



Neutral Citation Number: [2024] EWHC 113 (Admin)

Case No: CO/1423/2022; AC-2022-LON-000424

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/01/2024

**Before :**

**MRS JUSTICE ELLENBOGEN**

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**Between :**

**The King (on the application of Carly Jayne Willott)**

**Claimant**

**- and -**

**Eastbourne Borough Council**

**Defendant**

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**Nick Bano** (instructed by **BHT Sussex**) for the **Claimant**  
**Clare Cullen** (instructed by **Knights PLC**) for the **Defendant**

Hearing dates: 21 and 24 February 2023  
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**APPROVED JUDGMENT**

This judgment was handed down remotely at 2pm on 25 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE ELLENBOGEN DBE

**Mrs Justice Ellenbogen DBE :**

1. This judgment follows the full hearing of the Claimant’s application for judicial review of the Defendant’s decision, on review, dated 4 January 2022, by which it upheld its original decision, made on 9 February 2021, that the Claimant ‘*does not qualify to join the housing register due to the ‘serious anti-social behaviour’ at her tenancy* [address supplied]’. The challenge is advanced on six grounds, but, broadly put, on two alternative footings. The first is a challenge to the lawfulness of a rule which is said to disqualify applicants who have a poor history of anti-social behaviour, including those who are disabled within the meaning of the Equality Act 2010 (‘the EqA’), from joining the social housing waiting list. Should that challenge fail, the Claimant challenges the lawfulness of the Defendant’s application of the rule in her case. The challenge comes about in the following circumstances.
2. With effect from 14 December 2015, the Claimant and her family occupied a house in Royal Sussex Crescent, Eastbourne, initially under an introductory tenancy and, subsequently under a secure tenancy within the meaning of section 79 of the Housing Act 1985 (‘the HA 1985’). An initial allegation of anti-social behaviour was made on 13 June 2016. A further complaint was made on 14 June 2018, following which the Defendant sent the Claimant a letter enclosing an acceptable behaviour contract. Notice seeking possession was served on 7 June 2019 and a claim for possession was issued on 17 July 2019. On 9 January 2020, the Defendant issued a claim for an injunction in respect of dogs at the property and a final injunction was granted on 28 September 2020, requiring that identified dogs be controlled, and be removed from the house should they bark for longer than 10 minutes. The order did not prevent the Claimant from keeping dogs.
3. On 27 January 2020, Ms Kim Barnes, a senior caseworker employed by the Defendant, made a safeguarding referral, stating that she had concerns about the Claimant’s mental health. On 10 March 2020, Professor Fox, a professor of clinical psychiatry, completed a report on the Claimant, the key part of which read as follows:

**Opinion**

- 4.1 [The Claimant] is a 29 year old lady who is subject to a housing possession order and also in July 2019 her children were taken into care. Allegations have been made about her behaviour with neighbours and other antisocial behaviours. She has a history of disruptive behaviour going back to her childhood.
- 4.2 She has been diagnosed as having Adult ADHD and an autistic spectrum condition with which I concur.
- 4.3 Other diagnoses include Mixed Anxiety and Depressive Disorder (ICD-10 Code F41.2) and also Mild Alcohol Dependence (ICD-10 F10.2).
- 4.4 Her prognosis is somewhat guarded as Adult ADHD is a chronic condition. From the SWIFT reports and parallel case of child and

family proceedings it has been assessed as severe, chronic and enduring.

- 4.5 With regard to alcohol, she has engaged with STAR in the last month and she does need to minimise her alcohol intake and also not use alcohol to cope with anxiety and some symptoms of autism. She needs to learn this. She has been offered rehabilitation but is yet to take this up. Until this is the case her prognosis will remain guarded.
- 4.6 With regard to mixed anxiety and depression, I believe that once she has managed to get on top of her alcohol difficulties and get through the childcare proceedings and her housing issues sorted out then it is likely her mood will improve.
- 4.7 She appears to have had difficulties with autism and ADHD for most of her life. Anxiety and depressive symptoms have occurred more recently with the difficulties she has been having and alcohol again is relatively recent in the last few years.
- 4.8 I believe she is disabled within the meaning of the Equality Act 2010. This relates to her ADHD and autistic spectrum condition because her difficulties have been present for more than a year and they are of a severe nature. They are also enduring.
- 4.9 There is treatment that could be suggested from a psychological perspective to assist her once she has managed to minimise her alcohol intake and she could benefit from a course of CBT looking at self-esteem and some of her emotional control issues; perhaps 6 to 12 sessions of treatment would be my initial recommendation and then further sessions as required.

Professor Fox did not (and had not been asked to) address whether the conduct of which complaint had been made, and which had led to the possession proceedings, had arisen in consequence of the disabilities which he had identified.

4. On numerous occasions, the Police had attended at the Claimant's property. Towards the end of March 2020, she had left the property, following complaints of anti-social behaviour. On 1 April 2020, the Police attended again, following reports of concerns about her safety on her return. Those had related to the behaviour of her former partner, Mr Walters, who has since died. The Police found Mr Walters at the house and he was served with a domestic violence protection order on 3 April 2020, the conditions of which banned him from contacting the Claimant, directly or indirectly. Nevertheless, Mr Walters was found by Police at the Claimant's house on 11 April 2020, and arrested, after a forced entry. On 1 May 2020, he and the Claimant were arrested at the property, she for affray and he for assault. Mr Walters was arrested at the property, once again, on 8 May 2020, for assaulting the Claimant. Bail conditions were set to prevent him from entering Eastbourne, or contacting the Claimant before 26 June 2020.

5. On 8 June 2020, Mr Walters was found by Police and arrested at the house. He was charged with assaulting a police officer and breach of his bail conditions. The Claimant was also charged with various offences and the dogs were removed from the house. On 18 June 2020, she pleaded guilty to those offences (assault and obstruction of police officers, and being in charge of a dog dangerously out of control). On 16 June 2020, an order was made requiring that all three of the Claimant's children reside permanently with their father. On 1 August 2020, Mr Walters was found by Police hiding in an upstairs cupboard at the Claimant's house. The Claimant's dogs were released by Police into the care of her mother, at the beginning of August 2020. On 3 September 2020, the Defendant received a report that dogs could be heard at the Claimant's house. On 28 September 2020, following a two-day trial, the Deputy District Judge declined to make a possession order, on the basis that the Defendant had not, at that stage, discharged its public sector equality duty.
6. On 24 November 2020, the Claimant applied, online, to join the Defendant's housing register. That application was rejected by letter dated 9 February 2021, which, it would appear, did not come to the Claimant's attention at that time. The Defendant relied upon the terms of its allocation policy (considered further below) in concluding that the Claimant did not qualify to join the register, going on to state, *'We are aware that Eastbourne Homes, as the managing agent for Eastbourne Borough Council, has recently taken your case to court due to Anti-Social Behaviour (ASB) perpetrated by yourself and a visitor to your home. The allocations team are also aware possession was not awarded to the landlord, but Eastbourne Homes have appealed this decision and are still awaiting an outcome. Since the court hearing you have been served with a Community Protection Warning Letter due to further ASB. When the appeals process is completed, you may ask for a review of the decision to refuse your application to join the housing register.'*
7. On 18 August 2021, on appeal, His Honour Judge Simpkins found that the Deputy District Judge had been wrong to conclude that the Defendant had not discharged its public sector equality duty, and granted an order for possession by 29 September 2021. In the event, the Claimant was evicted from the property on 15 March 2022.
8. On 1 October 2021, the Claimant requested a review of the Defendant's original decision. On 16 December 2021, she approached the Defendant, requesting assistance as a homeless applicant, pursuant to Part 7 of the Housing Act 1996 ('the HA 1996'). She stated that she was homeless from her parents' address, following an incident with her father, and that bail conditions prevented her from residing there. On 23 December 2021, the Claimant was placed by the Defendant in interim accommodation, under section 188 of the HA 1996.
9. As previously noted, the decision taken on review, challenged in these proceedings, was dated 4 January 2022.

### **The decision under challenge**

10. In his sixteen-page letter upholding its original decision, the decision-maker, Mr Gary Hall, Head of Homes First, relied upon the Defendant's allocation policy, dated June 2018, identifying the relevant aspects of that policy as being:
  - a. (at pages 8 to 9):

***‘Other applicants, who do not qualify to join the register***

*d) Applicants whose anti-social behaviour (ASB) is serious enough to make them unsuitable to be a tenant (“the ASB policy”)*

b. (at page 10):

***‘Who is not eligible to join the housing register? Applicants whose antisocial behaviour is serious enough to make them unsuitable to be a tenant do not qualify***

*Where the Council is satisfied that the Applicant (or a member of their household) is guilty of unacceptable behaviour serious enough to make them unsuitable to be a tenant of the Council, the Applicant does not qualify.*

*Behaviour which can be regarded as unacceptable for these purposes includes behaviour by the Applicant or by a member of their household that would – if the Applicant had been a Council tenant at the time – have entitled the Council to a possession order under certain grounds contained in the Housing Act 1985.*

*It also includes behaviour which has led to a closure order or a civil injunction against the Applicant or a member of their household under the Anti-Social Behaviour, Crime and Policing Act 2014.*

*There is no need for the Applicant to have actually been a Council tenant when the acceptable behaviour occurred. The test is whether the behaviour would have entitled the Council to a possession order if, whether actually or notionally, the Applicant had been a secure tenant.*

*If an Applicant considers their unacceptable behaviour should no longer be held against them as a result of changed circumstances, they can make a fresh application. Unless there has been a considerable lapse of time it will be for the Applicant to show that their circumstances or behaviour have changed. Each case will be considered on its own merits.’*

c. (at pages 29 to 30):

***‘ANTI- SOCIAL BEHAVIOUR AFFECTING PRIORITY***

*Some applicants are excluded from joining the register because they do not qualify as a result of unacceptable behaviour.*

*However, even where it is decided that an Applicant does qualify, any history of anti-social behaviour of the Applicant (or member of their household), which affects their suitability to be a tenant, may still be taken into account when allocating a home that is “subject to a sensitive letting” under a Local Lettings Scheme as described below.*

*Any Applicant affected by the decision that their history of antisocial behaviour may be taken into account when allocating a home that is “subject to a sensitive letting” will be notified in writing, with reasons, by the Homes First Team.*

*Any home that is “subject to a sensitive letting” will be identified as such when it is advertised.*

*Whilst any Applicant may bid for homes that are “subject to a sensitive letting”, the Homes First Team will consider bids from those with a history of anti-social behaviour on a case-by-case basis as to whether the Applicant is suitable to be allocated the home they have bid for.*

*The Council reserves the right to take full account of the needs of the local community, as well as the Applicant’s when deciding to make an allocation of accommodation to the Applicant. In very exceptional cases, this right may extend to not allocating a particular home to an applicant, even where the home has not been advertised as being “subject to a sensitive letting”. In such cases, the Homes First Team will seek the authority of a Head of Homes First.’*

11. The decision letter went on to note that, over a prolonged period, the Claimant had committed a number of acts which could be considered to be “anti-social behaviour”, which had been the subject of possession proceedings by the Defendant. In summary, it was said, between June 2016 and June 2019, the Defendant had recorded 40 incidents of the Claimant, or members of her household, causing a nuisance or annoyance at the property, on the grounds of which the Defendant had been granted an outright possession order.
12. Having set out the grounds for review, Mr Hall stated his conclusions, summarised as follows:
  - a. He was satisfied, on balance, and for the reasons given, that the policy was lawful on public law grounds. Page 10 stated that each case would be considered on its own merits, and the policy also allowed an applicant to make a fresh application if s/he considered that the unacceptable behaviour should no longer be held against him or her as a result of changed circumstances. Pages 29 to 30 made clear that not all applicants who displayed unacceptable behaviour would be excluded from the housing register. In cases in which an applicant who had a history of antisocial behaviour had been allowed to join the register, this might be taken into account in allocating a home which was “subject to a sensitive letting”. That demonstrated that the policy was not a blanket or inflexible one, but designed flexibly to meet the needs of a range of people, including those having protected characteristics under the EqA. In practice, it was said, the policy was operated flexibly, and, in the past year, only one other applicant had been disqualified. There had been numerous applicants, including those having protected characteristics, who had had a history of antisocial behaviour and who had been allowed to qualify for the housing register. Disqualification on this ground was only used in extremis. The Defendant had a duty to protect existing tenants and other residents from the impact of serious antisocial behaviour and the provision invoked allowed it to do so. Accommodating a person having a history of serious antisocial behaviour near other tenants would mean that the

Defendant would not adequately be protecting its existing tenants and other residents. The guidance for local authorities on the allocation of accommodation provided, at paragraph 3.27:

*‘Housing authorities should avoid setting criteria which disqualify groups of people whose members are likely to be accorded reasonable preference for social housing, for example on medical or welfare grounds. However, authorities may wish to adopt criteria which would disqualify individuals who satisfy the reasonable preference requirements. This could be the case, for example, if applicants are disqualified on a ground of anti-social behaviour.’*

It followed that the Department for Levelling Up, Housing and Communities had concluded that such a policy was, in general terms, lawful. The anti-social behaviour disqualification provision in the allocation policy was discretionary, and allowed the Defendant to consider each case on its merits, including by reference to an applicant’s disabilities, or other protected characteristics. It enabled the Defendant to disqualify, in extremis, those applicants whose behaviour made them unsuitable to be council tenants. In the past year, only the Claimant and one other applicant had been disqualified from joining the register under the ASB policy.

