Neutral Citation Number: [2019] EWCA Civ 692

Case No: C1/2018/1285

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)
Mr Justice Supperstone
CO/1119/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2019

Before :

LORD JUSTICE UNDERHILL
(VICE PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION)
LORD JUSTICE LEWISON
and
LADY JUSTICE KING

- -

Between :

THE QUEEN ON THE APPLICATION OF TERESA WARD & ORS	**Appellant**
-and-	
THE LONDON BOROUGH OF HILLINGDON	**Respondent**
-and-	
THE EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

Case No: C1/2018/1971

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)
Mr Justice Mostyn
CO/3461/2016

THE QUEEN ON THE APPLICATION OF YILMAZ GULLU	**Appellant**
-and-	
THE LONDON BOROUGH OF HILLINGDON	**Respondent**
-and-	
THE EQUALITY AND HUMAN RIGHTS COMMISSION	**Internener**

Mr Jamie Burton (instructed by **Osbornes Solicitors LLP**) for the **Appellant Yilmaz Gullu** in the first appeal

Mr Ian Wise QC & Mr Azeem Suterwalla (instructed by **Hopkin Murray Beskine**) for the **Respondents Teresa Ward & Ors** in the second appeal

Mr Kelvin Rutledge QC & Mr Andrew Lane (instructed by **London Borough of Hillingdon** in both appeals) for the **Appellant** in the second appeal and the **Respondent** in the first appeal

Mr Dan Squires QC & Mr Chris Buttler (instructed by the **Equality and Human Rights Commission**) for the **Intervener** in both appeals

Hearing dates : 3rd and 4th April 2019

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Approved Judgment

Lord Justice Lewison:

The issue

1. Hillingdon LBC's housing allocation policy provides that, subject to exceptions, a person who has not been continuously living in the borough for at least 10 years will not qualify to join the housing register. One of the exceptions is that an unintentionally homeless person who does not satisfy the residence requirement is entitled to join the register; but is placed in band D. Two challenges were brought against the lawfulness of that policy, on the ground that it is indirectly discriminatory on the ground of race; and cannot be justified. One, by Irish Travellers, succeeded before Supperstone J (*R (TW) v London Borough of Hillingdon* [2018] EWHC 1791 (Admin), [2018] PTSR 1678). The other, by a Kurdish refugee of Turkish nationality, failed before Mostyn J (*R (Gullu) v London Borough of Hillingdon* [2018] EWHC 1937 (Admin), [2019] HLR 4). Since the courts below reached different answers on substantially the same challenge, I granted permission to appeal. Mr Wise QC, for TW and EM as they were known below, did not pursue any claim that they should be anonymised in this court.

The basic legislative framework

2. Section 166A of the Housing Act 1996 requires every housing authority in England to have an allocation scheme for determining priorities in allocating housing accommodation. The section goes on to provide (so far as relevant):

> "(3) As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to—
>
> (a) people who are homeless (within the meaning of Part 7);
>
> (b) people who are owed a duty by any local housing authority under section 190(2), 193(2) or 195(2) (or under section 65(2) or 68(2) of the Housing Act 1985) or who are occupying accommodation secured by any such authority under section 192(3);
>
> (c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions;
>
> (d) people who need to move on medical or welfare grounds (including any grounds relating to a disability); and
>
> (e) people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others).
>
> (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.
>
> (7) The Secretary of State may by regulations—
>
> (a) specify further descriptions of people to whom preference is to be given as mentioned in subsection (3), or
>
> (b) amend or repeal any part of subsection (3).
>
> (8) The Secretary of State may by regulations specify factors which a local housing authority in England must not take into account in allocating housing accommodation.
>
> (11) Subject to the above provisions, and to any regulations made under them, the authority may decide on what principles the scheme is to be framed.
>
> (14) A local housing authority in England shall not allocate housing accommodation except in accordance with their allocation scheme."

3. Section 199 defines a "local connection":

> "(1) A person has a local connection with the district of a local housing authority if he has a connection with it—
>
> (a) because he is, or in the past was, normally resident there, and that residence is or was of his own choice,
>
> (b) because he is employed there,
>
> (c) because of family associations, or
>
> (d) because of special circumstances …
>
> (6) A person has a local connection with the district of a local housing authority if he was (at any time) provided with accommodation in that district under section 95 of the Immigration and Asylum Act 1999 (support for asylum seekers)."

4. Regulations now require that additional preference be given to former members of the armed services: Housing Act 1996 (Additional Preference for Armed Forces) (England) Regulations 2012.

5. Amendments to the Act made by the Localism Act 2011 precluded housing authorities from allocating housing to persons who were ineligible. Such persons were defined in the section itself; and the Secretary of State was given power to specify additional categories of such persons. But, subject to that, a housing authority could decide for itself what classes of persons are, or are not, qualifying persons: section 160ZA (7). A person who is subject to immigration control is ineligible, unless they fall within a class of person prescribed by regulation. The Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 provide for four classes of person subject to immigration control who are, nevertheless, eligible. Class A consists of:

> "a person who is recorded by the Secretary of State as a refugee within the definition in Article 1 of the Refugee Convention and who has leave to enter or remain in the United Kingdom."

6. All eligible persons included in the "reasonable preference" groups must be treated as qualifying for inclusion in the allocation policy. But section 166A (3) does not allocate priorities as between the preference groups listed in that sub-section. That is dealt with by section 166A (5), which enables the housing authority itself to determine priorities. So there is no general impediment to a housing authority placing some preference groups in different bands within the scheme: *R (Jakimaviciute) v Hammersmith and Fulham LBC* [2014] EWCA Civ 1438, [2015] PTSR 822 at [26] – [27] and [50]. Equally, compliance with section 166A (5) does not guarantee success in being allocated housing; because in many if not most districts demand for accommodation exceeds supply: *R (Lin) v Barnet LBC* [2007] EWCA Civ 132, [2007] HLR 30.

7. In exercising their powers under Part 6 of the Act, housing authorities must have regard to guidance issued by the Secretary of State: Housing Act 1996, section 169 (1). The Secretary of State issued guidance in 2012. The relevant part of it is as follows:

> "3.22 When deciding what classes of people do not qualify for an allocation, authorities should consider the implications of excluding all members of such groups. For instance, when framing residency criteria, authorities may wish to consider the position of people who are moving into the district to take up work or to escape violence, or homeless applicants or children in care who are placed out of borough."

8. The Secretary of State issued further guidance in 2013. The relevant parts of that guidance are as follows:

> "12. The Government is of the view that, in deciding who qualifies or does not qualify for social housing, local authorities should ensure that they prioritise applicants who can demonstrate a close association with their local area. Social

> housing is a scarce resource, and the Government believes that it is appropriate, proportionate and in the public interest to restrict access in this way, to ensure that, as far as possible, sufficient affordable housing is available for those amongst the local population who are on low incomes or otherwise disadvantaged and who would find it particularly difficult to find a home on the open market.
>
> 13. Some housing authorities have decided to include a residency requirement as part of their qualification criteria, requiring the applicant (or member of the applicant's household) to have lived within the authority's district for a specified period of time in order to qualify for an allocation of social housing. The Secretary of State believes that including a residency requirement is appropriate and strongly encourages all housing authorities to adopt such an approach. The Secretary of State believes that a reasonable period of residency would be at least two years.
>
> 16. Whatever qualification criteria for social housing authorities adopt, they will need to have regard to their duties under the Equality Act 2010, as well as their duties under other relevant legislation such as s.225 of the Housing Act 2004.
>
> 18. Housing authorities should consider the need to provide for exceptions from their residency requirement; and must make an exception for certain members of the regular and reserve Armed Forces – see further at paragraph 23 below. Providing for appropriate exceptions when framing residency requirements would be in line with paragraphs 3.22 and 3.24 of the 2012 guidance.
>
> 21. These examples are not intended to be exhaustive and housing authorities may wish to consider providing for other appropriate exceptions in the light of local circumstances. In addition, authorities retain a discretion to deal with individual cases where there are exceptional circumstances."

