Housing Allocations and the Equality Act

Introduction

The statutory rules in relation to the formulation of housing lists and allocation policies by local authorities and registered social landlords in Scotland are to be found in sections 19-21 of the Housing (Scotland) Act 1987, as extensively amended.

Of particular importance is section 20(1), which provides that local authorities and registered social landlords must secure that in the selection of their tenants a "reasonable preference" is given to certain classes of persons including, homeless persons.[1]

Sections 19-21 underwent fairly extensive amendment by the Housing (Scotland) Act 2001. Further significant changes will be made by sections 3 to 6 of the Housing (Scotland) Act 2014, when they come into force. That will necessitate Scottish social landlords amending their allocation policies. That will, in turn require consultation with tenants and applicants, under the new section 20A of the Act (also not yet in force).

The Scottish government has also issued guidance to the social rented sector entitled: *Social Housing Allocations: A Practice Guide* (March 2013). Once the 2014 Act changes come into force, this will be replaced by: "The Legal Framework for Social Housing Allocations – Statutory Guidance".[2]

Challenges to allocation policies

The leading English authority is the decision of the House of Lords in *R. (Ahmad) v Newham LBC*.[3] Prior to *Ahmad*, there had been a burgeoning jurisprudence of judicial review challenges to allocation policies. *Ahmad* brought that trend to an abrupt halt.

However, that does not mean that challenges are out of the question. In England, there has been a resurgence, in recent years, in judicial review challenges to allocation policies. Although in *Ahmad* the Court discouraged judicial intervention, Lord Neuberger also said:

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[1] A "reasonable preference" rule also applies to social landlords in England and Wales under the equivalent provisions in part 6 of the Housing Act 1996, though the statutory provisions are significantly different to those in Scotland, with different "reasonable preference" categories. There are now separate statutory codes for English and Welsh social landlords contained, respectively, in sections 166A and 167 of the 1996 Act.

[2] The new guidance has been issued in draft by the Scottish Government, and may be accessed at: https://beta.gov.scot/policies/social-housing/

[3] [2009] UKHL 14; [2009] HLR 31.

> …subject to complying with the other provisions of section 167, and subject to rationality and compliance with any other relevant legislation, the terms of the allocation scheme are a matter for the local housing authority.[4]

This passage suggests that there are three bases on which an allocations policy may be successfully challenged, notwithstanding *Ahmad*:

1) Failure to comply with the relevant legislation (which in Scotland means sections 19 to 21 of the 1987 Act, as soon to be further amended);
2) Irrationality;
3) Failure to comply with other legislation.

It is this last ground, in particular, that has often been relied upon in recent cases, with claimants founding on a variety of enactments, in particular section 19 of the Equality Act 2010 (indirect discrimination), and article 14 (in conjunction with article 8) of ECHR.

R. (H) v Ealing LBC

It is appropriate to focus particularly on this case,[5] as it is the only one of the recent allocation cases (i.e. since 2015) to have been considered by the Court of Appeal, at the time of writing. It is also a case in which the main challenges to the allocation policy were on equality law grounds.[6] Those were that (a) Ealing's allocation policy was indirectly discriminatory against women, disabled people, and older people, contrary to section 19 of the 2010 Act, and (b) contrary to article 14 of ECHR.

In October 2013, Ealing amended its allocation rules by introducing two new priority schemes: the "WHPS" and "MTPS".[7] Under the WHPS, 15% of its allocations would be made to "working households", defined as households which included a person who had been employed for at least 24 hours a week, during 12 of the previous 18 months. Under the MTPS, 5% its allocations would be made to existing tenants of the authority seeking to transfer, who had not been in breach of their tenancy agreements for specified periods of time. Prior to amending the scheme, the authority had prepared an Equalities Analysis, which stated that "for most equalities strands the proposed changes to the allocations policy will have no impact on applicants".

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[4] At paragraph [37].
[5] [2016] EWHC 841 (Admin); [2016] HLR 20 in the High Court; [2017] EWCA Civ 1127; [2018] HLR 2 in the Court of Appeal.
[6] Whereas in other cases, the equality law argument has been one of several grounds for judicial review, including the ground that the policy does not comply with housing legislation. See, for example, the earlier challenge to Ealing's policy in *R. (HA) v Ealing LBC* [2015] EWHC 2375 (Admin); [2016] PTSR 16.
[7] The "Working Households Priority Scheme" and the "Model Tenants Priority Scheme".