- b. The policy was not indirectly discriminatory, contrary to section 19 of the EqA. The discretion within the policy meant that it was not necessarily applied to all applicants with a history of serious antisocial behaviour, and each case was considered on its merits, allowing the Defendant to take into account any protected characteristic when deciding whether to disqualify. An equality and fairness analysis of the policy had been carried out in August 2017, which had not specifically considered the disabilities which affected the Claimant. Accordingly, he had given consideration to those. It was not accepted that it was “reasonably obvious” that people whose disabilities caused them to behave in an anti-social or difficult manner rendered them more likely to commit unacceptable behaviour serious enough to make them unsuitable to be tenants.
- c. In considering whether the PCP placed people with a disability similar to the Claimant’s at a particular disadvantage, he had considered the empirical evidence. Professor Fox had considered the Claimant to be disabled within the meaning of the EqA by reference to her ADHD and autistic spectrum condition. He had also noted the Claimant to be on the cusp of alcohol dependency, which was an excluded impairment under Regulation 3 of The Equality Act 2010 (Disability) Regulations 2010. Accepting that there were some studies which suggested that people who had ADHD might be more likely to engage in anti-social behaviour, and might therefore be disadvantaged by the ASB disqualification provision, the question was whether that provision was a proportionate means of achieving a legitimate aim. The aim of the policy was to ensure that the Defendant and other social housing occupants could live free from the harassment, alarm or distress which result from anti-social behaviour. Dealing with such behaviour was also time-consuming for housing officers, and had an opportunity cost, diverting time and resources from the other activities of managing a housing stock, to the detriment of the majority of tenants. The Department for Levelling Up, Housing and Communities’ guidance, ‘Help With

Anti-social Behaviour For Social Housing Tenants’ stated, ‘*Anti-social behaviour (ASB) in your neighbourhood can make life miserable. It is unacceptable behaviour that comes in many forms – such as noise, abusive behaviour, littering, or illegal drug taking. Registered social housing providers ... have a responsibility to prevent antisocial behaviour*’. He was satisfied that the policy had a legitimate aim.

- d. The policy was rationally connected to the objective, and was no more than necessary to accomplish it. Lesser measures, such as not applying it to persons having a protected characteristic, such as the Claimant, would not meet the legitimate aim, and would mean that other tenants and residents would be subject to anti-social behaviour. The fact that the policy was discretionary was another reason why it was considered to be proportionate.
- e. Whilst outside the remit of the review, in the few cases in which applicants were disqualified from the housing register, the more appropriate form of housing was usually supported housing, to which the Claimant had been offered a referral, which she had rejected.
- f. The Claimant’s solicitors had suggested that a reasonable adjustment would be for the Defendant to allow her to join the allocation scheme on a discretionary basis. To do so would undermine the legitimate aim of the policy, which allowed for the exercise of discretion in appropriate cases, which discretion he had decided not to exercise in the way suggested, because it would not be reasonable to do so in the circumstances. He had taken account of the facts as they stood at the time of the review, including that the Claimant was now homeless within the meaning of Part 7 of the HA 1996, and came within a reasonable preference category in section 166A(3)(a) of that Act. In consequence of numerous acts of anti-social behaviour, the Defendant had been granted an outright possession order. The court had held that, for the purposes of section 15 of the EqA, it was proportionate for such an order to be granted, and, on appeal, it had been held that the Defendant had complied with the public sector equality duty. At the time of the possession proceedings, consideration had been given to moving the Claimant to alternative accommodation, however that had not been considered appropriate as she had engaged in anti-social behaviour when moved to temporary accommodation, and at her sister’s address. The issue to which he needed to give serious consideration was whether the Defendant should, particularly having regard to the public sector equality duty, disqualify her from the housing register. Some of the anti-social acts had been committed by her children, dogs, and Mr Walters. Since about June 2020, her children no longer resided with her, and were now with their father. He understood that her dogs were at her parents’ accommodation, and that she was temporarily separated from them as she was in the Defendant’s interim accommodation, in which dogs were not allowed. She had previously said that she would not part with her dogs, and put them and alcohol ahead of other issues, such as her housing. He was aware that the Claimant was still in contact, and in an off/on relationship, with Mr Walters. It was not in issue that she had the protected characteristic of ‘disability’, as defined in the EqA. Since the original decision, made in February 2020, there had been no evidence to suggest that the Claimant was now less likely to engage in anti-social behaviour. On or about 15 December 2021, she



had been in an altercation with her father, which had led to the Police being called and her being granted bail, with a condition not to return to her parents' address. Recently, there had been another instance involving Mr Walters, which had resulted in injury to both parties. Professor Fox's report had pointed out the guarded prognosis. Other material had assessed the Claimant's adult ADHD as being severe, chronic and enduring. Mr Hall noted the prospect of an improved prognosis were the Claimant to embark upon a detox program and Professor Fox's opinion that there was treatment which could be suggested from a psychological perspective, once the Claimant had managed to minimise her alcohol intake. At present, there was no indication that her behaviour had changed to reduce the likelihood of her engaging in anti-social behaviour. In light of the above, Mr Hall stated that he was upholding the decision to disqualify the Claimant from the housing register on ground (d). Should there be a change in the future, she could make a fresh application in accordance with the policy. The Defendant, and other agencies working with her, could refer her to a detox program, or to supported housing, were she to be willing to engage with a programme.

- g. In reaching his conclusions, he had had regard to the public sector equality duty, for which section 149 of the EqA provided. In carrying out the review, he had borne in mind throughout that the Claimant had the protected characteristic of disability; the extent of her disability; and how it affected her behaviour; and how the anti-social behaviour policy affected her as an applicant having a protected characteristic.
- h. Were the Claimant to be allowed to join the housing register, the average waiting time for her to be re-housed would be in the region of five years. She would be likely to be affected by the policy relating to allocation of accommodation 'subject to a sensitive letting'. Placing her on the register would not alleviate her current housing situation as a homeless person. In practice, the disadvantage was slight.
- i. Having weighed up all the relevant factors, he had decided that the Claimant was not a qualifying person for the housing register, in accordance with rule (d). He was satisfied that it was appropriate for the Defendant to use its discretion in her case, given the extent and duration of her anti-social behaviour; the lack of evidence of a change in her behaviour; and the need to balance that against the need to safeguard other tenants.

13. It will have been noted that the review decision made reference to a report by SWIFT specialist family service. On 29 April 2019, the Claimant had been assessed by Dr Leslie Valon-Szots, Principal Clinical Psychologist and Amina Ouchai, Assistant Psychologist, following a referral for screening to explore possible autistic spectrum condition in order to help professionals better understand her needs. They concluded that:

- a. Her scores indicated that she had possible traits of autistic spectrum condition and attention deficit hyperactivity disorder. Her accounts of her childhood and, in particular, educational experiences, behaviours, interests and relationships might also be consistent with someone who had traits of both conditions. Her

current presentation would further support that, in that she displayed low frustration tolerance; fast, and at times somewhat disjointed, speech; difficulty maintaining concentration; and a tendency to be impulsive. She also presented with high levels of anxiety, expressed as worrying and becoming fixated on things which were said to her, and difficulties meeting new people and accessing amenities, if this involved speaking to people whom she did not know.

- b. The assessor would hypothesise that the Claimant struggled on a basic level with social interactions in terms of relationship-building, frustration tolerance, and emotion regulation, which had an impact on her ability to communicate reciprocally with others. Some of that was likely to be due to underlying traits of autism spectrum condition and ADHD, and some of it might be due to coping strategies which she had developed throughout her life in order to cope with her negative experiences within education, relationships, etc.
- c. The Claimant had experienced a great deal of negative feedback about her behaviours (even her attempts to be close to her mother were interpreted as her being needy), and was likely to expect negativity from others. She appeared to deal with that by externalising (that is concentrating on the perceived mistakes or inadequacies of others), and by presenting as aggressive, rude or conflictual in order to push others away. (Again, some of that might also be due to her autistic spectrum condition traits, whereby she could be very blunt and lack an ability to take into account the feelings of the other person). It might also be a learned way of relating to others, in which she did not understand how others might perceive that.
- d. In summary, the Claimant demonstrated some traits consistent with both autistic spectrum condition, and ADHD, which would be likely to have an impact upon her ability to concentrate, focus, regulate her own emotions, empathise, and communicate reciprocally with those around her. She had also reported negative educational and relational experiences which had decreased her exposure to warm, positive interactions with others, which would have been exacerbated by the traits identified above, but would also have an impact on how those traits might manifest within future relationships and interactions.
- e. The assessment had involved a basic screening of autistic spectrum condition and ADHD, which did not constitute a diagnosis, but rather an indication. It did not enable the assessor to comment upon the level and severity of any traits. If the Claimant wished to gain a more in-depth understanding, she could be referred for full diagnostic assessment. Even if she chose not to pursue that, or if a full diagnosis were not given, she did have traits indicative of autistic spectrum condition and ADHD, which were likely to have had an impact, and to continue to have an impact, on her social communication. There followed recommendations as to how professionals interacting with the Claimant might communicate and interact with her to best effect.
- f. In summarising the account given by the Claimant, the report stated, '[The Claimant] *identified that there had been some issues within her current relationship... but that this was "only when we were drunk". She felt that the majority of concerns had come from the schools...* [The Claimant] *identified*

*that alcohol had previously been an issue, agreeing that she had a tendency to “do stupid things when I’m pissed”. She felt that this was less of an issue now, and also stated that she was rarely under the influence of alcohol when in charge of the children. Between the second and third appointments, there was an incident in which [she] had been arrested by the police due to an altercation with her sister, whilst under the influence of alcohol. She explained to the assessor that this had occurred as Mr Waters had picked the children up as he was supposed to be looking after them, and she had started drinking as she would not be having the children in her care. Mr Waters had then unexpectedly dropped the children at her mother’s, where she had gone to collect them and had got into an altercation with her sister over her current partner’s infidelity.’ That matter was revisited later in the report, in which it was recorded that, ‘Regarding her drinking, [the Claimant] reported that she did not feel that she “needed” alcohol, and often went 4 days without it. However, she did report that she likes to go out, when she does not have care of the children, and may drink a lot of alcohol. Between the second and third meetings, [the Claimant] was arrested after an altercation with her sister regarding her current partner, George. [The Claimant] reported that she had been under the influence of alcohol at the time, and due to Mr Waters not having the children as had been expected, the children had been at the house at the time. However, [the Claimant] felt that the circumstances were highly unusual and unexpected, and reiterated that this was not usual. [The Claimant] is currently waiting for a Drug and Alcohol Triage from SWIFT, and so no further information regarding this was asked.’*

- g. During assessment, the Claimant had self-reported difficulties with concentration, impulsivity, and inattention. In addition, she was observed to be susceptible to some emotional liability, low frustration tolerance and difficulties with concentration. In summary, her results indicated that, compared with other age-matched female peers, she experienced herself as having significant problems in some areas, consistent with ADHD. Those difficulties included inattention/memory problems, with her score in this area very high (> 99<sup>th</sup> percentile) and impulsivity/emotional liability, again scoring very high (> 99<sup>th</sup> percentile). Her overall scores for ADHD symptoms suggested that she could meet the threshold for a possible ADHD diagnosis. ADHD was a neuropsychiatric condition which tended to run in families. It comprised difficulties within three core areas: hyperactivity, impulsivity, and inattention, some combination of which must be considered problematic before the age of 12. Associated features included low frustration tolerance, irritability, poor planning abilities, sensation-seeking/recklessness and mood swings. Whilst symptoms usually improved into adulthood, some difficulties could persist and the presentation might be more subtle as the individual had learned to mask or control difficulties more successfully. By the age of 25, an estimated 15% of people diagnosed with childhood ADHD still had a full range of symptoms, with 65%, still having some symptoms which affected their daily lives.
- h. The Claimant’s overall score, on an 80-question, self-report scale used to screen (not to diagnose) autistic traits in adults, was 153, significantly above the score of 65 which would give rise to a recommendation for specialist autistic spectrum condition assessment. She had shown higher than expected scores in all

categories, with particularly high scores within the domains of language and social relatedness. It was highlighted that the fact that the scale had been completed by a respondent meant that the scores reflected that which the respondent was willing and/or able to identify and disclose.