9. It is common ground that in allocating accommodation under Part 6 of the Housing Act 1996 Hillingdon is providing services to a section of the public. Accordingly, section 29 (1) of the Equality Act 2010 comes into play. It provides:

> "A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service."

The homeless

10. A local housing authority owes a number of duties to the homeless under Part 7 of the Housing Act 1996. These are duties owed to specific people rather than "target" duties owed to the public at large. A person is homeless if he has no accommodation which he is entitled to occupy; and which it is reasonable for him to continue to occupy: section 175. Where a person is unintentionally homeless and in priority need, the duty is that prescribed by section 193 (2). That duty is a duty to secure that suitable accommodation is made available to that person. The duty is a continuing and indefinite duty, although it may be brought to an end in one of the ways laid down by section 193 itself. If he became homeless intentionally, but has a priority need the duty is limited to providing short term accommodation while he looks for somewhere else to live: section 190 (2). If a person is threatened with homelessness, the duty is to take reasonable steps to help him secure that the accommodation does not cease to be available for his occupation: section 195 (2). So far as reasonably practicable a housing authority must secure accommodation "in borough": section 208. But for many local authorities, particularly those in London, securing Part 7 accommodation in borough is not reasonably practicable: see *Alibkheit v Brent LBC* [2018] EWCA Civ 2742, [2019] HLR 15. We were told during the hearing that most placements that Hillingdon make under Part 7 (including Mr Gullu's) are "out of borough" placements. So it is, in practice, unlikely that those to whom duties are owed under Part 7 will be able to satisfy the 10-year residence requirement.

11. In broad terms, a person aggrieved by a decision made under these provisions is entitled to a review of the decision, followed, if appropriate by an appeal to the county court.

12. Persons who fall within these categories also fall within the reasonable preference groups in section 166A (3) (a) and (b).

Asylum seekers and refugees

13. An asylum seeker is not eligible for assistance under Part 7: sections 185 and 186. The Secretary of State has power to provide accommodation for asylum seekers who are or are likely to become destitute: Immigration and Asylum Act 1999 section 95 (1). A person who is accommodated in this way is deemed to have a local connection with the local housing authority in whose district he was accommodated: Housing Act 1996 section 199 (6). In practice, asylum seekers who are accommodated under these provisions have no choice about the location of that accommodation. Asylum seekers are normally accommodated outside London.

14. If an asylum seeker's claim is successful, he will normally be recognised as a refugee. At that point he ceases to be an asylum seeker, with the consequence that the Secretary of State no longer has the power to accommodate him. In practice this means that the refugee will be threated with homelessness (or be actually homeless). But since he has a deemed local connection with the district in which he has been accommodated, it is to the housing authority for that district that he must make his application for assistance under Part 7 of the Housing Act 1996. For the reasons given, that is unlikely to be a London authority.

Promoting the welfare of children

15. Section 11 (2) of the Children Act 2004 imposes on local authorities a duty to make arrangements for ensuring that:

> "(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children"

16. This duty applies both at the stage of formulating policy and also at the stage when individual decisions are made: *Nzolameso v Westminster CC* [2015] UKSC 22, [2015] PTSR 549 at [24]. We are concerned in these appeals only with the stage of formulation of policy.

Discrimination

17. It is important to stress that it is not suggested that Hillingdon's allocation policy fails to comply with the express duties laid down by the Housing Act 1996 itself. The principal challenge is based on unlawful discrimination. Discrimination is of two kinds: direct and indirect. We are not concerned with direct discrimination. Section 19 of the Equality Act 2010 defines indirect discrimination:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> (3) The relevant protected characteristics are—
>
> …
>
> Race."

18. "Race" includes colour, nationality and ethnic or national origins: section 9 (1). But a racial group may consist of two or more distinct racial groups: section 9 (4).

19. A provision, criterion or practice is usually described as a "PCP". As Lady Hale put it in *Essop v Home Office* [2017] UKSC 27, [2017] 1 WLR 1343 at [25]:

> "Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment—the PCP is applied indiscriminately to all—but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."

20. The key point is that "equality of results" is the goal.

Hillingdon's allocation policy

21. Hillingdon's housing allocation policy has undergone changes. The first version that we have been shown (dated June 2013) excluded from qualification those who had not been living in Hillingdon for at least 10 years. There were some limited exceptions to that requirement, but the exceptions did not extend to all persons who were entitled to "reasonable preference" under section 166A (3). During the course of the (Gullu) litigation Hillingdon amended its policy. We are concerned with the revised policy (dated December 2016).

22. Before formulating the policies, Hillingdon conducted two equality impact assessments. One was conducted before the introduction of the original policy in 2013. The other was conducted before its amendment in 2016. In the first of these officers set out the aims of the policy. One of these was to reward residents with a long attachment to the borough. They then considered the impact of the 10-year residency qualification on different ethnic groups. Irish Travellers were not among them. Nor did the assessment consider the impact of the qualification on non-UK nationals. The assessment included a graph which illustrated the differing impact of differing lengths of residency qualifications. That tended to show a widening gap between white people and those in BME and other groups as the length of the requirement increased. But it offered no opinion on whether the adoption of a qualification of less than 10 years would undermine the aims of the policy. Under the heading "Assessment" it stated:

> "The introduction of a ten-year residential qualification criteria will have a negative impact on this group.. In addition, it will mean new residents arriving in the borough and/or country will not be able to access the Housing Register for a period for 10 years."

23. The second sentence of that quotation is all that was said about new residents arriving in the country. Under "Conclusions" it stated:

> "Although we think the policy changes will not discriminate against some "protected" groups, it will only be possible to monitor this effectively once it is implemented. The information is not conclusive in determining whether there might be unintended consequences of the changes.
>
> Therefore, continuous impact monitoring will be carried out which will be reported to members after a year of implementation.
>
> 2. The assessment also shows that the qualification rule relation to 10 year residency could result in a number of households who are in housing need becoming excluded from allocation of social housing. For residents who have not resided in the borough for more than 10 years, mainly BME residents, there will be a negative impact. In addition, for new BME and non BME arrivals to the borough there will be a negative impact as they will not be able to access the waiting list for 10 years.
>
> **Action**
>
> Data has been provided on the estimated impact based on 5, 6, 7, 8 9 and 10 years. This can be used to review and consider an option that would minimise the impact."

24. Officers submitted the draft policy to Cabinet for approval. The accompanying report noted that the Policy Overview Committee had considered the relevant documents. It continued:

> "With regard to the requirement that 10 years living continuously in the same location amounted to local residency, members asked how this might be applied to asylum seekers.
>
> Asylum seekers do not have access to council housing. If asylum seekers meet requirements for housing while waiting for a decision on their application, they will be placed by the UK Borders Agency wherever suitable housing is available in the UK. They will not be able to choose where to live and housing is not provided in London."

