 3 and not Part 4 because the authority was providing accommodation solely in the exercise of a public function.
- This meant it was under a pro- active duty to make reasonable adjustments under section 29(7) as opposed to the reactive duty under Part 4.
- The question was whether the Council's housing allocation policy operated in practice put disabled people at a "substantial disadvantage - i.e. more than minor or trivial. It did.
- The Council had taken no steps to adjust the policy as operated to meet the needs of disabled people.



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Decision – reasonable adjustments

- Adjustments that could have been made were:
- Properties that were adapted to meet the needs of disabled persons could be exempted from the automatic preference given for all houses to households with children
- If the preference given for all houses to households with children (presently all adapted properties) was to be maintained, pro-active steps could be taken to enable disabled people to secure other suitable accommodation when applying the policy.
 - information being provided to bidders about whether a non-house property was “adaptable”
 - measure of preference could be given to disabled households in applying for properties which could be adapted to meet the needs of the disabled



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PSED

- One of the purposes of the PSED is to ensure that unintended discrimination is identified by a public body before it results in individuals with protected characteristics from suffering adverse outcomes.
- Accepted by the Council that this made it very difficult for it to demonstrate that it had discharged its Public Sector Equality Duty because it simply did not have any reliable information to enable Council officers or members to know how the scheme was working and whether the scheme was, in practice, impacting adversely on any group of Birmingham residents with protected characteristics.



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PSED

- The EIA could not be criticised for not having foreseen every single problem arising from the interaction of different policy decisions.
- The Council never reviewed how the policy was working in practice and they did not undertake any analysis to see how the scheme was impacting on those with protected characteristics at any point after 20 April 2017 when the policy became live.
- The Council had been operating a scheme for the past 4 years without knowing whether, in practice, the scheme achieved the objectives which were set out when the scheme was launched or had unintended consequences which impacted adversely on groups of Birmingham residents with protected characteristics.



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R (Willott) v Eastbourne Council (2024) EWHC 113

- Claimant had diagnoses of ADHD and autistic spectrum disorder. Evicted for ASB.
- Council refused entry on to the housing register on grounds of serious ASB.
- Alleged that this amounted to disability discrimination.
- Claim failed.



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R (Willott) v Eastbourne Council (2024) EWHC 113

- Section 19 indirect discrimination: C had failed to show that policy excluded a greater number of persons with ADHD and an autistic spectrum condition than persons without those disabilities. In any event, policy proportionate.
- Ss. 20 & 21: C had failed to show that establish that policy resulted in substantial comparative disadvantage to people with neuropsychiatric conditions. No duty to make reasonable adjustments.
- Section 15: evidence did not show that C's ASB was in consequence of disability.



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R (FG) v Kensington & Chelsea RLBC

- FG had a diagnosis of paranoid schizophrenia and depression for which she was prescribed substantial medication. Experienced auditory hallucinations and particularly disadvantaged by noise nuisance which caused her to suffer severe anxiety and concerns that her hallucinations were worsening.
- Also seriously affected by foul smell, with the impact of the smell heightened as a result of her severe chronic mental health condition.
- Evidence that FG's functioning had been seriously impacted by issues of noise and foul smell at her home allocated to her by the Defendant.



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R (FG) v Kensington & Chelsea RLBC

- Argued that by failing to adequately address the issues of noise nuisance and smell at her property, D has discriminated against FG within the meaning of ss. 20 and 21 EqA in the exercise of a function, and/or subjected her to a detriment in the provision of a service contrary to s.29(6) and/or 29(2)(c) EqA.
- D had acted in breach of its obligations under the PSED to FG and in particular had failed to have due regard to the need to eliminate discrimination and/or advance equality of opportunity when considering what action, if any, should be taken.
- FG's case was that D should have taken steps set out in the expert acoustics report to upgrade sound insulation at the property.



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R (FG) v Kensington & Chelsea RLBC

Section 20

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (4) The **second requirement** is a requirement, where **a physical feature** puts a disabled person at a **substantial disadvantage** in relation to a relevant matter in comparison with persons who are not disabled, to **take such steps as it is reasonable to have to take to avoid the disadvantage**.



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R (FG) v Kensington & Chelsea RLBC

Section 20

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

- (a) removing the physical feature in question,
- (b) altering it, or
- (c) providing a reasonable means of avoiding it.

SECOND REQUIREMENT DOES NOT APPLY IF PART 4 IS THE APPLICABLE PART OF EQUALITY ACT



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R (FG) v Kensington & Chelsea RLBC

Section 20

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

- (a) a feature arising from the design or construction of a building,
- (b) a feature of an approach to, exit from or access to a building,
- (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
- (d) any other physical element or quality.



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R (FG) v Kensington & Chelsea RLBC

Key issue – Part 3 or Part 4 Eq Act?

- By s. 28 (2)(a), Part 3 does not apply to discrimination that is prohibited by Part 4 (premises).
- By S. 32 (3), Part 4 does not apply to the provision of accommodation if the provision, if the provision **is for the purpose only** of exercising a public function or providing a service to the public or a section of the public.



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R (FG) v Kensington & Chelsea RLBC

Key issue – Part 3 or Part 4 Eq Act?

- Argued that Part 3 applied because the allocation of property fell under Part 3 (Nur) and in the provision of social housing D was a core public authority exercising public functions and providing public services and the ongoing regulation of a social tenancy granted in the exercise of a public function is not the exercise of a public function.
- D accepted that the allocation of fell under Part 3 EqA but argued that subsequently the matter came within Part 4 because the ongoing provision of accommodation was not solely for the purpose of a public function but also for the purpose of complying with D's obligations under the tenancy agreement.



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R (FG) v Kensington & Chelsea RLBC

- Court found that claim fell under Part 4 not 3, as the provision of social housing was not solely for the purpose of a public function but also to enable D to
 - comply with its statutory obligation to make the accommodation available to the person to whom it was allocated pursuant to its housing allocation scheme;
 - managing its social housing stock in the public interest;
 - complying with its private law obligations under the tenancy agreement and its statutory obligations as a landlord.
- If Part 3 had applied then although there was no anticipatory duty on the facts of the case,
 - a duty would have arisen once D was notified of FG's noise and smell issues
 - Noise and smell could be a relevant physical feature of premises
 - There was a burden on D to show that it had made reasonable adjustments
 - On the facts D had not failed to make reasonable adjustments