### **The Grounds of Review**

14. As a preliminary matter, it will be necessary to determine the proper construction of the category (d) rule within the Defendant's allocation policy. Subject to that, the grounds of review are as follows:

#### **Ground One**

- a. The category (d) rule is unlawful as being a blanket policy which is over-rigid and/or a fetter on the local authority's discretion. Further or in the alternative, the rule and the allocations scheme are framed so as to breach the requirement that there be a residual discretion;

#### **Ground Two**

- b. The category (d) rule is unlawful because it indirectly discriminates against disabled people, contrary to section 19 of the EqA; people with disabilities are disproportionately likely to be excluded from accessing the Defendant's social housing allocations scheme and the Defendant cannot establish that it is a proportionate means of achieving a legitimate aim;

#### **Ground Three**

- c. In any event, in deciding that the Claimant did not constitute a 'qualifying person' under the allocations scheme, the Defendant had unlawfully failed to adhere to the latter. The decision-maker's conclusion that the category (d) rule was only used 'in extremis' had read words into the policy which did not exist. He had invented a discretion for which the scheme did not itself provide and then determined whether or not to exercise it by reference to arbitrary criteria of his own selection;

#### **Ground Four**

- d. In deciding that the Claimant did not constitute a 'qualifying person' under the allocations scheme, the Defendant had acted unlawfully, contrary to section 15 of the EqA. The decision amounted to unfavourable treatment, the reason for which had been the Claimant's conduct as a tenant, which a court of competent jurisdiction had already determined to have had sufficient causal connection with her disability (of which the Defendant had been aware), for the purposes of section 15. The Defendant could not show that lesser measures, such as its acceptance of the Claimant onto the scheme; the grant of an introductory tenancy; and/or the taking of appropriate steps to manage any anti-social behaviour would not have sufficed to achieve its aim;

#### **Ground Five**

- e. In deciding that the Claimant did not constitute a 'qualifying person' under the allocations scheme, the Defendant had acted unlawfully, contrary to sections 20 and 21 of the EqA, because the application of the category (d) rule had

constituted a PCP which had put her at a substantial disadvantage when compared with a person who was not disabled; the Defendant had been under a duty to take reasonable steps to avoid that disadvantage; the waiver or disapplication of the rule would have constituted such a step; and the Defendant had failed to take it.

It is said that an alternative way of putting Grounds Four and Five is that, if the Defendant is right to contend that the category (d) rule is discretionary, sections 15, 20 and 21 of the EqA had obliged it to treat the Claimant more favourably and the breach of those sections also constituted a breach of section 149 (and, in particular 149(6)) of the EqA. Instead, the Defendant had applied a rule which it adopted only in extremis and thereby reached a decision which had a particularly harsh effect on the Claimant.

### **Ground Six**

- f. The Defendant had acted in breach of section 166A(9) of the HA 1996 and of public law duties in accordance with *Lumba (WL) v SSHD* [2011] UKSC 12 etc to frame the allocations scheme in such a way as to enable applicants to understand how their applications would be treated. Neither the purported discretion as to whether to apply rule (d), nor the criteria to be applied appeared on the face of the scheme. If it were right that, in practice, the rule was applied only selectively and ‘*in extremis*’, it was unlawful for the scheme itself to give the contrary impression, that it would be applied whenever the test was met.

### **The Grounds of Resistance**

15. On the point of construction, it is the Defendant’s case that disqualification under rule (d) requires that the Defendant be satisfied both that the applicant, or a member of his or her household, be guilty of unacceptable behaviour and that the behaviour is serious enough to render him or her unsuitable to be a tenant. The rule is said to be framed in a way which permits the Defendant to consider the applicant’s personal circumstances and requires the exercise of judgement as to whether an applicant is unsuitable to be a tenant, including by reference to his or her personal circumstances. That was underscored by the reference in the rule to behaviour which would have entitled the Defendant to a possession order under the HA 1985, which would itself require a court to have regard to the particular tenant’s circumstances when determining whether the order was reasonable. The category (d) rule provided for each case to be considered on its own merits and admitted of a fresh application following a change of circumstances, each indicative of a discretion. The fact that the wider scheme precluded those who have a history of anti-social behaviour from bidding under certain policies indicated that such individuals could qualify under other parts of the scheme, which also contained a residual discretion for direct lets, in exceptional circumstances.

16. As to the Grounds of Review:

### **Ground One**

- a. In considering the meaning of an allocation scheme, the courts will adopt an approach permissive of a sensible degree of flexibility when it comes to dealing with individual applications: *R (Ariemuguvbe) v Islington BC* [2009] EWCA Civ 1308. The application of a blanket or rigid policy is one which prevents an

applicant's personal circumstances from being taken into consideration. Rule (d) was not such a policy; the criteria would not be met unless the applicant was unsuitable to be a tenant, itself requiring consideration of his or her personal circumstances, and the rule expressly provided for each case to be considered on its own merits, permitting a fresh application in the event of a change in circumstances. In any event, it was not accepted that, as a matter of law, an allocations scheme was required to contain a residual discretion, notwithstanding which the Defendant's scheme allowed for direct allocation in 'exceptional circumstances'.

### **Ground Two**

- b. It was accepted that rule (d) constituted a PCP for the purposes of section 19 of the EqA, and that it applied, or would apply, to applicants who did not have the protected characteristic of disability. The Defendant had consistently raised the need for the Claimant to evidence the fact that subsections 19(2)(a) to (c) (and, in particular, (b)) were met, which she had failed to do. Even if those requirements were considered to be met, it was clear that the category (d) rule was a proportionate means of achieving a legitimate aim, which included managing the Defendant's housing stock and preventing anti-social behaviour. If a person were to be permitted to join the allocation scheme, and were then to be allocated a property in circumstances in which he or she was unsuitable to be a tenant, the Defendant's legitimate aims would not be met. It would put other residents at a high risk of being subjected to anti-social behaviour and the lesser measures suggested by the Claimant were directed at a particular case, rather than at the PCP itself. In any event, those measures could be taken only after others had been subjected to further anti-social behaviour and could not achieve the legitimate aim of its prevention. They would involve the Defendant's expenditure of its limited resources on addressing the further anti-social behaviour. The proportionality of the PCP was demonstrated by an applicant's ability to reapply in the event of a change of circumstances, and by the Defendant's residual discretion to make a direct allocation in exceptional circumstances.

### **Ground Three**

- c. This ground is said to be misconceived and to rely upon an unfair reading of the original decision letter, dated 4 January 2020. Rule (d) could be classified as discretionary, and the decision-maker's use of the term 'in extremis' had referred to the fact that the rule applied only where an applicant was deemed 'unsuitable to be a tenant'.

### **Ground Four**

- d. The court was not bound by the findings made in the possession claim. In any event, the judge who had determined that claim had considered some of the Claimant's conduct to have been caused by her use of alcohol. Further, disqualifying the Claimant from joining the allocation scheme was a proportionate means of achieving a legitimate aim (see above) which could not be met by lesser measures, including those identified by the Claimant.

### **Ground Five**

- e. Section 29 of, and Schedule 2 to, the EqA set out the way in which the duty to make reasonable adjustments applied to service providers and (per paragraph 2(2) of Schedule 2) related to disabled persons in general. Acknowledging that the category (d) rule constituted a PCP, it was for the Claimant to provide evidence that the conditions for which section 20 of the EqA provided had been met. She had failed to identify the reasonable adjustments which she contended ought to be made in respect of the relevant group of disabled persons, contending, simply, that the Defendant ought to have waived or disapplied the rule in her case. Even that would not have constituted a reasonable adjustment, given that she had continued to engage in anti-social behaviour at other properties up to the date of the review decision.

### **Ground Six**

- f. The Defendant had not acted in breach of section 166A(9) of the HA 1996. The scheme had been framed in a way which enabled applicants to understand how an application would be treated.

### **Remedy**

17. In any event, contended the Defendant, section 31(2A) of the Senior Courts Act 1981 obliged the Court to refuse to grant relief, because it was highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. Grounds one to three argued for an interpretation of the allocations policy which was contrary to the Claimant's interest; to the effect that the Defendant had no discretion to consider her personal circumstances. If that were right, it was highly likely that the outcome would not have been substantially different, as the Defendant had in fact proceeded on the basis that it had a discretion. Ground six asserted that the applicable policy was unclear. Were that to be made out, it would be highly likely that the outcome for the Claimant would not have been substantially different.
18. In response to that contention, the Claimant asserts that, were her claim to succeed on the relevant grounds, the Court would, presumably, quash the relevant parts of the scheme, and the Defendant would be required to reformulate its allocations rules in order to avoid a blanket policy. The Claimant's application would then fall to be considered under the new, more flexible scheme. Were that application to succeed, the Defendant would be bound to award a 'priority date' commensurate with the date on which her original application had been made, and she would be well-placed to secure social housing relatively quickly, particularly as a member of a 'reasonable preference' group. It could not be said that it was highly likely that the outcome for the Claimant would not be substantially different.

### **The evidence**

19. In support of her claim, the Claimant relied upon the witness statement of her mother, to which the SWIFT assessment was exhibited, together with a newspaper article, published in August 2022, with which she had been provided by the Claimant's solicitors, written by the Bureau of Investigative Journalism ('the BIJ') and said to demonstrate that individuals with mental illness were very likely to commit the form of anti-social behaviour which would satisfy rule (d) of the Defendant's allocations policy. The thesis of that article was that mentally ill people were being sent to prison for breaching antisocial behaviour injunctions, which "experts" said that they were unable

to follow. It was said that the Ministry of Justice did not collect any data on when and how antisocial behaviour injunctions were used, or on what happened when they were breached. Thus, the BIJ had analysed 156 court judgments in which an injunction had been granted by reference to anti-social behaviour, published between 2019 and mid-2022, to create a ‘first of its kind’ database which logged the gender of the individual concerned; the date of the injunction; details of the breaches; the type of sentence imposed and its duration. Having recorded its analysis, to the effect that the average custodial sentence was 86 days, the article continued, *‘Andrea Albutt, the president of the Prison Governors Association, told the Bureau that such sentences are pointless. “Invariably the reason why the person has the antisocial behaviour injunction is because of their mental health”, she said, “and if they come [to prison] for short periods of time, we don’t have them long enough to stabilise them [and] their antisocial behaviour becomes worse. They can become very psychotic when they come into prison and we do not have the facilities to manage them. Putting people in prison for short periods of time for a civil offence is just crazy.’* The writer noted that the BIJ had found 11 instances in which a person’s mental health issues had been mentioned explicitly by the judge who had imposed a custodial sentence and that people in court facing prison sentences included those with personality disorders, debilitating OCD and schizophrenia. *“We see desperately ill people produced to court”, said Rosaleen Kilbane, a partner at the Community Law Partnership. “The big flaw of the system is it presumes people committing antisocial behaviour are doing so deliberately and will respond to the injunction. It is not at all uncommon for people to go to prison.”*’