25. The report also stated:

> "Broadly speaking, the proposed changes will have a neutral effect on applicants with different ethnic origins – the priority that an applicant will have for housing depends entirely on their individual circumstances.

> It could, however, be argued that by requiring residents to have resided in Hillingdon for ten years before they become eligible for accommodation, the Council is indirectly discriminating against applicants from a BME background. This is because, as the EIA shows, BME applicants are less likely to have resided in Hillingdon for the ten year period.
>
> …
>
> The proposed allocations policy recommends that exceptions to the ten year local connection requirement be made in appropriate cases, such as applicants who have been subjected to domestic violence. An exception may also be granted where an applicant can demonstrate that they would suffer hardship if they were not considered for housing.
>
> As stated in the EIA, it is not anticipated that BME applicants will suffer detriment if the ten year local connection requirement is introduced. However, by permitting exemptions to avoid hardship, the circumstances of all applicants can be fully considered and the possibility of an applicant suffering any disadvantage avoided. Further, by reviewing the operation of the Allocations Policy after one year, Cabinet will be able to consider whether any changes to the policy should then be made."

26. The "not" in the first sentence of the last quoted paragraph is puzzling.

27. We do not have any minute of the Cabinet discussion which led to the approval of the draft policy. What we are told about it comes from paragraph 11 of Ms Murphy's witness statement:

> "I understand that Cabinet considered the report and the Impact Assessment and approved the ten-year residence requirement as providing the most appropriate balance between the needs of those on the Housing Register and the aims of the policy, namely to support stable communities within the borough and to reward those residents who could demonstrate a stronger attachment to Hillingdon. The Scheme allows for a number of exceptions to the ten-year residence requirement in specified situations and in cases where hardship would result, which was felt to provide protection to those applicants who would otherwise be disproportionately impacted by the changes."

28. This seems to recognise that some groups *would* be disproportionately impacted by the changes; but that the exceptions to the residency requirement overcame that disproportionate impact. At this stage, the housing allocation policy did not envisage the preference groups described in section 166A (3) being exempt from the 10-year residence requirement. Where the policy did cater for exemptions from the requirement, those who were exempt were placed in one of three priority bands A, B or C. Those in band A had priority over those in bands B and C; and those in band B

had priority over those in band C. In August 2016, following the decision in *Jakimaviciute*, Hillingdon amended the policy so as to enable those in the statutory preference groups to be admitted to the housing register. By this time, Mr Gullu had initiated his claim for judicial review. One of the grounds on which he challenged the policy was that it unlawfully discriminated against refugees; either *per se* or because they were included in a racial group of non-UK nationals. Officers carried out a further equality impact assessment following a public consultation.

29. 320 households responded to the consultation. Of the respondents, three identified themselves as "Gypsy or Traveller". They amounted to 0.5% of the respondents. A small number of the respondents objected to the 10-year residency requirement:

> ".. one considered it to discriminate against minorities and two that it discriminated against gypsies and Travellers."

30. The 2016 equality impact assessment again considered applicants by reference to their ethnicity. It divided the cohort into more sub-groups of ethnicity than the 2013 assessment; but it did not include Irish Travellers among them. Nor did it consider the cohort by reference to nationality rather than ethnicity. Despite Mr Gullu's challenge, officers did not consider either refugees or non-UK nationals. However, Chart 4, analysing the results of the consultation, did record that 0.8% of respondents were "White- Gypsy or Traveller"; although the change from the previous percentage of 0.5% was not explained. Following the assessment, the revised policy went to cabinet. In the accompanying report officers stated:

> "The Assessment states that the Policy actually seeks to advance equality of access and improved outcomes for local residents and in the circumstances there is no need for any mitigating actions."

31. The revised policy, approved by Cabinet, enabled the statutory preference groups to join the housing register. Homeless persons or those to whom duties were owed under Part 7 (i.e. preference groups (a) and (b)) who met the 10-year residence qualification were placed in bands A, B or C, depending on the kind of accommodation in which they had been accommodated. But where a person in one of those groups did not meet the 10-year residence qualification, they were placed in a newly created band D, which had lower priority than bands A, B and C.

32. So far as other reasonable preference groups were concerned, they were placed in bands A, B or C.

33. Supperstone J set out the relevant parts of Hillingdon's current allocation policy, which Mostyn J also adopted:

> "9. The key objectives of the Allocation Scheme, set out at para 1.2, are to:
>
> · "Provide a fair and transparent system by which people are prioritised for social housing.

· Help those most in housing need.

· Reward residents with a long attachment to the borough.

· Encourage residents to access employment and training.

· Make best use of Hillingdon's social housing stock.

· Promote the development of sustainable mixed communities."

10. Para 1.2 further states:

"The Council will register eligible applicants who qualify for the reasonable preference criteria and certain groups who meet local priority. In addition, the Council will ensure that greater priority through 'additional preference' is given to applicants who have a longer attachment to the borough, are working, … and childless couples."

11. Paragraph 2 of the Allocation Scheme sets out eligibility and qualification rules for housing. The qualification rules include at para 2.2.4:

"Households who have not been continuously living in the borough for at least 10 years and will not qualify to join the housing register

Applicants will need to demonstrate a local connection with Hillingdon. Local connection within the terms of this scheme will normally mean that an applicant has lived in Hillingdon, through their own choice, for a minimum of 10 years up to and including the date of their application, or the date on which a decision is made on their application, whichever is later.

For purposes of continuous residence, children spending time away from home for education due to periods of study such as at university and people who have moved away up to 3 times due to the requirements of their job will be disregarded. Secure, introductory or flexible tenants of Hillingdon Council and care leavers housed outside the borough will be considered as having a local connection with Hillingdon.

People will also be considered as having a local connection with Hillingdon when they are placed in the borough of Hillingdon in temporary accommodation in accordance with sections 190(2), 193(2), 195(2) or who are occupying accommodation secured by any local authority under section 192(3)."

There are ten exceptions to this qualification. One exception is for "Statutorily homeless persons and other persons who fall

within the statutory reasonable preference groups (see paragraph 12 below)".

12. Section 4 of the Allocation Scheme refers to the Council operating a 'Choice Based Lettings Scheme' through a central lettings agency known as "Locata", and section 5 sets out how the Choice Based Lettings Scheme operates. It states:

"5.1 Priority Banding

Housing need is determined by assessing the current housing circumstances of applicants. A priority 'band' is then allocated according to the urgency of the housing need. There are three priority bands as follows

Band A – This is the highest priority band and is only awarded to households with an emergency and very severe housing need.

Band B – This is the second highest band and is awarded to households with an urgent need to move.

Band C – This is the third band, and the lowest band awarded to households with an identified housing need.

If following an assessment it is determined that an applicant has no housing need, they cannot join the housing register…"

13. Section 6 of the Allocation Scheme provides that in certain specified cases, an allocation may be made outside of the Choice Based Lettings Scheme. These include "where homeless households have been in temporary accommodation for longer than the average period, they will be made one direct offer of suitable accommodation".

14. Section 12 of the Allocation Scheme ("Reasonable Preference Groups") states, so far as is relevant:

"The council will maintain the protection provided by the statutory reasonable preference criteria in order to ensure that priority for social housing goes to those in the greatest need…

12.1 Homeless household

This applies to people who are homeless within the meaning of Part 7 of the 1996 Housing Act (amended by the Homelessness Act 2002 and the Localism Act 2011).