The claimants were members of two families. One family comprised a single mother and five of her children. The family had been victims of domestic violence. The mother had long-standing mental health problems and was unable to work because of her disability and her need to care for her children. The second family comprised a married couple, their daughter and infant grandson. The adults in the family were all disabled and unable to work. Both families applied to the authority for accommodation but did not receive an allocation. They raised proceedings for judicial review of the policy, challenging Ealing's policy on various grounds.

The claimants succeeded in the High Court.[8] The judge accepted that the WHPS had a disparate impact on disabled persons, older people and women with child-care responsibilities. That was not justified. The allocations schemes of other local authorities showed how Ealing's aims could be met in a less intrusive way.[9] The judge found it significant that Ealing's policy contained no "safety valve" in the form of a discretionary power to override the 5% and 15% quota in respect of those who could not work because of a disability, or age or caring responsibilities.[10] Accordingly, the policy was contrary to section 19 of the Act. He also found that both the WHPS and the MTPS breached article 14 of ECHR, in conjunction with the "right to family life" in article 8: access to suitable long-term accommodation being important for maintaining family life.[11] The WHPS indirectly discriminated against the certain groups under article 14, and could not be justified, because it was not the least intrusive way of meeting Ealing's aims. The MTPS directly discriminated against non-council tenants who were unable to become model tenants. Furthermore, he found that notwithstanding the council's Equalities Analysis, it had not given proper consideration as to how the quota might affect those with protected characteristics. It was accordingly in breach of the PSED.

R. (H) v Ealing LBC (Court of Appeal) – indirect discrimination under section 19 of the 2010 Act

Before the Court of Appeal, Ealing conceded that the WHPS was a "PCP" for the purposes of section 19(1), and that, if looked at in isolation, it gave rise to indirect discrimination. In particular, it accepted that women, disabled people and the elderly are less likely to be in work than others.[12] However, it argued that the question of whether there was "disadvantage" under section 19(2) had to be considered by looking at its arrangements for allocations as a whole. The policy contained several

[8] This decision is fully described in the judgment of the Court of Appeal, at [21] to [32].
[9] [2016] HLR 20, at [59] to [62].
[10] Ibid, at [46], [62] and [66].
[11] Ibid: [73] to [88].
[12] At [57]. The statistics before the Court indicated that 36% of women are in full time work, as opposed to 56% of men; 46% of disabled people, as opposed to 76% of others of working age; 67% of people aged 50–64 and 10% of people aged 65 and older, as opposed to 81% of younger adults.

"safety valves", the overall effect of which was that women, disabled people and the elderly were not at a disadvantage.

This argument was rejected by the Court. It was contradictory to accept, on the one hand, that the WHPS was a PCP which was a distinct scheme within the allocations policy, but at the same time to say that one could look outside it, to determine whether it was disadvantageous for the purposes of section 19(2). The "safety valves" were matters which properly were relevant to justification under section 19(2)(d), rather than the existence of indirect discrimination under section 19(2)(a)–(c).[13]

However, the Court of Appeal decided that High Court was not entitled to reject Ealing's justification defence. It was not in dispute that the WHPS pursued a legitimate aim. The issue was whether a less intrusive measure could have been used without unacceptably compromising the achievement of that aim.[14]

In deciding that issue against Ealing, the judge had focussed on the lack of "safety valves", in comparison with the allocations policies of other authorities. However, those policies were so radically different from the WHPS that it is impossible to derive from them the conclusion that the WHPS was a disproportionate way of achieving Ealing's legitimate aim. Those policies related to the undifferentiated entirety of the housing stock. There was no recognition by the judge of the critical difference that: (a) the WHPS only relates to 15% of Ealing's housing stock, and that (b) banding both in the WHPS and for the rest of the housing stock gives priority to women led households, disabled people and the elderly requiring sheltered housing, and that there is an overall discretion to put people into a higher band than would otherwise strictly be applicable. The judge had failed to consider the effect on the Protected Groups as a whole under the entire Housing Policy for all Ealing's housing stock.[15]

Indirect discrimination under section 19 – other cases

In *R. (XC) v Southwark LBC*,[16] the circumstances were very similar to those in *R. (H) v Ealing*. Again, the policy was found to be indirectly discriminatory, but the discrimination was justified, under section 19(2)(d). There are two other recent decisions of the High Court in which allocation policies have been found to be unlawful under section 19 of the 2010 Act: *R. (HA) v Ealing LBC*,[17] and *R. (C) v Islington LBC*.[18]

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[13] [56] to [59] per Sir Terence Etherton, MR. See also [40] to [43].
[14] I.e. the third part of the proportionality test.
[15] At [82] and [85]
[16] [2017] EWHC 736 (Admin); [2017] HLR 24.
[17] [2015] EWHC 2375 (Admin); [2016] PTSR 16, not to be confused with *R. (H) v Ealing LBC*.
[18] [2017] EWHC 1288 (Admin); [2017] HLR 32.