20. The Claimant further relied upon part of a report of the Disability Rights Commission (‘the DRC Report’), entitled *‘Disabled people’s experiences of anti-social behaviour and harassment in social housing: a critical review’*, dated August 2007. At that time, the Disability Discrimination Act 1995 was in force. Within that report, the authors stated their view that, *‘Whilst our findings are not conclusive, they do point to evidence that the subjects of antisocial behaviour interventions often have mental health problems, learning difficulties, and neurological disorders.’* In chapter 5 of their report, the authors noted the lack of data available at national level, with the consequence that it was impossible to estimate the percentage of anti-social behaviour interventions issued to disabled people and to assess evidence of disproportionality. *‘anecdotal evidence, particularly in relation to ASBOs suggests, however, that people with particular impairments are disproportionately more likely to be recipients of measures designed to tackle anti-social behaviour. ASBOwatch, ASBO concern, BIBIC and NAPO have monitored the use of ASBOs, and have documented instances in which the granting of an ASBO appears to be a disproportionate and inappropriate response to problem behaviour. NP (2005) has collected a number of cases studies which point to a potential misuse of ASBOs, 13 of which related to cases involving children and young people with neurological disorders, including ADHD, Asperger syndrome (AS) and autism.... As the figures above indicate, ADHD appears to be particularly prevalent among the young people issued with ASBOs with 58 out of the 137 (42%), as cases reportedly involving a child with the condition.’* Later in the report, under the heading ‘Disabled people’s experiences of being subject to anti-social behaviour interventions’, an account was given of certain work undertaken in 2003 and 2005, which had sought to elicit families’ feelings regarding their experience of the acceptable behaviour contract (‘ABC’) process. The research had involved 13 young people from 10 families, nine of which lived in social rented housing. The young people in question had been placed on a contract for a range of anti-social behaviour. During interviews,



research participants had been given the opportunity to raise issues which had most concerned them regarding their experiences and feelings. Mental health problems were said to have dominated their accounts and the authors professed to having been 'continually disturbed' by the number of young people who had been subject to ABCs and had mental health problems and learning difficulties. Over half of those who were subject to contracts had had relatively serious mental health, or personality disorder, problems and related learning difficulties, for which some had received psychological/psychiatric support. Officially diagnosed ADHD for which children were receiving psychological and medical support had emerged as a central health issue. The report also referred to research reviewed over a period spanning 1997 to 2005, which had pointed to a strong and robust link between ADHD, associated personality factors, such as restlessness, impulsive behaviour, and difficulty maintaining concentration, daring, clumsiness and anti-social behaviour in childhood and adolescence, which tended to persist into adulthood. That said, it was said to be not yet clear whether anti-social behaviour was a true risk effect of ADHD, or whether the association of ADHD with later anti-social behaviour arose because of some other associated factor. Certain authors had noted that anti-social behaviour in children having ADHD was linked with genetic factors, family adversity, and peer rejection, suggesting that, despite the increased risk of anti-social outcomes in those having ADHD, relatively little was known about the factors which contributed to, mediated, and moderated the link between the two.

21. The DRC Report's conclusions included the following: *'ADHD in particular is emerging as a central issue in debate about disability and anti-social behaviour (Thapar et al, 2006), and, on the basis of our review, we can say with some degree of certainty that a large percentage of those subject to anti-social behaviour measures appear likely to have, or have a diagnosis of, ADHD. Given the studies which report the risk effect of ADHD, this is perhaps not surprising.'*
22. In her witness statement, the Claimant's mother stated her view that the picture painted of her daughter by the Defendant was not very accurate and that, when the Claimant's case had gone to trial, the Defendant had been ordered to select 12 specimen allegations, many of which had been dismissed. Her evidence was that the Claimant's children no longer lived with her; that the Claimant continued to struggle with major problems in her life; that the Claimant's dogs lived at her parents' home and were happy and well-behaved; that the Claimant took medication for depression; anxiety and to enable her to sleep at night; that she was supposed to have contact with the STAR drug and alcohol service but that that could be *'a bit wishy washy'* as case workers changed regularly; that the Claimant drank occasionally, but not to excess; and that the Claimant largely spent the day with her mother and stayed at home in the evening. It was her long-term goal to have her children returned to her care and she was undertaking parenting assessment by Social Services.
23. The Defendant relied upon the witness statement of Mr Hall. Mr Hall gave evidence of his 30 years' experience working in social housing. He recorded his understanding that the allocations policy had been introduced in June 2018, having been subject to extensive public and internal consultation, and been through the appropriate governance processes prior to its publication. From 2014, he said, the predecessor policy had included a similar disqualification provision for applicants *'whose unacceptable behaviour [was] serious enough to make them unsuitable to be a tenant'*. The only

remarkable change to the provision made by the present policy was the statement that each case would be considered on its own merits.

24. On the understanding that the interpretation of the policy was a matter for the court, Mr Hall considered it important to set out the way in which the Defendant had interpreted and applied that policy to date. He confirmed that there was no unpublished guidance, or procedures, to be considered, and that the test applied derived from the published policy itself. He stated that, when making decisions as to whether an applicant met the qualification criteria, it was necessary to apply a two-stage approach. First, had the applicant (or member of his or her household) been guilty of unacceptable behaviour? Secondly, was the applicant's unacceptable behaviour serious enough to make him or her unsuitable to be a tenant? The exclusion only applied if the answer to both questions was yes, such that there was no blanket disqualification simply because an applicant or member of the household had been guilty of anti-social behaviour. When considering an application from an applicant where anti-social behaviour was involved, the first question required assessment of whether the applicant or household member had been guilty of some level of unacceptable conduct. The second element required consideration of a number of factors, because the Defendant was tasked with assessing whether the behaviour was serious enough to render the applicant unsuitable to be a tenant. That was said not to be a simple task because, in some cases, the circumstances surrounding any unacceptable behaviour, as well as the applicant's then current circumstances, would not necessarily mean that s/he was unsuitable to be a tenant. In others, the behaviour might be so concerning and serious that the applicant would be unsuitable.
25. It was Mr Hall's evidence that the policy gave some guidance on what could be considered when determining whether the applicant's behaviour was unacceptable for the purposes of rule (d). That included having regard to whether it would have entitled the Defendant to a possession order under the HA 1985, requiring an assessment of whether, faced with the same behaviour, the Defendant would be able to satisfy the court that relevant grounds were made out, but also that it would be reasonable for a possession order to be made. On his evidence, the assessment required broad consideration, including of any other circumstances which might impede the Defendant's entitlement to a possession order, for example of any issues arising under the EqA. The policy included provisions limiting the ability of a qualifying applicant to bid for certain properties, necessarily acknowledging that there would be qualifying applicants who had a history of unacceptable behaviour. The circumstances surrounding each application could be different and would require individual attention on their own merit, as the policy recognised. An applicant's ability to make a fresh application envisaged situations in which a change in circumstances would render the applicant suitable to be a tenant, notwithstanding evidence of unacceptable behaviour. The policy provided for a residual discretion on the part of the Defendant, 'retained in exceptional circumstances', to allow for a direct let to an applicant who did not qualify under the policy. Mr Hall did not believe that any situation had arisen in which the Defendant had considered, or been asked to consider, exercising that discretion in favour of an applicant who had not qualified under the policy.
26. Regarding the decision which he had taken on review, Mr Hall stated that he had had access to the evidence which had been available in the possession proceedings, some of which he exhibited to his statement, and which he had considered when carrying out

the review. He had also had background knowledge of the case in general, having been consulted on it in connection with budget. He had been provided with a copy of the evidence of Professor Fox. He had not considered rule (d) to have been a blanket policy. He had agreed with the original officer's assessment, and had considered the circumstances as they had stood both at the time of the original decision, and at the time of review. The decision-making had been aided, to a degree, by the fact that the Claimant had been a secure tenant, who had been subject to a possession order by reason of her unacceptable behaviour, and that of others in her household. It was that persistent unacceptable behaviour, which had satisfied the court that the Defendant was entitled to an order for possession, because the relevant grounds had been made out and it was reasonable for an order to be made. The court had also held it to be proportionate, for the purposes of section 15 of the EQA, for a possession order to be granted and, on appeal, it had been held that the Defendant had complied with its public sector equality duty. Thus, an independent tribunal had considered all of the factors which a reviewing officer would have been expected to consider and determined that a possession order was reasonable and proportionate, a decision upheld on appeal. Following the original decision, there had been further incidents of similar unacceptable conduct, such that, at the time of his review, there had been nothing to suggest that the Claimant's conduct had improved, or would be likely to do so.

27. Mr Hall stated that he had considered the particular exclusion to have been operated flexibly. In the year preceding the decision, only one other applicant had been disqualified under the relevant part of the policy. There had been numerous applicants, including those having protected characteristics, who had had a history of anti-social behaviour, but had been allowed to qualify for the housing register. In his decision, he had stated that disqualification from the register on the particular ground was used only "in extremis". By that, he had meant that it was used only in extreme cases in which the unacceptable behaviour was serious and significant and there were no positive signs of the applicant otherwise being a suitable tenant. He had been satisfied that the Claimant's was such a case, because her conduct had comprised serious and persistent anti-social behaviour, which had been continuing at other properties at the time of review and had been critical in assessing her unsuitability to be a tenant. Mr Hall stated that it was clear from his decision letter that he had considered a wide range of personal circumstances, relating not only to the Claimant's conduct, but to that of others in her household. In particular, he had considered the Claimant's disability and, on the basis of the available medical evidence, had formed the view that she needed to address her alcohol use, if her behaviour were to improve. It had also been clear from that evidence that the Claimant had been offered rehabilitation, but had refused it. As the decision-making process which had resulted in the decision taken had reflected a wider construction of rule (d) than that for which the Claimant was contending, he could safely say that the same decision would have been reached on the Claimant's narrower interpretation of the rule to be applied.
28. Mr Hall exhibited to his statement the equality impact assessment which had been carried out at the time of introduction of the policy. It was his evidence that an updated assessment of the policy was to be undertaken, following the issues which the Claimant had raised in these proceedings. It was said that the Defendant did not have full information as to the number of disabled applicants who had applied to the allocation scheme since its introduction, though he was able to provide statistics for new applicants who had joined the housing register in the preceding four years relating to

the number of households in which mobility/disability needs had arisen. There had been only one case in the previous two years in which an applicant had been excluded from the housing register. That applicant had not had a disability.

29. On the question of proportionality, Mr Hall stated his view that he had not seen any evidence in general, or anything presented by the Claimant as part of her claim, which had demonstrated that rule (d) would put anyone sharing the Claimant's protected characteristic at a particular disadvantage by comparison with those who did not. Nevertheless, for the purposes of his review, he had acknowledged the possibility that it might do so. Whilst it might be suggested that persons with disabilities causative of their anti-social behaviour were placed at a disadvantage, he would suggest that that was not the case, because, whilst the disabilities might explain that behaviour, the behaviour would not automatically render them unsuitable to be a tenant. Individuals having similar disabilities might seek to address their behaviour in a range of ways, for example, by engaging with support services in order to manage their behaviour, or taking steps to comply with the medication regime. Such matters might positively influence their suitability to be a tenant. In any event, Mr Hall stated his view that the provision remained a proportionate means of achieving a legitimate aim. On his evidence, antisocial behaviour had a serious and detrimental impact on those who suffered it. Considerable time, effort, resource and public money was spent in having to address it, was incurred in managing it at all levels, but was magnified in situations in which the Defendant was compelled to commence court proceedings, whether to restrain the behaviour, or to recover possession. That was public money which would be better utilised in providing other valid services for the community.
30. Any lesser measure would, in Mr Hall's view, require consideration to be given to making exceptions to rule (d), for any applicant having a disability, or whose anti-social behaviour related to a disability. That would not achieve the Defendant's legitimate aims, and would put it in a position whereby it would risk accepting applicants unsuitable to be tenants and likely to continue to act in an anti-social manner. That would create an intolerable situation for other residents and the Defendant's staff, as well as, potentially, others going about their business in the community. It would run contrary to everything which the Defendant sought to achieve in keeping people safe, and making its neighbourhoods places in which people wanted to live. It would also expose the Defendant to the risk of further expenditure of time, effort and public money in commencing legal action to address the behaviour in question. Social housing was a precious resource, for which reason the policy focused on ensuring that only those applicants who were suitable to be tenants would qualify, from an anti-social behaviour perspective. In any event, an applicant disqualified on the basis of rule (d) would not be precluded from securing housing elsewhere. Such a person could still make a homelessness application or seek accommodation in the private rental sector, as well as seeking to address the relevant behaviour, with or without support.
31. In connection with section 15 of the EqA, Mr Hall prayed in aid the legitimate aims to which he had already referred, observing that the impact of anti-social behaviour on those who suffered from it formed an important part of the necessary balancing exercise; they, too, had rights and freedoms which needed to be considered. The Defendant owed a duty of care to all of its tenants and community impact was a consideration to be balanced equally against the personal circumstances of those against whom action was taken. The legal fees in the Claimant's case had been 'huge'. The

Defendant had worked with multiple agencies in an effort to support her, and a number of those who had witnessed the relevant behaviour, at ‘huge’ overarching cost to the public purse and emotional cost to residents. The community impact of her behaviour had been significant and the Defendant had come under significant pressure over the time which it had taken to recover possession, because of the sustained effect which her behaviour had had on those who had been obliged to endure it. Were the Defendant to permit the Claimant to join the register, it would also expose itself to regulatory criticism, as a registered provider of social housing required to develop a policy for maintaining and improving neighbourhoods, and actively to address anti-social behaviour. To uphold those obligations by acting to evict the Claimant, only to rehouse her in the knowledge that she continued to demonstrate the conduct for which she had been evicted, would run totally contrary to the required standards, and inevitably expose neighbourhoods to nuisance behaviour, with the associated reputational damage to the Defendant. For the same reasons, an introductory tenancy would not be a feasible risk mitigation measure and the Defendant would be setting the Claimant up to fail, where her circumstances had not changed and she remained unsuitable to be a tenant. In those circumstances, Mr Hall was satisfied that the policy had a legitimate aim and had been applied proportionately in the Claimant’s case.