…

Where the Council has been able to prevent homelessness and the main homelessness duty has been accepted, applicants will be placed in one of the following bands:

Band A – in temporary accommodation but the landlord wants the property back AND the council cannot find alternative suitable temporary accommodation. Where an applicant fails to successfully bid within 6 months, a direct offer of suitable accommodation will be made. If the property is refused the Council will discharge its duty under Part VII of the Housing Act and withdraw any temporary accommodation provided.

Band B – In Bed and Breakfast, council hostel accommodation or women's refuge.

Band C – In other forms of temporary accommodation.

Where the Council has been unable to prevent homelessness and the main homelessness duty has been accepted, applicants with less than 10 years continuous residence in the borough will be placed in Band D.

…

12.4 Medical grounds

If you apply for housing because your current accommodation affects a medical condition or disability, your application will be referred to the council's medical adviser or occupational therapy team depending on what you have put in your application for assessment.

…

12.6 Hardship grounds

There are a number of households applying to the housing register who experience serious hardship because of a combination of different factors which make the need for re-housing more urgent than when considered separately.

The decision as to the appropriate priority 'band' will depend on both the combination and degree of the various factors with a view to ensuring that the greatest priority is given to those in the greatest need.

In circumstances where this applies, a panel of officers (Hardship Panel) will undertake a review of the case to determine whether priority for re-housing is necessary.

The following priority banding will be considered

> Band B – the applicant or a member of their household has multiple needs or has an urgent need to move. Examples include:
>
> · To give or receive care or support from/to a resident in the borough, avoiding use of residential care. It is constant care to/from a close relative as evidenced by a professional's report and supported by the Council's Medical Adviser;
>
> · Child protection reasons;
>
> …
>
> · Other urgent welfare reasons."
>
> 15. Section 14 of the Allocation Scheme ("Additional Priority") provides that additional priority is awarded in order to determine priorities between people in the reasonable and local preference groups. It is awarded in circumstances which include:
>
> "14.2 Couples aged over 21 without children
>
> Additional priority is awarded to couples aged 21+ without children. This will improve access to available lettings to those households without children who would otherwise be in 'Band C'.
>
> 14.3 10-year continuous residency
>
> Additional priority is awarded to those who have a local connection by living in the borough continuously for a minimum period of ten years. This will support stable communities and reward households who have a long-term attachment to the borough.
>
> Local connection will normally mean that an applicant has lived in Hillingdon, through their own choice, for a minimum of 10 years up to and including the date of their application, or the date on which a decision is made on their application, whichever is later.

34. Under the policy, therefore, a person who does not fall into one of the groups entitled to "reasonable preference", and who has not lived in Hillingdon for 10 years, does not qualify for the housing register at all; subject to certain exceptions which are not relevant to either of these appeals. A person who does fall into one of the groups entitled to reasonable preference (such as a homeless person) qualifies for the housing register. But if such a person has not been living in Hillingdon for 10 years, they will be placed in Band D.

The facts

TW

35. Both Ms Ward and Mr McDonagh are Irish Travellers. Ms Ward is 29 years' old and has three young children. She is a single parent. She cannot read or write. Having spent a significant part of her early life travelling, she says that she now wishes to settle, at least while her children are young and in school. Her children's educational opportunities are important to her.

36. Ms Ward was living with relatives on a caravan site in Hillingdon when she was asked to leave and became homeless in 2015. She applied to Hillingdon for homelessness assistance. She was housed in a bed and breakfast hotel and then moved to another, before she was provided with accommodation under Part 7 of the 1996 Act. She says that the accommodation was in very poor repair and an independent environmental health officer has confirmed that it is unfit for human habitation.

37. She was not placed on the housing register until her solicitors wrote on 29 January 2018 requiring Hillingdon to do so. In response Hillingdon notified her that she had now been placed on the register, but that because she had not lived in the borough for ten years she was placed in band D.

38. Mr McDonagh is 61 years' old. He lives with his wife adult son and daughters. All four are disabled and require care because of their disabilities. He too is disabled.

39. Mr McDonagh receives a Carer's Allowance in recognition of the more than 35 hours per week care he provides for his daughter. All three children receive Employment Support Allowance and Disability Living Allowance.

40. Mr McDonagh has lived in Hillingdon since 2011. He became homeless in 2012 and was accommodated by Hillingdon at a series of addresses until he was made to leave temporary accommodation on 1 March 2017. Between March 2017 and February 2018, save for occasional nights with friends or family, he and his children slept in his van until they were provided in February 2018 with accommodation under Hillingdon's severe weather protocol. They continue to live in temporary accommodation.

41. By letter dated 8 June 2018 Hillingdon informed Mr McDonagh that the hardship panel, to whom his housing register application had been referred, had decided that he did not meet the criteria for social housing. He was informed that if he disagreed with the decision he could request a review. Because of a change of factual circumstances Mr McDonagh was later allowed onto the register and placed in band D.

42. In both these cases Ms Polly Neate, the chief executive of Shelter, gave evidence about the difficulties faced by Irish Travellers. She drew particular attention to the effect of homelessness on children; and explained that changing schools has a long term impact on children's lives and futures. Ms Natalie Stables, the head of Ethnic Minority and Traveller Achievement Services in Salford also gave evidence. She explained that educational outcomes for Gypsy and Roma children ("GRT children") are very poor; and are the worst out of all ethnic groups. The reasons are complex. They include a high level of adult illiteracy. There was some anecdotal evidence to

suggest that GRT children who are more settled in houses and attend school more regularly, achieve better outcomes on the whole that GRT pupils who are highly mobile or live on a site. The rate of in-year admission to schools (which itself damages educational attainment) is higher for GRT children than any other ethnic group.

Gullu

43. Mr Gullu is a Kurdish refugee of Turkish nationality. In Turkey he was tortured and persecuted on the ground of his ethnicity and beliefs. He came to the UK in July 2011 and applied for asylum. In November 2013 the Secretary of State ("the SSHD") granted him indefinite leave to remain. While Mr Gullu's asylum application was being processed he was destitute. The SSHD therefore provided him with accommodation. Normally accommodation for asylum seekers is provided outside London. But because Mr Gullu was receiving treatment for the psychological effects of torture, he was accommodated in Hillingdon. His entitlement to that accommodation came to an end when he was granted leave to remain. Thus he became homeless. On 18 December 2013 he applied to Hillingdon for housing assistance. Hillingdon initially refused his application and refused to register him on the housing register because he had not lived in Hillingdon for 10 years.

44. Thereafter, Hillingdon accepted that it owed Mr Gullu the main housing duty under section 193 (2) of the 1996 Act. But it maintained its refusal to register him on the housing register because he did not satisfy the 10-year residence requirement. Hillingdon confirmed on 10 February 2017 that he could register on the scheme because he has a reasonable preference. He was placed in Band D.

45. Ms Chloe Morgan, from the Refugee Council, gave evidence about the housing of asylum seekers. She said that where asylum seekers are housed during the pendency of their applications, they have no choice where to live. They are simply allocated housing: usually out of London and the south-east.

46. Moreover, accommodation providers move asylum seekers from place to place. Providers are permitted to move asylum seekers twice a year without their consent; but the Home Office Select Committee recorded instances of asylum seekers being moved more frequently. She concluded that the fact that asylum seekers are regularly moved around between different accommodation providers makes it difficult for them to build up local connections in a particular area. Turning to Hillingdon's allocation policy her evidence was that the 10-year residence requirement will disproportionately affect asylum seekers and therefore refugees. As she explained:

> "Refugees are very unlikely to have been resident in *any* Local Authority borough for 10 years."