Article 14 (in conjunction with article 8)

In the cases so far considered, the claimants argued contravention of the ECHR alongside the argument under section 19 of the 2010 Act.[19] There have also been two decisions of the High Court in which the claimants relied on article 14 (with article 8) alone, because none of the protected characteristics under the 2010 Act were applicable: *R. (YA) v Hammersmith and Fulham LBC*,[20] and *R. (Osman) v Harrow LBC*.[21] In both cases, the court accepted that article 14 (with article 8) was engaged, and that the rule in question was discriminatory, but that the discrimination was justified.

There are four matters may be require to be considered in relation to an allegation of unlawful discrimination under article 14: (1) whether the subject matter of the dispute is within the scope or ambit of one of the other rights and freedoms under ECHR;[22] (2) whether the claimant has a "status" which article 14 requires to be protected; (3) whether the claimant has been discriminated against in the enjoyment of that right or freedom because of her status; and (4) whether the discrimination is nonetheless justified.[23]

As regards the applicability of article 14 (with article 8) to allocations policies, it is the first of these issues that is in doubt, given that article 8 does not confer a right to a home. In *R. (HA) v Ealing LBC*,[24] the judge in the High Court said that whilst there was no enshrined right to a physical home, there was a right under article 8 to the enjoyment of a "family life". This could, in reality, only be enjoyed in settled accommodation. Hence the link between article 8 and allocations policies.[25] In the later case of *R(H) v Ealing LBC*,[26] the claimants argued that the link between the council's allocations scheme and article 8 was established by various factors, in particular importance of accommodation for advancing family life.

The judge accepted that there was such a link.[27] In the Court of Appeal's decision, that was also accepted by the Master of the Rolls, who gave the leading judgment.[28] However, Lord Justice Underhill stated the "provisional view" that the allocation of

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[19] With the exception of *R. (XC) v Southwark LBC*, in which no art 14 argument was made.
[20] [2016] EWHC 1850 (Admin); [2016] HLR 39
[21] [2017] EWHC 274 (Admin).
[22] Because art 14 is not "free standing".
[23] See the decision of the Supreme Court in *Mathieson v SSWP* [2015] UKSC 47; [2015] 1 WLR 3250.
[24] [2015] EWHC 2375 (Admin); [2016] PTSR 16.
[25] At [29].
[26] In the High Court: [2016] EWHC 841 (Admin); [2016] HLR 20.
[27] See the discussion at [73] to [88]. For the consideration of the issue in other cases, see *R. (YA) v Hammersmith and Fulham LBC* at [55] to [62], and *R. (Osman) v Harrow LBC* at [63] to [65]. In *R. (C) v Islington LBC* the application of article 14 was not disputed by the council.
[28] As regards the WHPS, but not the MTPS.

social housing is a social welfare benefit of a kind which does not, without more, fall within the ambit of article 8. Lord Justice Davis was of the same opinion.[29]

It remains to be seen whether that view will prevail in future cases. In any event, the outcome in *R(H) v Ealing LBC* seems further to call into question the value of adding a case under article 14, if there is already a case under the 2010 Act, particularly if the same proportionality test is to be applied in both cases.

The PSED

In both *R. (C) v Islington LBC* and *R(H) v Ealing LBC*, the claimants argued that, in making changes to its existing policy, the council had failed to have regard to section 149 of the 2010 Act.[30]

In the first case, the court noted that reference was made in the scheme to ongoing monitoring which enabled the local authority to fulfil the PSED. It was satisfied that Islington had given sufficiently rigorous and conscientious consideration to its obligations under the Act.[31] In the Ealing case, the court concluded that there had been a failure to comply with the PSED when the WHPS had been introduced. However, in light of the fact that the policy was currently undergoing a "full review", and the council was clearly alive to the discrimination issues, the court did not consider it necessary or appropriate to quash the WHPS. This conclusion suggests that, where a social landlord seems vulnerable to a decision that it has not complied with the PSED in implementing a policy, it may avoid an adverse outcome to proceedings, by initiating a review of the policy, in which due regard is had to the matters set out in section 149.

[29] Respectively at [133] and [128]. Lord Davis's view is briefly stated. Both judges agreed with the MR that, in any event, any discrimination under art 14 would be justified. Note that at [88], the MR states that "The submissions on [the link between article 14 and 8] were not well developed by counsel for either side".

[30] Discussed in ch 5, at .

[31] At [102] to [105].