32. It was difficult, in Mr Hall’s view, to identify reasonable adjustments which would mitigate against any substantial group disadvantage which the Claimant might establish. The policy already contained a provision enabling a fresh application where circumstances had changed, and another conferring a residual discretion to make a direct allocation in exceptional circumstances. In Mr Hall’s view, those were adequate overarching safeguards, which ensured that no class of person was placed at a disadvantage. Were it to be suggested that a blanket exception for disabled persons, or disabled persons whose anti-social behaviour related to their disability, ought to be applied, in Mr Hall’s view such an adjustment would not be reasonable. It would simply sidestep the important requirement in the Defendant’s policy that an applicant be suitable to be a tenant. It would mean that the Defendant would be permitting those whom it considered unsuitable to be tenants to join the housing register and potentially secure accommodation in which earlier unacceptable behaviour would be repeated, with the potential profoundly to affect others and associated exposure of the Defendant to a real risk of expending time, resource and public money in addressing the issues created. For the same reasons, a waiver or application of rule (d) in the Claimant’s case would not have been reasonable.

### **The parties’ submissions**

#### *For the Claimant*

33. Relying on Professor Fox’s report, Mr Bano submitted that the Claimant was a vulnerable woman, suffering from autistic spectrum disorder (‘ASD’) and ADHD. Her anxiety, alcohol dependency and depression were not advanced as disabilities. He submitted that he had no difficulty in acknowledging that the Claimant had been responsible for anti-social behaviour, for the purposes of rule (d), albeit that her behaviour had not been as serious as the Defendant had made it out to be. This Court, he said, was fixed with the findings of fact made in the possession proceedings, albeit that, for the purposes of Ground Four, it was appropriate to have regard to the wider evidence which had been before the Deputy District Judge and to the allegations of subsequent anti-social behaviour, acknowledging that the latter ought to be treated with caution, absent findings of fact.

*The point of construction*

34. Mr Bano submitted that housing allocations were made under Part VI of the HA 1996 and that local authorities were obliged to allocate in accordance with the scheme. Save as regulated by statute, and within certain limits, they could formulate their own eligibility rules. It was accepted by the Defendant that rule (d) operated automatically once the test had been met. The key question of construction was whether the operation of the rule was a matter of discretion, or one of simple fact finding. It was Mr Bano's submission that the rule raised a question of primary fact, rather than of evaluative judgment. The test for qualification was as set out in the fourth paragraph of the relevant section. He acknowledged that, if he were right, the second and third paragraphs of the rule constituted unnecessary verbiage. If one adopted the Defendant's construction, he contended, it would follow that it had obtained a possession order to which it had not been entitled. In such circumstances, the Defendant would be obliged to consider whether the conduct in question would have entitled it to such an order and might conclude that it would not. In this case, all relevant matters had been taken into account by the Deputy District Judge, leaving the Defendant no room for manoeuvre. The final paragraph of rule (d) entitled an applicant to re-apply, if s/he had behaved appropriately since his or her earlier anti-social behaviour; it could not assist with the question of whether the rule was over-rigid on first application.

*Ground One*

35. In Mr Bano's submission, rule (d) raised a 'type three' question of precedent fact, as exemplified by *R(A) v Croydon LBC* [2009] UKSC 8. If the Defendant were correct, it raised a 'type two' question, even when a possession order had been made. That defied common sense. If, in practice, a discretion was applied, then the policy was not compliant with *Lumba* principles and the decision maker had behaved unlawfully in failing to have adhered to the scheme; a lawful application of rule (d) would not have allowed regard to the Claimant's disabilities. Were the court to accept that submission, grounds four to six would fall away. If the scheme did permit the exercise of discretion, its application in this case had been unlawful (per grounds four to six). In that event, grounds one and three would be dismissed, but the question of proportionality raised by ground two might still need to be decided.

36. In Mr Bano's submission, it was established by authority that housing allocations schemes must contain a residual discretion to make extraordinary decisions in appropriate cases. *Holley v Hillingdon LBC* [2017] PTSR 127, CA was said to provide strong support for that proposition. Furthermore, he contended, allocations schemes or policies could not unlawfully fetter the council's discretion. For that proposition, he relied upon: *R (Ahmad) v Newham LBC* [2009] PTSR 632, HL [15]; *R (YA) v Hammersmith and Fulham LBC* [2016] HLR 39 [85]; *R (Yazar) v Southwark LBC* [2008] EWHC 515 (Admin) [47]; *R (Conway) v Charnwood BC* [2002] EWHC 43 (Admin); *R v Westminster CC e.p. Hussain* (1999) 31 HLR 645; and *R v Canterbury CC e.p. Gillespie* (1987) 19 HLR 7, each being a housing authority case, reflective of the position in public law generally (see, for example, *R (Adath Yisroel Burial Society) v Inner North London Senior Coroner* [2019] QB 251, CA [77] to [78]). Acknowledging that, in *R (Hillsden) v Epping Forest DC* (unrep) [2015] EWHC 98, the contrary conclusion had been reached, Mr Bano submitted that the ratio of that decision had since been undermined by the conclusion reached in *R (Adath Yisroel Burial Society)*, at [79] to [86].

37. In this case, submitted Mr Bano, the Defendant necessarily relied upon an implicit discretion, to be contrasted with the explicit discretion to be found in other rules of the scheme (see rules (a); (c) and (i), in the same section). It had actively removed the statutory discretion formerly to have been found in section 160A(7) of the HA 1996, superseded in England in April 2012 under the Localism Act 2011. The original provision remained in force in Wales. Nevertheless, the court was being asked to read in a discretion which, on the face of rule (d), did not exist, contrary to the common sense meaning of that rule.
38. The availability of a fresh application did not assist in establishing the Defendant's scope to take account of an applicant's personal circumstances on a first application and would oblige the Defendant to satisfy the court that its oblique reading of the scheme somehow overrode the test for which it provided. Nor was the Defendant assisted by its contention that it could emulate the decision-making process of a judge seised of possession proceedings; such a judge would be addressing a question fundamentally different from whether an applicant should be rehoused, on which the applicant's personal circumstances would bear very differently. In any event, where, as in this case, the court had already made a possession order, 'the test' was, intrinsically, satisfied and, no matter how compelling an applicant's personal circumstances, they simply could not feature in the decision; the scheme obliged the Defendant to reject the application automatically. Contrary to the Defendant's pleaded case, the Claimant's case was not particularly unusual in as much as a possession order had been granted at the time of the rule (d) review. Apart from the speculative nature of that contention, it assumed that, in most cases, the tenant would have committed very serious, anti-social behaviour, but that, nevertheless, the landlord would not have sought to evict him or her — an inherently unlikely scenario.
39. Finally, the availability of direct letting did not confirm the requisite discretion either, for two reasons. First, the essence of the scheme was that it was choice-based and it was the benefit of that scheme which the Claimant sought in these proceedings. Secondly, the prohibition on fettering a discretion was to leave room to disapply the particular rule in exceptional cases, rather than to offer an applicant something of an entirely different nature: *R (Adath Yisroel Burial Society)* [78].
40. In short, submitted Mr Bano, the scheme had not been framed so as to allow departure from rule (d). The highest that the Defendant could put its case was that a discretion ought to be inferred. Whilst the courts had encouraged an approach which applied a 'sensible degree of flexibility' (*R (Flores) Southwark LBC* [2021] HLR 16, CA [39] to [40]), that principle related to the interpretation of existing rules, and could not stretch to the invention of new rules, particularly those which would contradict the existing provisions of the scheme.

#### *Ground Two*

41. Mr Bano submitted that the parties were agreed that section 19 of the EqA applied; that the Claimant's ADHD and ASD constituted disabilities; and that the Defendant had applied a provision, criterion or practice ('PCP') in the form of rule (d).
42. Disadvantage encompassed the denial of an opportunity: *R (TX) v Adur DC* [2022] EWHC 3340 (Admin) such as exclusion from the scheme. Per *R (Ward and Gullu) v*

*Hillingdon LBC* [2019] EWCA Civ 692 [57] to [59] and section 6(3)(b) of the EqA, it was for the Claimant to establish that a higher proportion of those having her particular disabilities would be affected by the relevant PCP. There was no requirement that every person having the Claimant's disabilities be disadvantaged by rule (d): *Essop v Home Office (Border Agency)* [2017] UKSC 27 [27]; *R (Ward and Gullu)* [59]. Reliance was placed upon the DRC Report, though it was said to be very difficult for an individual litigant to produce evidence of the relevant figure, and there was no requirement that a claimant provide statistical evidence as to the likely effect of a PCP, nor evidence as to the actual consequences of the rule: *R (TX)* [59]. It was to be noted that the Defendant itself had brought proceedings against 11 households, in six of which there had been a disability. At its highest, and tentative though its conclusions were, the DRC Report had stated, 'with some degree of certainty', that a proportion of those against whom measures for anti-social behaviour had been taken had received a diagnosis of ADHD. The position was less clear for autism. For all of its limitations, the DRC Report established that those with autism and ADHD were more likely to be subject to a disadvantage. The BIJ study was also to be noted. Albeit anecdotal in nature, it was the best material which the Claimant could produce; there had been no systematic study undertaken.

43. Mr Bano submitted that, even if the reports on which the Claimant relied were considered to lack value, it was a matter of logic that the relevant neurological disorders manifested in behavioural aberrations. It would not follow that ADHD and ASD would necessarily cause anti-social behaviour, but it stood to reason that a higher proportion of people with those disorders engaged in such behaviour. In effect, the point had been conceded by the decision-maker himself, in the decision under review: *'I accept that there are some studies, which suggest that people with ADHD may be more likely to engage in anti-social behaviour, and may therefore be disadvantaged by the ASB disqualification provision.'* The SWIFT report had spoken of the difficulties which such individuals experienced in regulating their emotions. It was a source of frustration to the Claimant that the mental health charity, Mind, had not intervened in the proceedings, but it should not be controversial to state that those having neurodevelopmental and behavioural disabilities were disproportionately prone to behaving in a way which might be characterised as anti-social, when compared with those who did not have such disorders. In *York City Council v Grosset* [2018] EWCA Civ 1105, the Court of Appeal had had no difficulty in finding the requisite link between a serious physical disability and certain conduct, for the purposes of section 15 of the EqA. Mr Bano invited the court not to take an 'over-strict' view of the evidence required to establish group disadvantage, for the purposes of section 19(2)(b). Some evidence had to be produced, but it need not be conclusive, or the requirement would present an extraordinary hurdle. If the effect of alcohol were of concern, the question was whether those having the relevant conditions were more likely to self-medicate with alcohol, acknowledging that there was no evidence before the court to that effect.
44. As to whether the Claimant herself had been placed at the relevant disadvantage, Mr Bano submitted that she was not required to demonstrate a causal link between that disadvantage and her disabilities: *Essop* [25], nor why it was that rule (d) placed her at a disadvantage: *R (TX)* [59]; what mattered was whether the disadvantage was connected to the PCP, as it plainly was in this case. Here, alcohol use was related to the Claimant's disabilities, though it was accepted that some of her anti-social behaviour was alcohol-related and not disability-related. Nevertheless, from the SWIFT report it was clear that certain conduct had been disability-related, but not alcohol-related. Once



the relationship between disability and the Claimant's behaviour was established, it need not afford the entire explanation.