The role of the court

47. In *R (Ahmad) v Newham LBC* [2009] UKHL 14, [2019] PTSR 632 the House of Lords sounded a warning against over-interference in the policy choices made by a housing authority in framing its allocation policy. Lord Neuberger said at [46]:

> "… as a general proposition, it is undesirable for the courts to get involved in questions of how priorities are accorded in housing allocation policies. Of course, there will be cases where the court has a duty to interfere, for instance if a policy does not comply with statutory requirements, or if it is plainly irrational. However, it seems unlikely that the legislature can have intended that judges should embark on the exercise of telling authorities how to decide on priorities as between applicants in need of rehousing, save in relatively rare and extreme circumstances. Housing allocation policy is a difficult exercise which requires not only social and political sensitivity and judgment, but also local expertise and knowledge."

48. He added at [62]:

> "Knowledge of the circumstances of applicants generally, long term strategy considerations, expertise, political and social awareness, and local knowledge all have a part to play when it comes to formulating and implementing a housing allocation scheme. With information essentially consisting of the scheme itself, the circumstances of the particular applicant and a few statistics (of questionable mutual consistency), the court should be very slow indeed to second guess Newham."

49. Despite these warnings the court must, of course, be satisfied that a housing allocation policy does not unlawfully discriminate, as both Lady Hale and Lord Neuberger made clear at [14] and [37] respectively. Protection against unlawful discrimination, even in an area of social and economic policy, falls within the constitutional responsibility of the courts. Even in the area of welfare benefits, where the court would normally defer to the considered decision of the policy maker, if that decision results in unjustified discrimination, then it is the duty of the court to say so: *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 at [160].

50. In addition, paragraph 16 of the Secretary of State's statutory guidance expressly requires housing authorities to comply with the Equality Act 2010.

Does Hillingdon's housing allocation policy discriminate?

51. In *R (H) v Ealing LBC* [2017] EWCA Civ 1127, [2018] PTSR 541 this court considered the correct approach to an allegation that a particular part of a housing allocation policy amounted to indirect discrimination. The policy in question set aside a small but not insignificant proportion of lettings for "working households" ("WHPS") and "model tenants". One of the arguments advanced on behalf of Ealing was that, in considering the question whether a particular part of the allocation policy (a "PCP") amounted to indirect discrimination it was necessary to consider the whole of the policy "in the round". The policy, considered in the round, contained a number of "safety valves" which meant that, overall, the disadvantaged groups were not disadvantaged by the particular parts of the policy under attack. This court had "no hesitation" is rejecting that argument. Sir Terence Etherton MR said:

> "[58]. In the light of that acceptance on the basis of those statistics, and the concession by Ealing on this appeal that each of the two priority schemes is a PCP, it inevitably follows that the WHPS gives rise to indirect discrimination within section 19(2) of the EA 2010. The wording of section 19(2) is precisely applicable, namely that participation in the WHPS is open to those who are not women, disabled people or elderly, and people who do have any of those characteristics will be disadvantaged in comparison because they are less likely to be in work than those who do not have those characteristics, and the claimants here are within those protected groups and would be disadvantaged.
>
> [59] In short, it is contradictory of Ealing to concede, on the one hand, that for the purposes of section 19(2) of the EA 2010 the WHPS is a PCP, and, on the other hand, to seek to rely on Ealing's housing policy as a whole to rebut the PCP's discriminatory impact on the relevant protected groups. What this highlights is that the matters on which Ealing relies, the so-called safety valves, are matters which properly are relevant to justification under section 19(2)(d) of the EA 2010 rather than the existence of indirect discrimination under section 19(2)(a)–(c) of the EA 2010."

52. In the light of that, it is necessary to consider paragraph 2.2.4 of Hillingdon's policy separately. The question is whether that is a PCP that amounts to indirect discrimination.

53. Supperstone J did not discuss this question, which was conceded by Hillingdon (see para [31] (iv) of the judgment); but concentrated on whether Hillingdon was able to justify its policy. Hillingdon was also prepared to make the same concession before Mostyn J. But he did not accept it; and held that the policy did not discriminate against Mr Gullu. Before us Mr Rutledge QC, on behalf of Hillingdon, repeated the concession; and said that he was not able to support Mostyn J's reasoning on this question. Nevertheless, I ought to explain why I consider that this concession was rightly made; and why Mostyn J was wrong to reject it.

54. Mostyn J dealt with the question of discrimination as follows:

> "[15] The claimant is a recent arrival in Hillingdon who is a refugee. He is discriminated against in favour of long-term residents not because he is a refugee but because he is a short-term resident. Nobody is suggesting that discrimination on that basis is to be impugned. Indeed, as I have pointed out, it has been expressly authorised by Parliament and strongly encouraged by the government.
>
> [16] The correct analogue is therefore another short-term resident who is not a refugee. That analogue might be a recent arrival from another part of the UK or a recent arrival from the EEA exercising treaty rights. The same treatment is meted out

> to the claimant and the analogue – both are denied priority by virtue of the 10-year residency rule. The claimant's case can only get off the ground if he can show that his circumstances and those of the analogue are materially different: that they are unalike cases. If he can show that they are unalike then the defendant has to justify the same treatment being applied to both.
>
> [17] But are they unalike? Mr Burton says the circumstances of a refugee and those of a voluntary migrant from Yorkshire or France are different because the refugee has no choice but to apply in Hillingdon whereas the analogue comes to Hillingdon by choice. Further, the refugee may be more vulnerable as a result of the persecution he has suffered which has resulted in the award of refugee status. All of this is true, but so what? The reason that each has started the 10-year journey may be different but that is immaterial to the process of starting the clock and counting the days, which is all that the measure stipulates."

55. Mr Burton, for Mr Gullu, supported by Mr Squires for the Equality and Human Rights Commission, submits that Mostyn J did not distinguish between direct discrimination and indirect discrimination. It is not suggested that the 10-year residence requirement amounts to direct discrimination. But the whole basis of indirect discrimination is that what appears to be a neutral provision is substantially more difficult for a person with a protected characteristic to comply with than a person without that characteristic.

56. In the present case the protected characteristic is that of "race" as defined. Since "race" includes national origins, and a racial group may be made up of two or more distinct sub-groups, non-UK nationals are a class of people sharing a racial characteristic. It is also possible, of course, to define Mr Gullu's protected characteristic differently. As well as being a non-UK national, he is also a non-UK/EEA national; a Turkish national, and a person of Kurdish ethnicity. Each of these could be described as a protected characteristic.

57. Mostyn J's first error was to compare Mr Gullu with an individual analogue ("a voluntary migrant from Yorkshire or France"). If the case were one of direct discrimination, that would be the correct approach. But in a case of indirect discrimination, it is not. In the case of indirect discrimination, the correct comparison is between groups rather than individuals. Lady Hale explained this in *Essop* at [41]:

> "… all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it"—ie the PCP in question—puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In

> general, therefore, identifying the PCP will also identify the pool for comparison."

58. As Lady Hale also emphasised at [27]:

> "… there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage."

