Housing Allocation Schemes: Indirect Discrimination

Introduction

1. In an important decision for local housing authorities[1], the Court of Appeal has recently ruled that Hillingdon London Borough Council's housing allocation policy (which prioritised people who had been resident in the local area for 10 years) indirectly discriminated against certain protected groups. The policy was therefore unlawful.

Allocation Policy

2. The allocation policy provided 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.

Challenges to Policy

3. Two challenges were brought against the lawfulness of Hillingdon LBC's policy, on the ground that it is indirectly discriminatory on the ground of race; and cannot be justified.

[1] *R (on the application of Gullu) v. Hillingdon London Borough Council; R (on the application of Ward) v. Hillingdon London Borough Council* [2019] EWCA Civ 692

4. One of the challenges, brought by Irish Travellers, succeeded before Supperstone J (*R (TW) v London Borough of Hillingdon* [2018] EWHC 1791 (Admin)).

5. The other, by a Kurdish refugee of Turkish nationality, failed before Mostyn J (*R (Gullu) v London Borough of Hillingdon* [2018] EWHC 1937 (Admin)).

6. Since Supperstone J and Mostyn J reached different answers on substantially the same challenge to the allocation policy, the Court of Appeal granted permission to appeal.

The Law

7. Under section 166A of the Housing Act 1996, local housing authorities are required to have a scheme for determining priorities in allocating housing. Amendments to the Housing Act 1996 made by the Localism Act 2011 enabled local authorities to decide, subject to exceptions, what classes of person were qualifying persons.

8. 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). Guidance encourages local authorities to prioritise applicants with a local connection. The guidance also states that consideration has to be given to the implications of excluding members of groups of non-qualifying persons and to the Equality Act 2010.

9. In *R (Ahmad) v Newham LBC* [2009] UKHL 14, 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."*

10. Despite these warnings, the court must be satisfied that a housing allocation policy does not unlawfully discriminate. Protection against unlawful discrimination, even in an area of social and economic policy, falls within the constitutional responsibility of the courts.

Did Hillingdon LBC's policy discriminate?

11. In the earlier decision in *R (H) v Ealing London Borough Council* [2017] EWCA Civ 1127, the Court of Appeal 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" 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. The Court of Appeal had no hesitation is rejecting that argument. Sir Terence Etherton MR said at [58] – [59]:

> *"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. 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 Eating'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."*

12. As such, it was necessary for the Court of Appeal to consider paragraph 2.2.4 of Hillingdon LBC's policy separately. The crucial question was whether that is a PCP

which amounts to indirect discrimination. As the challenge concerned indirect discrimination, the correct comparison was between groups rather than individuals.

13. In Ms Ward's case the relevant characteristic was being an Irish Traveller. In Mr Gullu's case, it was being a non-UK national. Accordingly, the question in Ms Ward's case was: are Irish Travellers put at a disadvantage in satisfying the 10-year residence requirement as compared with persons who are not Irish Travellers? The question in Mr Gullu's case was: are non-UK nationals put at a disadvantage in satisfying the 10-year residence requirement as compared with persons who are UK nationals?

14. In relation to Ms Ward, it was common ground that the policy put her to a relevant disadvantage. In Mr Gullu's case, Hillingdon had been prepared to concede this point at first instance but Mostyn J found that it did not put a non-UK national at a disadvantage. The Court of Appeal held that he was plainly wrong in this respect. Lewison LJ stated:

> *"If, then, one asks: does a 10-year residence requirement disadvantage non-UK nationals more than UK nationals, the answer must be "yes"... 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."*

15. The Court of Appeal therefore held that the PCP did indirectly discriminate in both cases.

Safety Valves

16. Hillingdon LBC attempted to negate the discrimination by arguing that the scheme contained "safety valves", including the possibility of a higher banding being given because of hardship. However, the key principle was that the goal was equality of outcome. If a PCP resulted in a relative disadvantage to one protected group, any measure relied on as a safety valve had to overcome that disadvantage. There was no evidence that the instant safety valves had operated to eliminate the disadvantage to the two protected groups. The judge in Ms Ward's case therefore correctly rejected the local

authority's reliance on them, and the judge in Mr Gullu's was wrong not to. Taken as a whole, the allocation policy indirectly discriminated against the two protected groups.

Was the discrimination justified?

17. The next question was whether the discrimination was justified. It was common ground that the correct approach to justification of indirect discrimination is to follow the structure described by Lord Reed in *Bank Melat v HM Treasury (No2)* [2013] UKSC 39:

> *"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."*

18. The Court of Appeal held that Hillingdon had not really attempted to justify the indirect discrimination. Rather, its efforts had been directed (unsuccessfully) towards showing that the negative effect on the protected groups had been overcome by the 'safety valves'.

19. The nearest that Hillingdon 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 which would have the knock-on effect that those who were on the register had a reduced chance of actually being housed. Lewison LJ accepted that that was no doubt true, but that was only part of the picture. The next question, which remained unaddressed, was whether the inclusion of more people on the register 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. As such, the discrimination had not been justified.

Breach of PSED

20. As well as finding that its policy indirectly discriminated against Irish Travellers and non-UK nationals, the Court of Appeal held that the local authority had breached the public sector equality duty ("PSED") in section 149 of the Equality Act 2010.

21. The Court of Appeal confirmed that it did not consider 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. However, as a result of Mr Gullu's later challenge in 2016, Lewison LJ considered that Hillingdon ought at least to have considered the position of non-UK nationals but failed to do so in breach of the PSED.

What could be done to mitigate the discrimination?

22. The Court of Appeal went on to consider what, if anything, Hillingdon could do to mitigate the indirect discrimination. Whilst stressing that it was not for the court to rewrite Hillingdon's policy, the Court to Appeal provided two *possible* solutions:

    (i) At paragraph 100, Lewison LJ expressed the view that it would 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.

    (ii) Alternatively, Lewison LJ stated it would be possible to introduce a different residence requirement for persons who have had no fixed abode. He acknowledged that such a provision is likely to amount to indirect discrimination in favour of Irish Travellers and other ethnic groups with a similar lifestyle but indicated that it is possible that such indirect discrimination could also be justified. Lewison LJ suggested that there were other possibilities (without setting out what those possibilities were), but stated that these were for Hillingdon to consider.

Conclusion

23. The decision of the Court of Appeal demonstrates an increasing willingness to interfere with allocation schemes on the ground that they unlawfully discriminate against a certain group. Whilst policy making still remains the province of the individual local authority, this case serves as an important reminder that authorities must carefully consider how their policy may discriminate against a particular group. Where this is the case, all is not lost as it may be possible to justify the discrimination but the burden will fall squarely upon the local authority to positively demonstrate and evidence how this is the case.

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