45. On the issue of proportionality, Mr Bano observed that the four-stage test was as set out in *Bank Mellat v HM Treasury* [2014] AC 700 [74]: (1) Was the objective of the measure sufficiently important to justify the limitation of a protected right? (2) Was the measure rationally connected with the objective? (3) Could lesser measures have been used without unacceptably compromising the objective? (4) Was the impact on the Claimant's rights overall disproportionate? Mr Bano submitted that he took no issue with the legitimacy of the Defendant's aims, but did not accept that rule (d) was rationally connected with the aim of preventing anti-social behaviour, in merely shifting responsibility for managing it to private landlords. In any event, there were less intrusive measures which would have sufficed to achieve the Defendant's aims. The lesser measure which the court was invited to accept was that for which the statutory mechanism in Wales continued to provide. Thus, the Defendant would need to show why that position; the absolute discretion, could not have been achieved. Only 11 claims had been issued in the last five years; a number sufficiently low that it could not justify the absence of a discretion. It was not the statute which obliged a lack of discretion, but the Defendant's scheme itself. The statutory provision applicable in England simply did not deal with the matter. Further, *R (XC) v Southwark* [2017] EWHC 736 (Admin) [99] and [100] was authority for the proposition that allocations policies required safety valves. The focus was to be on the scheme, rather than on the outcome in a particular case. That theme had been revisited in *R (Ward and Gullu)* [86] and [87]. As an aspect of proportionality, a safety valve allowing departure from the policy in appropriate cases would be required, absent exclusion of disabled applicants from the rule.
46. All that the Claimant asked was that rule (d) should mirror the statutory provision from which it was, presumably, derived; section 160A(7) of the HA 1996, a provision which was totally discretionary, even where the local authority was satisfied that the applicant was unsuitable to be a tenant. Parliament had considered that a flexible, permissive rule was capable of achieving the aims of all Welsh (and, historically, all English), local authorities, notwithstanding which the Defendant had taken the view that such an approach would not achieve its legitimate aims, yet, there was no evidence to indicate that the position in Eastbourne was somehow much worse than obtained throughout Wales, where a lesser measure sufficed.

#### *Ground Three*

47. This ground arose from trite propositions which were not in dispute, submitted Mr Bano; a local authority was required to comply with its own scheme and with its statutory obligations (see section 166A(14) of the HA 1996). Either the Defendant's scheme permitted the exercise of a discretion, or it did not. Mr Hall's witness statement had identified a range of factors to which he had had regard which had not appeared in the scheme, even in generic terms. A 'major deviation' from an allocation scheme constituted a breach of the statutory duty to allocate housing in accordance with it: *R (A) v Lambeth BC* [2002] 50 HLR 56 [28]. Nor was it open to a local authority to adopt 'administrative practices' which did not reflect the contents of the scheme itself: *R (Faarah) v Southwark LBC* [2009] HLR 12 [37], [41]. Public authorities could not '*live in the world of Humpty Dumpty: they cannot make [a policy] mean, whatever they would like it to mean*': *Tesco Stores v Dundee CC* [2012] PTSR 893, SC [19]. Mr Hall's witness statement in these proceedings served to undermine the Defendant's

case. The scheme was very clear, but Mr Hall's position was that, 'in practice', the Defendant applied a wholly different approach, whereby, in this case, the decision-maker had considered that rule (d) ought to be applied 'selectively' and the case determined 'on its own merits'. He had designed unpublished criteria for himself, as to whether there had been adequate improvement in the Claimant's behaviour, and whether her circumstances had been 'in extremis' and considered the rule which he ought to have applied to be no more than guidance to which he ought to have regard. That had been unlawful: *Faarah*; *R (Mandalia) v SSWP* [2015] 1 WLR 4546, SC [29]; and *R (A) v Lambeth BC*.

48. Acknowledging that ground three sought to compel the Defendant to adhere to a policy which, on the Claimant's case, was unlawful, Mr Bano, nevertheless, invited the court to mark the unlawfulness of the Defendant's approach. Had it adhered to its unlawful policy, it would, at the very least, have led to a much more straightforward legal challenge.

#### *Ground Four*

49. Mr Bano submitted that, were the Claimant to be wrong in relation to all of the above, such that the scheme had entitled the Defendant to make an individual evaluative decision on the merits of her case, the target of her challenge would shift from being the scheme itself to the particular decision made.
50. Ground Four concerned section 15 of the EqA. In issue was (1) whether there had been sufficient causal connection between the Claimant's disabilities and her anti-social behaviour; and (2) proportionality.
51. As to the first of those issues, two questions arose — whether any of the Claimant's antisocial behaviour had arisen from her disability; and, if so, whether the Defendant had rejected her application "because of" that behaviour. In Mr Bano's submission, the evidence clearly established that at least some of the Claimant's anti-social behaviour had been directly related to her disability. He contended that disability need not be the sole, or even the main, cause and that the connection could be fairly loose: *Pnaiser v NHS England* [2016] IRLR 70; *York City Council v Grosset* [50]. Even if alcohol had played a part in the Claimant's behaviour, that would not remove the connection. Here again, reliance was placed upon the Fox and SWIFT reports.
52. As to the second question, the threshold set was low and required that the disability-related conduct must have had an influence which was more than trivial. The Defendant had not identified the particular behaviour which had barred the Claimant from the register and had not stated that its only concern had been alcohol-related behaviour, its treatment of her, at least in part, must have been disability-related. Professor Fox had said that the Claimant's drinking had led him to a guarded prognosis. He had not said that, were she to stop drinking, all anti-social behaviour would cease, or that her disabilities precluded her from seeking help. Absent alcohol consumption, there was some disability-related connection to her bad temper; poor relationships; and control of her emotions.
53. On the question of proportionality, Mr Bano relied upon *Aster Communities Limited v Akerman-Livingstone* [2015] AC 1399 [32H], emphasising that the focus here was on the availability of lesser measures (see above). The generosity of approach which the

law required fell to be contrasted with the Defendant's position, which equality law was designed to avoid, to the effect that it did not wish to take on tenants having behavioural disabilities. A local authority was obliged 'to go above and beyond' for disabled applicants.

*Ground Five*

54. Under sections 20 and 21 of the EqA, where a PCP puts people with disabilities at a particular disadvantage, a duty arises to 'take such steps as it is reasonable to have to take to avoid the disadvantage'. In this case, Mr Bano submitted, the comparison to be undertaken was broader than that required under section 19 of the EqA and was not between the class of people who shared the Claimant's specific disabilities, on the one hand, and the class of people who did not, on the other. The effect of paragraph 2 of Schedule 2 to the EqA was to require the court to frame a group comprising similarly disabled people: *R (Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108 (Admin) [25] to [26]; here, probably, '*people with behavioural disabilities*', which was to be compared with a group comprising those who were not disabled in any way: *R (Rowley)* [24]. The duty would arise, not when an applicant identified or requested an adjustment, simply when the court was satisfied that there was a PCP giving rise to a disadvantage, and that there was an adjustment which it would have been reasonable to make: *R (Nur) v Birmingham CC (no. 2)* [2021] HLR 23, at [149] and [157]. Whether or not an adjustment was reasonable, was an objective question for the Court, bearing in mind all of the circumstances of the case: *Royal Bank of Scotland v Allen* [2009] EWCA Civ 1213 [40] and [46].
55. Albeit that the figures set out in the DRC Report were not directly on point, they painted a picture, as did the text of that report, so Mr Bano submitted. Collectively, they served to demonstrate the disproportionate disadvantage caused by the PCP which had been applied in this case. A reasonable adjustment might be the reintroduction of the statutory discretion for which section 160A(7) of the HA 1996 had provided and which had since been deleted in England. Its absence constituted a breach of section 21 of the EqA. If the decision-maker had applied a discretion, it had been the wrong one; he had evaluated whether the Claimant had been unsuitable to be a tenant, as opposed to whether, if so, rule (d) ought to be disapplied. The Defendant had made no adjustment to the policy to meet the needs of those having behavioural disabilities. As a matter of principle, there might be individuals who were completely unsuitable to be tenants, such as those who hoarded items and thereby created unsafe environments, whom it would not be fair to oblige the council to re-house. Anti-social behaviour of the nature under consideration in this case was much easier to address, by way of behaviour contracts, or an injunction. A reasonable adjustment would entitle the Defendant to have regard to the opportunity, time and cost engaged in dealing with anti-social behaviour by the particular applicant.
56. Subject to the argument advanced under Ground Four, Mr Bano acknowledged that, in this case, having made the reasonable adjustment which he proposed, the Defendant might lawfully conclude that the Claimant did not qualify to join the register. When considering whether to disapply rule (d), it could factor in any pattern of past behaviour. If, having done so, it considered that that pattern was likely to be repeated, it would be entitled to conclude that the Claimant was not entitled to the waiver of the disqualification which would otherwise follow. In so doing, it would be obliged to comply with section 149 of the EqA. In that context, the court was not being invited to

speculate as to the outcome, but could not conclude that it was highly likely to have been the same. That was because, in exercising a discretion specifically concerned with disability and any positive duty owed to disabled applicants, the Defendant would have been obliged to have adopted a very different approach from that which it had adopted in this case and to have asked itself a very different question from whether the Claimant was a suitable tenant.

*Ground Six*

57. In relation to ground six, Mr Bano observed that *Lumba* had been applied in the context of housing allocation in *R (Roman) v Southwark London Borough Council* [2022] EWHC (Admin) ([121], [123]); and *R (Cort) v Lambeth LBC* [2022] EWHC 1085 (Admin). The short point was that public authorities were obliged to publish, or, at least, possess, a transparent statement, setting out the way in which discretionary decisions would be reached. In the allocations context, there was a statutory provision to similar effect; section 166A(9) of the HA 1996. The Defendant had confirmed in evidence that there were no additional policies or guidance, such that the scheme was exhaustive and determinative. If the policy did not provide for a discretion, the Defendant unlawfully had failed to adhere to the applicable legal principles; there had been a gulf between rule (d) as, respectively, drafted and applied. In Mr Bano's submission, one of grounds three or six had to succeed; either the Defendant had not been entitled to depart from the clear provisions of rule (d), or it had been so entitled, with the necessary consequence that it had been obliged to formulate and publish a transparent statement of the criteria by reference to which the rule was selectively applied.

*Remedy*

58. Mr Bano submitted that the Claimant had been caused serious prejudice and that the court should: allow her claim; grant appropriately worded declarations; quash rule (d) and/or the Defendant's decision that the Claimant was not eligible to join the housing register; order that the Defendant pay compensatory damages for discrimination, with quantum to be assessed by the County Court, if not agreed; and order the Defendant to pay the Claimant's costs.

*For the Defendant*

59. Ms Cullen outlined the statutory scheme for housing allocation for which Part VI of the HA 1996 provided and the legislative history, contending that it formed the background against which all grounds of review necessarily fell to be considered. She observed that, between 1997 and 2003, local authorities had been permitted to exclude classes of applicants from applying to join their allocation schemes. From 2003, they had had the power to treat a person as ineligible on grounds of 'unacceptable behaviour serious enough to make [the applicant] unsuitable to be a tenant'. Behaviour could only be regarded as unacceptable if it would have entitled the authority to a possession order under any of the grounds in Schedule 2 to of the HA 1985 (other than ground 8), if the applicant had been a secure tenant: sections 160A(7) and (8). From 15 January 2012, in England, authorities had, again, been permitted much broader powers in respect of qualification criteria, and those statutory provisions had been repealed, as redundant. The "*Allocation of accommodation: guidance for local authorities in England*" stated that local authorities might wish to adopt qualifying criteria, which would disqualify individuals who satisfied the reasonable preference requirements, giving the example of anti-social behaviour (at paragraph 3.28).

60. Where there was antisocial behaviour, there were a number of grounds on which a local authority would be permitted to obtain a possession order against a secure tenant. The court would need to be satisfied both that the relevant ground was made out and that it was reasonable for a possession order to be made: sections 84(1) and (2)(a) of the HA 1985. In relation to the latter, all relevant circumstances as at the date of the hearing were to be taken into account: *Cumming v Danson* [1942] 2 All ER 653, 655. The court was obliged to have regard to any medical evidence relating to the tenant's mental health, including as to whether that state of health related to the behaviour of which complaint was made, and to consider whether, with treatment, the relevant behaviour could improve: *Croydon LBC v Moody* (1999) 31 HLR 738, pp744 to 745; *Teign Housing v Lane* [2018] EWHC 40, at [56] and [57]. It would not be reasonable to make a possession order which would involve disability discrimination: *Teign* [41].

*The point of construction*

61. It was for the court to interpret an allocations policy, adopting an approach which allowed for a degree of flexibility and in a 'practical, common sense, and not in a legalistic way': (*R (Ariemuguvbe)* [31] and [24]. Whilst a common sense interpretation of rule (d) would not entitle the court to read in words which were not present, it would require a purposive interpretation of wording which might otherwise be considered ambiguous. In Ms Cullen's submission, developing the points pleaded in the Grounds of Resistance and summarised above, such an approach supported the Defendant's construction of rule (d), in which the overriding test required the Defendant to evaluate an applicant's suitability to be a tenant. Where the Defendant's policy expressly exempted other non-qualifying groups, it applied criteria which engaged questions of fact alone; either they were satisfied, or they were not; and no evaluation was required. It was that which explained the differences between the wording of rule (d) and the other rules to which the Claimant had pointed.