59. The groups, for comparative purposes, consist on the one hand of those who share the relevant protected characteristic ("the protected group"); and on the other hand those who do not ("the comparator group"). In Ms Ward's case the relevant characteristic is being an Irish Traveller. In Mr Gullu's case, it is being a non-UK national. So the question in Ms Ward's case is: are Irish Travellers put at a disadvantage in satisfying the 10-year residence requirement as compared with persons who are not Irish Travellers? In her case it was common ground that they were. The question in Mr Gullu's case is: are non-UK nationals put at a disadvantage in satisfying the 10-year residence requirement as compared with persons who are UK nationals? Mostyn J's second error was to select as an analogue a person who could not satisfy the 10-year residence requirement (because they were a recently arrived voluntary migrant). Compounding this error was his concentration on some only of the comparator group. What he ought to have done was to have considered the comparator group (UK nationals) as a whole. The fact that some members of the comparator group are also disadvantaged by the PCP does not negate indirect discrimination, if a higher proportion of the protected group suffer that disadvantage.

60. If, then, one asks: does a 10-year residence requirement disadvantage non-UK nationals more than UK nationals, the answer must be "yes". A long line of cases has accepted that a residence requirement disadvantages non-UK nationals. In *Orphanos v Queen Mary College* [1985] AC 761 a residence requirement in order to qualify for reduced tuition fees indirectly discriminated against a Cypriot national (before Cyprus joined the EU). Lord Fraser said:

> "I have no doubt that the proportion of persons of non-British and non-E.E.C. nationality who wish to attend the college and who can comply with the requirement of having ordinarily resided in the E.E.C. area for three years immediately before 1 September 1982 is substantially smaller than the proportion of persons not of that group (i.e., persons who were British or E.E.C. nationals) who wish to attend the college and who can comply with it. That seems obvious and causes no difficulty."

61. In *R (Winder) v Sandwell MBC* [2014] EWHC 2617 (Admin), [2015] PTSR 34 a residence requirement in order to benefit from a council tax reduction scheme indirectly discriminated against non-UK nationals. It is notable that in that case, the claimants were in fact all UK nationals. Hickinbottom J accepted the submission that:

> "… the residence requirement is indirectly discriminatory because it is liable to affect a larger proportion of foreign (including EU) nationals than British nationals, because the

> former are inherently less likely to have lived their lives (and, in particular, the last two years) in Sandwell."

62. He did not require statistical evidence because the potential indirect discrimination was "obvious".

63. It is true that a person in one of the reasonable preference groups is permitted to join the register; but those who are homeless and cannot satisfy the 10-year residence requirement are placed in band D rather than in any higher band. That reduces their chances of being allocated accommodation; and in my judgment is a relevant disadvantage.

64. Mostyn J referred to the decision of Supperstone J in *TW*, but distinguished it at [18]:

> "Travellers are a nomadic people. It is in their blood and is their fundamental tradition. Therefore, as a matter of probability it is surely much more likely that an Irish traveller will not complete the 10-year journey than his or her analogue. The traveller and the analogue are unalike cases which should be treated differently."

65. That was not a valid ground for distinguishing the two protected groups. In *Essop*, Lady Hale said at [24]:

> "… in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons *why* a particular PCP puts one group at a disadvantage when compared with others. Thus there was no requirement in the 1975 Act that the claimant had to show why the proportion of women who could comply with the requirement was smaller than the proportion of men. It was enough that it was. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does."

66. She repeated at [33]:

> "In order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put."

67. It follows, in my judgment, that it was not legitimate to distinguish the decision of Supperstone J on the ground that the reason why Irish Travellers were put at a disadvantage by the PCP was known.

68. I therefore would hold that Mostyn J was wrong in finding that the PCP did not amount to indirect discrimination.

The public sector equality duty

69. Section 149 of the Equality Act 2010 creates the public sector equality duty ("the PSED"). Although duties under the PSED were raised as specific grounds of appeal only in Mr Gullu's appeal, I consider that performance of the PSED has a bearing on the approach both to the question of justification of indirect discrimination; and also to the alleged breach of section 11 of the Children Act 2004 in the formulation of the housing allocation policy.

70. The relevant parts of section 149 provide:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; …
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act."

71. Compliance with the PSED requires the decision maker to be informed about what protected groups should be considered. That will involve a duty of inquiry, so that the decision-maker is properly informed before making a decision: *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [26] (8).

72. Mr Rutledge submitted that in formulating the policy, it is not incumbent on the policy maker to assess the potential indirect discriminatory effect on every conceivable group that shares a protected characteristic. I consider that there is considerable force in that submission. It could not credibly be suggested, for example, that in formulating its housing allocation policy Hillingdon ought to have considered its potential impact on Native Americans or Australian aborigines without some specific cause to do so. It may well be the case that, in formulating a policy, a policy maker has conscientiously attempted to assess the potential indirect discriminatory effect on groups sharing protected characteristics; but has reasonably and in all good faith overlooked a particular such group. It would need to be shown that the policy maker had given adequate thought, conducting such inquiries as might be necessary,

to decide which particular protected groups ought to be considered. But if, having done so, a particular protected group was overlooked, I do not consider that, without more, that would amount to a breach of the PSED.

73. Mr Gullu relies heavily on the fact that the equality impact assessments did not consider, or did not consider adequately, refugees and non-UK nationals respectively. So far as non-UK nationals are concerned, consideration was limited to the half sentence that I have quoted, and the recognition that recent arrivals in the country would be disadvantaged.

74. I would not hold that Hillingdon were in breach of the PSED in carrying out the initial equality impact assessment in 2013. At that stage it had not been shown that there was any reason for Hillingdon specifically to have considered non-UK nationals or refugees. But by the time of the 2016 assessment Mr Gullu had made his challenge in court. In the light of that challenge, I consider that Hillingdon ought at least to have *considered* the position of non-UK nationals. But they did not. I would therefore hold that Mr Gullu has established a breach of the PSED.

Justification

75. This question is common to both appeals. It is important, however, to distinguish between two different questions. One question is whether the policy, taken as a whole, contains sufficient safeguards to eliminate the indirect discrimination resulting from the impugned PCP. Another, and different, question is whether any indirect discrimination is justified. Hillingdon's argument to some extent conflated these two questions.

76. The burden lies on the policy maker to justify the impugned PCP. It is not a legal requirement of justification that the reasons put forward in defence of the PCP must have been present to the mind of the policy maker at the time when the PCP was introduced. It is open to a policy maker to advance an *ex post facto* justification: *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 at [129]; *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] ICR 716 at [59] and [76]. However, in the case of an *ex post facto* justification, the court will not have had the benefit of the considered *decision* of the policy maker. Thus, as Lord Kerr pointed out in *Re Brewster* [2017] UKSC 8, [2017] 1 WLR 519 at [52]:

> "Obviously, if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made, this will call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised. Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide."

77. In *TW* Supperstone J held at [50] that Hillingdon's attempt to justify the indirect discrimination failed because of the "paucity and inadequacy of their evidence". He said at [52] that in order to justify indirect discrimination "the authority must address the possible impacts" of the PCP. At [53] he said:

> "The only consideration given to the impact of the residence requirement on "race" was in relation to BME or "white" residents. However, the adverse impacts on racial groups defined by "colour" were not the only ones that required consideration. I agree with Mr Wise and Mr Squires that a residence requirement, especially one as long as ten years, is almost certain to have a significant and adverse impact on Irish Travellers, yet the position of Irish Travellers does not appear to have been considered at all when the council conducted their equality impact assessment. No consideration has therefore been given as to whether the council has struck the correct balance between disadvantage to Irish Travellers and the aims of the residence requirement."

78. Mr Rutledge says that this does not matter. Justification is concerned with the effect of the PCP in question; not with the process by which the PCP was devised. He also submits that Supperstone J was wrong in so far as he held that justification could only succeed on the basis of material actually considered by the policy maker before introducing the PCP in issue.

79. I do not think that it is entirely clear whether Supperstone J was, as a matter of law, confining the material on which Hillingdon could rely by way of justification to material that had been considered before the introduction of the PCP. What he said at [50] and [52] seem to me to be neutral on the question. Paragraph [53] does suggest that the judge moved from his statement that Irish Travellers were not considered at the time of the equality impact assessment to the conclusion ("therefore") that no consideration "has" been given to their position. If that is what he meant, then I would agree with Mr Rutledge that it would have mis-stated the law.

80. In the end, however, I do not think that it matters. The material that Mr Rutledge relied on in defending the PCP was, in effect, the material contained in the 2013 equality impact assessment, the officers report to Cabinet (both of which preceded the introduction of the PCP) plus one paragraph in the witness statement of Ms Murphy; and the provisions of the policy itself. That was the position both before the judge, as the judge recorded at [42]; and before us. So in my judgment the judge was right to concentrate on that material.

81. As I have said, I do not consider that compliance with the PSED requires a policy maker to consider, in advance of formulating a policy, its potential impact on every conceivable protected group. There must be some trigger for considering a particular group. But that is not a complete answer. It may well be the case that, in formulating a policy, a policy maker has conscientiously attempted to assess the potential indirect discriminatory effect on a number of protected groups; but has reasonably and in all good faith overlooked a particular such group. In my judgment, it is incumbent on the policy maker once confronted with the omission, to justify the discrimination as regards that particular group. If a policy amounts to indirect discrimination against group E, I do not consider that it is an answer for the policy maker to say that it has considered groups A, B, C and D.

"Safety valves"

82. Mr Rutledge relied on a number of features of the scheme as amounting to what he called "safety valves". What he meant by "the scheme" was not only Hillingdon's allocation policy, but also the duties owed to the homeless under Part 7 of the Housing Act 1996. He pointed in particular, to the possibility of a higher banding being granted on account of hardship, the possibility of a direct offer outside the choice based letting scheme, and the continuing duty to house the unintentionally homeless in priority need under section 193 (2).

83. Supperstone J rejected this argument, which he dealt with shortly at [56]:

> "As for the "safety valves", I agree with Mr Wise and Mr Squires that they are not likely to benefit Irish Travellers any more than those with other ethnic origins. There is no evidence that the council gave consideration to whether they were likely to advantage persons who are Irish Travellers over other individuals with an equal need for housing."

84. Mostyn J, on the other hand, did place reliance on other features of the policy. As he put it at [34]:

> "It can be seen that the 10-year residence rule is not by any means the only gateway onto the register, nor is it, once you have got there, the only gateway to an uplift. There are other ways in, or up."

85. This court considered a similar question in *R (H) v Ealing*. In that case, the evidence was that the impugned policy which disadvantaged certain protected groups was counterbalanced by other parts of the policy which conferred "significant priority on those groups": see [76]. It was in those circumstances that the court was able to conclude that, taken overall, the policy did not disadvantage the protected groups.

86. As I have said, the key principle is that the goal is equality of outcome. If a PCP results in a relative disadvantage as regards one protected group, any measure relied on as a "safety valve" must overcome that relative disadvantage. Put simply, if the scales are tilted in one direction, adding an equal weight to each side of the scales does not eliminate the tilt. Mostyn J was wrong to hold otherwise.

87. In addition, there is no evidence that the "safety valves" within the allocation policy have actually operated to eliminate the disadvantage to the two protected groups in issue on these appeals. Indeed, in Mr McDonagh's case his application to the hardship panel failed.

88. In my judgment, Supperstone J was correct to reject reliance on the "safety valves" as eliminating the indirect discrimination; and Mostyn J was wrong not to.

89. It follows, in my judgment, that taken as a whole, Hillingdon's housing allocation policy does indirectly discriminate against the two protected groups in issue on these appeals.

90. I do not consider that this conclusion is affected by Mr Rutledge's reliance on accommodation under Part 7 for those owed a duty under section 193 (2). Accommodation under Part 7 is likely to attract lesser security of tenure than accommodation under Part 6; is likely to be less affordable; and is likely to be out of borough, thus undermining further a person's ability to satisfy the 10-year residency requirement. I also accept Mr Burton's submission that discrimination in distributing commodity A is not offset by distribution of commodity B.

Can the discrimination be justified?

91. That is not necessarily the end of the case. It is possible, in some circumstances, that indirect discrimination is justified. It is common ground that the correct approach to justification of indirect discrimination is to follow the structure described by Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [74]:

> "… it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter … In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

92. In some cases it may well be the case that there is indirect discrimination which can readily be justified. Thus, one exception to the 10-year residence requirement is people fleeing violence or harassment; and Hillingdon also accepts applicants under the West London Domestic Violence protocol. These exceptions may benefit women more than men; but no doubt that element of indirect discrimination is justifiable. In *Essop* at [29] Lady Hale gave other examples; such as fitness levels for firefighters or police officers.

93. Mostyn J dealt with the question of justification as follows at [38]:

> "I turn to the four-limbed test: i) Is the objective of the rule, whether the qualification itself, or the uplift, sufficiently important to justify the limitation of a protected right? For these purposes a limitation of a protected right is assumed. In my judgment the answer to this question is plainly yes. The rule is obviously highly important and is an expression of national and local democratic processes. The actual limitation is, as I have explained, minimal and requires no more than that the claimant is treated the same as any other recent arrival.
>
> ii) Is the measure is rationally connected to that objective? The answer to this is plainly yes.

> iii) Could a less intrusive measure not have been used without unacceptably compromising the achievement of the objective? In my judgment to water down the rule for refugees to say five years would be quite wrong and arguably unlawful positive discrimination in their favour. The alternative ways in or up, set out above, entirely negate any merit which this argument might otherwise have.
>
> iv) When balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, does the former outweigh the latter? The answer to this is plainly no. The latter greatly outweighs the former."

94. He thus concluded at [39] that "the scheme is not manifestly without a reasonable foundation."

95. There are a number of flaws in this reasoning. First, Mostyn J's starting point was the individual analogue whom he had discussed in considering whether there was discrimination at all. For the reasons I have given, that was wrong. Second, he was wrong to say that the alternative ways in or up "entirely negate" the discrimination. For the reasons I have given, they do not. Third, he was wrong to say that giving preference to *refugees* would arguably amount to unlawful discrimination. Since refugees as such do not share a protected characteristic for the purposes of the Equality Act 2010, it would not. Fourth, Hillingdon led no evidence about the scale of the disadvantage that would be suffered by the protected group of non-UK nationals. It follows that an attempt to "balance" the severity of the effect against the importance of the objective is an impossible task. Put simply, there is nothing to put on one side of the scale. Moreover, Hillingdon did not explain how much (if at all) the relaxation of the 10-year residence qualification would compromise the objective of the scheme to reward long term residents of the borough. In this connection, it is relevant to note that the statutory guidance recommends a residence qualification period of at least two years, rather than the 10 that Hillingdon has chosen. Although it is fair to say that the officers' first assessment did say that alternative lengths of residence qualification could be considered, there is no evidence that they actually were. Fifth, it is not for the court to "search around" for a justification that the policy maker has not advanced: *R (Elias) v Secretary of State for Defence* at [131]. Sixth, although the "manifestly without reasonable foundation" test applies to the first and second stages (and possibly to the third), it does not apply to the fourth: *R (A) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492 at [33].