62. Rule (d) was discretionary, in so far as it enabled an applicant's personal circumstances to be considered. The Defendant was not contending that unsuitable behaviour would automatically result in disqualification. It might be that the quality of the behaviour would be affected by, or in consequence of, disability. In practice, that would be highly relevant; in order to determine whether a possession order would be reasonable, the court would need to have regard to the tenant's personal circumstances. The Defendant could regard behaviour which would have entitled it to a possession order under certain grounds contained in the HA 1985, if the applicant had been a secure tenant, as satisfying the test under rule (d), but the Claimant was wrong to suggest that the fact that a possession order had already been made against her had obliged the Defendant to disqualify her under that rule. The existence of that order, whilst highly relevant to the Defendant's determination of whether the rule (d) test had been met, and able to be accepted as evidence of the Claimant's unacceptable behaviour, did not remove from the Defendant its responsibility to determine whether the test had been met, consistent with the Welsh Government's guidance in connection with the similar statutory provision which continued to apply in Wales. It followed that all such matters could be considered by the Defendant when applying rule (d). The final paragraph of the rule was forward-looking, but assisted in demonstrating how the rule was to be applied, Ms Cullen submitted. The availability of a discretion was clear, both from the rule and the practice. If the test in rule (d) was satisfied, however, Ms Cullen acknowledged that there would then be no discretion as to its consequence.

*Ground One*

63. Ms Cullen submitted that an allocation policy was not necessarily unlawful in the absence of a residual discretion: *R(Z) v Hackney London Borough Council* [2019] PTSR 2272, CA [84], approved in the Supreme Court [2020] UKSC 40 [77]ff. As to the caselaw upon which Mr Bano relied:

- a. In *Holley*, the Court of Appeal had considered that it did not need to decide the issue [27];
- b. In *Ahmad* and in *R (YA)*, the need for an allocation scheme to contain some form of residual discretion, were it not to be unlawful, had not been in issue;
- c. In *R (Yazar)*, the local authority had made a concession regarding a letter which had purported to set out another policy (not an allocations policy), rather than the policy itself.

None of those cases was binding, or directly on point, she submitted. They provided limited support for the Claimant's position, but did not address directly whether an allocations policy under Part 6 of the 1996 Act would be unlawful in the absence of a residual discretion.

- d. *R (Conway)* had concerned an applicant who had sought a transfer outside Part VI allocation, although the same policy had been adopted, and the distinction had been drawn between cases falling within Part VI and those in which there was a discretion to transfer out, which were subject to standard public law principles.
- e. *Hussein* had concerned a provision no longer to be found in the statute which had conferred a discretion to remove people from the housing register, rather than the allocations policy itself. At that time, the two had been separate. The applicable principles did not carry across, because Part VI mandated the need for a policy; its required content; and the obligation to allocate in accordance with its terms.
- f. *Gillespie* had predated the 1996 Act. Under the Housing Act 1957, there had been no requirement for an allocations policy, but it had been necessary to give reasonable preference to particular groups. That Act had not been structured in the same way as Part VI of the 1996 Act.

64. In this case, submitted Ms Cullen, contrary to the ordinary position, the local authority contended for a construction of the rule which was more permissive than that advanced by the applicant. Ground one raised a pure public law argument, which was to be considered separately from the remaining grounds of review. It was not disputed that a fetter would be unlawful, but an allocations policy was required by statute and had to be followed. Thus, the starting point for ground one (and leaving aside the EqA-related grounds) was that there was no requirement that the policy contain a residual discretion: *R (Adath Yisroel Burial Society)* [191] and [192].

65. Were the court to accept that the policy put those with a disability at a particular disadvantage and that the Claimant was herself at that disadvantage, the onus would be

on the Defendant to demonstrate proportionality. It was accepted that, ordinarily, the availability of some form of discretion would point to such a policy being justified.

### *Ground Two*

66. The essence of Ms Cullen’s submissions on this ground was that there was insufficient evidence before the Court to justify the conclusions which the Claimant urged, for the purposes of sections 19(2)(b) or (c) of the EqA and that it was for her to establish those matters: *R (TRX) v Network Homes Limited* [2022] EWHC 456 (Admin) [62]. In any event, if the Defendant’s construction of rule (d) were correct, the group disadvantage under section 19(2)(b) would not be established, because account could be taken of an applicant’s personal circumstances, nullifying any disadvantage which might otherwise arise. In any event, section 19(2)(c) would not be established, in light of the Claimant’s own actions; either the relevant PCP had not caused the disadvantage, or her circumstances were materially different from those of the group, by virtue of her alcohol abuse. When comparing cases for the purposes of section 19, there must be no material difference between them: section 23(1) of the EqA. In Ms Cullen’s submission, it would not suffice for the Claimant’s disabilities to form only part of the cause of any disadvantage, which was the distinction between sections 19 and 15 of the EqA, per *Essop* [32]. In this case, the decision letter had referred to alcohol abuse, to which others had alluded, and there had been material before the decision maker and the Deputy District Judge in that connection. There had been no evidence that the Claimant’s anti-social behaviour had arisen in consequence of her disabilities. Even if it had done so in part, the court might take the view that the Defendant could not overcome the requirement that there be a link between the PCP and the disadvantage, but that, when considering section 19(2)(c), it could be satisfied of a material difference in circumstances — this was an applicant at least part of whose anti-social behaviour had related to the use of alcohol.
67. There was also the need to distinguish between the question of whether the PCP eliminated indirect discrimination and that of justification. Any measure relied upon as a “safety valve” to nullify a “particular disadvantage” had to overcome the relative disadvantage: *R (Ward and Gullu)* [86]. Paragraph [95] provided some support for the Defendant’s proposition that a wider margin of appreciation ought to be adopted when considering the proportionality of an allocations scheme. The court would generally respect a policy choice, unless it were “manifestly without reasonable foundation”: *R(DA) v Secretary of State for Work and Pensions* [2019] UKSC 21 [58] and [59]. The policy as a whole was relevant: *R(XC)* [87] and the court should bear in mind that: (1) it was in no position to rewrite the policy, and weigh the claims of the multitude who were not before the court against the few who were; (2) it was undesirable for courts to be involved in questions of how priorities were recorded in housing allocation policies; and (3) courts should not interfere with allocation policies, save in clear and exceptional circumstances: *R (XC)* [93] to [96], citing *Ahmad*. The disqualification of applicants on grounds of anti-social behaviour had been held to be proportionate for the purposes of Articles 8 and 14 ECHR in the care leaver context: *R (YA)* [84] and [85].
68. Finally, Ms Cullen referred me to *R (Imam) v Croydon LBC (no. 2)* [2021] EWHC 739 (Admin), observing that there was some crossover with the question of reasonable adjustments. Whilst that case had been the subject of appeal on a different issue, there had been no appeal from its conclusions regarding the latter. In *Imam*, the claimant had been a wheelchair user, on a waiting list under Part 6 of the 1996 Act. At [87], the

stepped approach required and the need for evidence had been noted. The claim was dismissed in the absence of the latter [91] and [93]. In this case, Ms Cullen submitted, evidence was lacking for the purposes of the challenge brought under section 19 and section 20 of the EqA. For the purposes of the former, the evidence produced did not suffice to demonstrate that individuals having ADHD and ASD were at a particular disadvantage, or that the Claimant herself was at that disadvantage. The Defendant was not seeking to be obstructive and was sensitive to the risk of stigmatising those with ASD and ADHD. In *MM v SSWP* [2013] EWCA Civ 1565 [30], charities had intervened in the proceedings and an expert had been called as a witness. It would have been open to the Claimant in this case to come before the court with a CPR Part 35-compliant report from a suitably qualified expert as to each condition, supportive of her contention that such condition manifested itself in the way in which the court was invited to find. She had not done so and the evidence which she had produced was incapable of supporting the findings invited. This court was not bound by the findings of the Deputy District Judge, whose order had been set aside on appeal and whose analysis of the Fox Report had been found on appeal to have been flawed.

69. Ms Cullen submitted that, for the Defendant's purposes, the SWIFT report was noteworthy in two respects: it had been produced in April 2019, primarily for Children's Services, and had made no findings regarding the anti-social behaviour the subject of the possession proceedings. Professor Fox's report had not directly addressed whether the types of anti-social behaviour which had led to the possession proceedings, and to the Defendant's view that the Claimant ought to be disqualified under rule (d), had been connected to her disabilities. The identification of a difficulty in reciprocal communication with others did not address the behaviours with which this case was concerned and could not justify a conclusion that those with ADHD or ASD were likely to act in an anti-social way, or that the behaviour which had led to possession proceedings had arisen in consequence of either condition. More particularly, the Claimant herself had referred to the fact that she only did stupid things when drunk and that the complaints about her had related to alcohol abuse and noise. The BIJ article had primarily concerned an analysis of committal proceedings, and the DRC Report had referred to ADHD primarily in relation to children, rather than adults; its evidence base and findings had been limited. At its highest, the DRC Report had expressed '*some degree of certainty*' as to its conclusions, which fell apart when one considered the studies reviewed, relating as they did to cohorts within which the Claimant did not fall, being children with ADHD. Acknowledging that the Defendant's own data on disqualification under rule (d) was limited, it, too, did not support a finding of group disadvantage. The court ought to be very cautious when making findings in connection with sections 19(2)(b) or (c).

70. Ms Cullen invited the court to look at the evidence which had been before the decision-maker, as exhibited to his witness statement, which had included a statement from a police officer which had referred to the Claimant's drinking; to the fact that she had been permanently drunk and abusive to neighbours; and to an altercation with a resident in which she had described herself as having been drunk, said to demonstrate numerous links between her behaviour and her use of alcohol, leading to the possession proceedings and the Defendant's decision to exclude her from the register. Thus, even if she were able to establish group disadvantage, a central reason for her disqualification under rule (d) had been her alcohol use, and her failure to have addressed it. That was



akin to the example, given in *Essop* [32], of the applicant who had not passed the exam because she had not prepared for it, or shown up on time.

71. Ms Cullen submitted that Mr Bano's submission as to self-medication was wrong in law; alcohol dependency fell within the conditions excluded from protection under the EqA, such that, where a disability caused a person to act in a way which fell within that exclusion, the latter would bite, in connection with sections 19 and 15: *C and C v The Governing Body of a School* [2018] UKUT 269.
72. On the question of justification, the focus was on whether lesser measures would suffice, the legitimacy of the Defendant's aim having been accepted by the Claimant. The decision-maker's witness statement had set out the seriously detrimental impact on those who suffered anti-social behaviour, and the resources and public money spent in connection with it. Examples of how those having a similarly protected characteristic might seek to address their behaviour had been provided. When considering justification, one should consider the policy as a whole, the safety valves and assistance available within it, and the way in which they were of benefit to those having particular protected characteristics, were those individuals not disqualified: see *R (H) v Ealing LBC* [2017] EWCA Civ 1127 [56] and [59]. The Defendant's policy made clear that it did not cover referrals to extra care, supported or other specialist housing. The Claimant had rejected a referral to supported housing (on her case because she was not at the requisite level of disadvantage). Whilst the court had no evidence of the qualifying criteria for other policies, the existence of the latter provided evidence of some safety valve for those falling outside the allocations policy and fell to be considered in tandem with the decision-maker's evidence that they afforded an option for anyone disqualified under rule (d). Within the allocations policy itself, Band A made provision for individuals having severe and enduring mental health issues significantly affected by their current accommodation, albeit that the Claimant herself was unlikely to fall within that category, though she might fall within category (c): *'The Applicant is ready to move on from approved supported housing within Eastbourne and the appropriateness and need for a social tenancy has been confirmed by the Council'*. Read as a whole, the policy might advantage some individuals with disabilities, though it was acknowledged that there would be individuals with ADHD and ASD who lacked that level of disability. For those individuals, priority Band B would apply, which, amongst others, encompassed category (h): *'Applicants who are owed a full housing duty under s193 Housing Act 1996, and living in temporary accommodation on licence or on a non-secure tenancy'*. The availability of direct lets, in exceptional circumstances, also provided a safety valve, as did the ability to reapply for those who were able to address their behaviour, whose earlier unacceptable behaviour ought not to be held against them.
73. In Ms Cullen's submission, the recommendations made by Professor Fox as to how anti-social behaviour might be addressed primarily related to behaviour subsequent to allocation. It was for that reason that no lesser measure would achieve the Defendant's legitimate aims, including to prevent such behaviour. The position adopted in Wales was not of assistance, because the Welsh Government had not introduced the changes made in England by the Localism Act 2011. The Welsh Government might take a very different view as to whether those who exhibited anti-social behaviour ought to be accommodated, or whether local authorities ought to have the prevention of anti-social behaviour as an objective. The issue here, on which the court ought to focus, was

whether the lesser measure proposed would achieve the Defendant's aims. In considering the justification for rule (d), the court could consider whether there were measures which could be put in place to address the relevant behaviour.