96. In my judgment, Hillingdon has not attempted to justify the indirect discrimination, in the sense of acknowledging that there is discrimination but then explaining why that discrimination is justified. Rather, its efforts have been directed towards showing (unsuccessfully in my judgment) that, taking the scheme as a whole, the negative effect on the relevant protected groups has been overcome. The nearest that Mr Rutledge came to advancing a positive case on justification was to submit that if the 10-year residence requirement were to be reduced, more people would qualify for inclusion on the housing register. That would have the knock-on effect that those who were on the register had a reduced chance of actually being housed. That, no doubt is

true. But it is only part of the picture. The next question, which remained unaddressed, was whether the inclusion of more people on the register (how many?) would compromise the legitimate aim of rewarding people with a local connection; and if so, to what extent? Once that question has been asked and answered, it would then be necessary to ask and answer a third question: is the extent of the compromise of the legitimate aim unacceptable; and if so, why? That question, too, remained unasked and unanswered. Mr Rutledge also pointed out that the allocation policy would be kept under review. While that is no doubt sensible in order to deal with unanticipated cases of discrimination that arise by changing the policy, I do not consider that in itself it is a justification of existing discrimination.

97. Accordingly, I would hold that the indirect discrimination has not yet been justified.

What could Hillingdon do?

98. Mr Rutledge submitted that there was nothing that Hillingdon could lawfully do to mitigate any discrimination. It could not introduce a different residence qualification for Irish Travellers or non-UK nationals without being guilty of unlawful direct discrimination.

99. It is not, of course, for the court to rewrite the policy, as *Ahmad* makes abundantly clear. But the position is not necessarily as bleak as Mr Rutledge suggests. Refugees, as such, do not share a protected characteristic for the purposes of the Equality Act. But unlike economic migrants, asylum seekers have no choice about where they live during the pendency of their applications. That, as Ms Morgan's evidence shows, is a substantial impediment to building a local connection. Mostyn J did not refer to this evidence at all. In addition, a refugee is vulnerable, during the ten-year journey, to being moved against his will; with the consequence that his period of residence in Hillingdon may be interrupted without his having any choice in the matter.

100. It would therefore be possible, without unlawfully discriminating against a protected group, to introduce a special rule for refugees; since they are not a protected group. That would mitigate the disadvantage suffered by the most affected members of the protected group of non-UK nationals. Any residual indirect discrimination against non-UK nationals might then be capable of justification.

101. In addition, although Hillingdon may not directly discriminate against a protected group, they may lawfully indirectly discriminate against such a group if the discrimination is justified. It would, for example, be possible to introduce a different residence requirement for persons who have had no fixed abode. Such a provision is likely to amount to indirect discrimination in favour of Irish Travellers and other ethnic groups with a similar lifestyle. But it is possible that such indirect discrimination could also be justified. There are, no doubt, other possibilities; but they are for Hillingdon to consider.

The Children Act

102. Mr Wise QC argued that a failure to consider the position of Irish Travellers with children amounted to a breach of Hillingdon's duty under section 11 (2) of the Children Act 2004; because it is well-known that children of Irish Travellers have

lower educational attainments on account of a frequent change of school. In essence Supperstone J accepted this argument. He said at [76]:

> "The residency criterion has, in my view, potentially a significant impact on the welfare of children of Irish Travellers. However despite the council's Children's Services engagement there are no records or documents evidencing any action they took or discussions they had to promote or safeguard the welfare of children when the residence qualification was introduced or under further consideration in 2013 or 2016. That being so, I agree with Mr Wise that the council is not in a position to demonstrate, by reference to written contemporaneous records, the process of reasoning by which they reached their decision in relation to the impact of the residency qualification and uplift on the claimants' children."

103. It is important to stress that we are concerned in this case with the formulation of policy. As the judge rightly recognised, there were consultations with Hillingdon's Children's Services department before the policy was formulated. The policy contains numerous provisions dealing with children. Thus, for example, children away from home studying are exempt from the 10-year residence requirement. Children under 18 may be granted a form of tenancy in certain circumstances. The number and age of children are taken into account in assessment of housing need. There is special provision for care leavers and for foster parents and adoptive parents. Indeed, Hillingdon considered that the policy overall was so child-friendly that they introduced a counterbalancing priority for childless couples.

104. The judge relied on two cases which concerned individual decision making. In such cases the decision-maker will have to focus on safeguarding and promoting the welfare of the particular child or children likely to be affected by the decision. But I do not consider that that is the case at the stage of formulating policy.

105. It is of course easy, with hindsight, to see that the particular position of Irish Travellers with children under 18 had not been considered. But just as I consider that it is not a breach of the PSED to fail to deal with every conceivable protected group, so I consider that it is not a breach of section 11 (2) to fail to consider every situation in which children might find themselves. We do not know how many Irish Travellers with children under 18 live or wish to live in Hillingdon. Of the two claimants in these appeals one has children under the age of 18; but the other does not.

106. It may well be that if Ms Ward were to apply to the hardship panel, section 11 (2) of the Children Act 2004 would require Hillingdon to consider the impact on her children's education of refusing to move her up from band D. But that has not happened, and it is not the way that the case was put.

107. In respectful disagreement with the judge, I would hold that there has been no breach of section 11 (2) of the Children Act 2004. Supperstone J declared that the relevant parts of the policy under attack amounted to a breach of duty under section 11 (2). I would discharge that declaration. But I would not rule out the possibility that, now that the position of Irish Travellers with children under the age of 18 has been drawn

to Hillingdon's attention, it would be a breach of section 11 (2) to fail to consider them on any future review of the policy.

Articles 8 and 14 of the ECHR

108. Mr Burton had an additional argument based on articles 8 and 14 of the European Convention on Human Rights. The argument was that Mr Gullu had a particular status for the purposes of article 14 (namely that of a refugee); and that the provision of social housing was "within the ambit" of article 8 which requires respect for family and private life.

109. The ambit of article 8 is not an easy question. It was the subject of conflicting obiter observations in *R (H) v Ealing*. Any further consideration of the question in this case would also be obiter; and is best left to a case in which it matters.

Relief

110. I would allow Mr Gullu's appeal. In Ms Ward's case Supperstone J declared that the relevant parts of the policy "unlawfully discriminate" against Irish ravellers.

111. However, both Mr Burton and Mr Wise accepted that although Hillingdon had not yet justified the discrimination, it was still open to them to do so if better evidence were to be provided. In those circumstances, I consider that the declaration is too prescriptively phrased. I would prefer to follow the form of declaration made by the Supreme Court in *R (Coll) v Secretary of State for Justice* [2017] UKSC 40, [2017] 1 WLR 2093 at [45]. That would result in a declaration that the impugned provisions of the policy constitute indirect discrimination against Irish Travellers and non-UK nationals which is unlawful unless justified; and that Hillingdon has not yet shown such justification.

112. Subject to that change of wording, I would dismiss Hillingdon's appeal on the discrimination point; but allow it on the Children Act point.

Lady Justice King:

113. I agree.

Lord Justice Underhill:

114. I also agree.