*Ground Three*

74. Ms Cullen submitted that Mr Bano's reliance upon the words 'in extremis' in the review letter was misplaced. Its proper meaning had been explained by the decision-maker in his witness statement. When making the decision, Mr Hall had had before him the extensive attempts to assist the Claimant which had been made in the possession proceedings. The court was invited to apply the 'benevolent approach' required by *Holmes-Moorhouse v Richmond upon Thames* [2009] UKHL 7 [50], and to decline to 'take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach'. The short point was that the scheme had been applied correctly to the circumstances of the Claimant's case. If she were right in her submission as to the narrow construction of rule (d), it would have made no difference to the decision taken.

*Ground Four*

75. Ms Cullen submitted that, pursuant to section 191 of, and Schedule 22 to, the EqA, there would be no contravention of Part 3 of the EqA, 'if a person ('P') does anything P must do pursuant to a requirement of an enactment'. In this case, the Defendant was obliged to allocate in accordance with its scheme, per section 166A(14) HA 1996. If it considered the rule (d) test to be met, it could not allow the Claimant to join the housing register, albeit that it could make a direct allocation in exceptional circumstances. Thus, even if the requirements of section 15 of the EqA were found to have been made out, the Defendant's approach would not constitute a contravention of that section.

76. Furthermore, here, too, Ms Cullen prayed in aid the asserted paucity of relevant evidence. There had been an insufficient connection demonstrated between the Claimant's disabilities and the conduct which had led, first, to the possession order and, then, to her exclusion from the register. On the issue of proportionality, including consideration of the impact of anti-social behaviour on others, the decision-maker's statement was instructive. If the Claimant were permitted to join the register and be rehoused, having failed to address her alcohol abuse, a vicious circle would result. The Defendant had offered to refer her to supported housing, or to a detox program, if she were willing to engage.

*Ground Five*

77. As a preliminary matter, Ms Cullen challenged the Claimant's shift in position on this ground. As originally put, her contention had been that the duty to make a *reasonable* adjustment had been owed to her alone. As the law stood (see *R (Rowley)*), that would have warranted the dismissal of ground five. Her change of position, to the effect that the duty was owed to a class of people, had first been advanced in Mr Bano's skeleton argument, served 21 days prior to the hearing. Accordingly, the Defendant 'might have been' prejudiced and, had the case originally been advanced in the way now put, might have gone into further detail in its evidence, and led evidence on the form which a reasonable adjustment might take, though it was not submitted that it had lacked sufficient time in which to do so, albeit that the Defendant had struggled to obtain disclosure from the Claimant. In Ms Cullen's submission, in the allocations arena, it

was not for the court to search for possible reasonable adjustments, but to assess those proposed by a claimant.

78. Substantively, Ms Cullen submitted that ground five was only engaged if the Defendant's interpretation of rule (d) were accepted. The sub-group to which any duty was owed was 'people disabled in the same way': *R (Rowley)* [24]. In other cases, it has been widely drawn (see *R (Nur)* [151], in which it was considered that the court had to '*look at the position of disabled persons generally, and not just persons who have the particular disability suffered by [the particular claimant]*'). In this case, the sub-class, as formulated in the Claimant's skeleton argument, was problematic. It was unclear what was meant by behavioural disabilities; would it extend to those having eating disorders, or addictions (a number of which would not fall within section 6 of the EqA)? A disability such as ADHD or autism was not easily classified as being simply behavioural. Should the court consider that disabled persons generally constituted too broad a class, in *MM* [1] the class had been defined to comprise mental health patients (those having impaired mental, cognitive or intellectual difficulties).
79. Questions of disadvantage and the lack of evidence had already been addressed under ground two.
80. In his skeleton argument, Mr Bano had asserted that the appropriate reasonable adjustment would have been to waive rule (d) in cases of behavioural disability. In oral submissions, his position had shifted to the need for a discretion to do so. That would not have been a reasonable adjustment, whether generally, or in relation to the Claimant, for the reasons outlined by Mr Hall in his witness statement. The safety valves which the scheme as a whole contained ought to inform the nature of any reasonable adjustment advanced. Here again, the Claimant's failure to have addressed her alcohol use meant that any explicit discretion would have made no difference to the Defendant's concerns. If a duty was owed under section 20 of the EqA, and was breached by the Defendant, that breach had made no difference to the outcome, given the absence of evidence that the behaviour which had led to the possession proceedings, and the Claimant's subsequent disqualification under rule (d), had been due to her disabilities. If she were to be entitled to a remedy, the Claimant had to show that there was, at least, a real prospect that the proffered reasonable adjustment would have made a difference: *R (VC) v SSHD* [2018] EWCA Civ 57 [177].

#### *Ground Six*

81. Here again, the merit in this ground was said to come down to the proper construction of rule (d). This was not a case in which unpublished guidance had been applied; the policy itself had made sufficient provision for the exercise of discretion.

#### *Remedy*

82. Ms Cullen submitted that, if ground one were made out, it was highly likely that the same conclusion would have been reached. Regarding ground three, if the Defendant had failed to apply the policy, it had done so only in a way which had operated to the Claimant's advantage. Similarly, if upheld, grounds four and five would have made no difference, for reasons addressed in the course of addressing those grounds. If the grounds relating to the policy itself were made out, the court should refuse to grant a remedy and, in particular, a quashing order, given that the policy was to be reviewed imminently in any event. The court should not award damages under the EqA, or

transfer the matter to the County Court for that purpose. If the High Court had already made a determination as to unlawfulness, that would be material to the County Court's disposal, pursuant to section 119(6) of the EqA. That should have a bearing on this court's exercise of its discretion as to transfer, as should any remedy granted in relation to section 19 of the EqA. The question of whether transfer was appropriate had been addressed in *R (Rowley)* by Fordham J.

83. In all the circumstances, submitted Ms Cullen, the claim should be dismissed.

*For the Claimant in reply*

84. Mr Bano made two points in reply.

85. First, he submitted that the fetter of discretion was important independently of the EqA considerations. The court was invited to follow the Court of Appeal in *Holley*, even though it had left the question open in that case. The better view, he submitted, was that expressed in *R (Adath Yisroel Burial Society)* [79]ff, the principle in which applied where, as here, the relevant power *derived from* statute. The principal distinction drawn had been that between statutory and prerogative discretion.

86. Secondly, regarding remedy, he submitted that, were grounds two, four or five to succeed, there must be a remedy because the court would have found either an unjustified discriminatory PCP, or unjustified discrimination, contrary to section 15 or 20 of the EqA. That would entitle the Claimant to a declaration and damages (this being, he contended, a middle band *Vento*<sup>1</sup> case) and, probably, to a quashing order. As unlawful discrimination is not to be tolerated, it is difficult to contend for a de minimis approach. The test under section 31(2A) of the Senior Courts Act 1981 was whether it was highly likely that there would have been a different outcome. Here, Mr Bano submitted, the allocations decision might well have been the same, but the different outcome would have been the absence of unlawful discrimination, though he could provide no authority in support of his proposition that that would suffice.

87. Mr Bano submitted that the cases in which section 31(2A) has been applied had tended to be process cases, or procedural challenges. There had been some consideration of the application of section 31(2)(a) in *TM v Metropolitan Housing Trust Limited* [2022] 1 WLR 2161, CA [55], but it had not advanced matters much further. In any event, it was, generally, dangerous to second guess how a public body would reach a decision, and the more so in this case, where the Defendant had so strongly resisted any discretion over disqualification once unsuitability to be a tenant had been found. Mr Bano accepted, in principle, that section 31(2)(a) of the Senior Courts Act 1981 could apply to grounds three and six, and that any relief granted in relation to those grounds would be likely to be declaratory, rather than a quashing order.

## **Discussion and conclusions**

*The HA 1996*

88. I begin with a consideration of the Defendant's statutory obligations, under the HA 1996. By section 159 (situated within Part VI of the Act), a local housing authority is obliged to comply with the provisions of Part VI in allocating housing accommodation, subject to which it may allocate housing in such manner as it considers appropriate.

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<sup>1</sup> *Vento v The Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871

89. Section 160ZA provides for the position in England:

**160ZA Allocation only to eligible and qualifying persons in England**

- (1) A local housing authority in England shall not allocate housing accommodation—
  - (a) to a person from abroad who is ineligible for an allocation of housing accommodation by virtue of subsection (2) or (4), or
  - (b) to two or more persons jointly if any of them is a person mentioned in paragraph (a).
- (2) ...
- (3) ...
- (4) ...
- (5) ...
- (6) Except as provided by subsection (1), a person may be allocated housing accommodation by a local housing authority in England (whether on his application or otherwise) if that person—
  - (a) is a qualifying person within the meaning of subsection (7), or
  - (b) is one of two or more persons who apply for accommodation jointly, and one or more of the other persons is a qualifying person within the meaning of subsection (7).
- (7) Subject to subsections (2) and (4) and any regulations under subsection (8), a local housing authority may decide what classes of persons are, or are not, qualifying persons.
- (8) The Secretary of State may by regulations—
  - (a) prescribe classes of persons who are, or are not, to be treated as qualifying persons by local housing authorities in England, and
  - (b) prescribe criteria that may not be used by local housing authorities in England in deciding what classes of persons are not qualifying persons.
- (9) If a local housing authority in England decide that an applicant for housing accommodation—
  - (a) is ineligible for an allocation by them by virtue of subsection (2) or (4), or

(b) is not a qualifying person,

they shall notify the applicant of their decision and the grounds for it.

(10)...

(11) A person who is not being treated as a qualifying person may (if he considers that he should be treated as a qualifying person) make a fresh application to the authority for an allocation of housing accommodation by them.

90. The position as it applies in Wales is set out in section 160A of the HA 1996, which provides (materially):

**160A Allocation only to eligible persons: Wales**

(1) A local housing authority in Wales shall not allocate housing accommodation—

(a) ...;

(b) to a person who the authority have decided is to be treated as ineligible for such an allocation by virtue of subsection (7); or

(c) to two or more persons jointly if any of them is a person mentioned in paragraph (a) or (b).

(2) Except as provided by subsection (1), any person may be allocated housing accommodation by a local housing authority in Wales (whether on his application or otherwise).

(3) ...

(4) ...

(5) ...

(6) ...

(7) A local housing authority in Wales may decide that an applicant is to be treated as ineligible for an allocation of housing accommodation by them if they are satisfied that—

(a) he, or a member of his household, has been guilty of unacceptable behaviour serious enough to make him unsuitable to be a tenant of the authority; and

(b) in the circumstances at the time his application is considered, he is unsuitable to be a tenant of the authority by reason of that behaviour.

(8) The only behaviour which may be regarded by the authority as unacceptable for the purposes of subsection (7)(a) is behaviour of the person concerned which would (if that person were a contract-holder of the authority) breach section 55 of the Renting Homes (Wales) Act 2016 (anti-social behaviour and other prohibited conduct).

(9) If a local housing authority in Wales decide that an applicant for housing accommodation—

(a) is ineligible for an allocation by them by virtue of subsection (3) or (5); or

(b) is to be treated as ineligible for such an allocation by virtue of subsection (7),

they shall notify the applicant of their decision and the grounds for it.

(10)...

(11) A person who is being treated by a local housing authority in Wales as ineligible by virtue of subsection (7) may (if he considers that he should no longer be treated as ineligible by the authority in Wales) make a fresh application to the authority in Wales for an allocation of housing accommodation by them.

91. In all respects material for current purposes, that section mirrors section 160A of the HA 1996 as it had stood prior to amendment by the Localism Act 2011, in which subsections (7) and (8) had provided:

(7) A local housing authority may decide that an applicant is to be treated as ineligible for an allocation of housing accommodation by them, if they are satisfied that –

(a) he, or a member of his household, has been guilty of unacceptable behaviour, serious enough to make him unsuitable to be a tenant of the authority; and

(b) in the circumstances at the time his application is considered, he is unsuitable to be a tenant of authority by reason of that behaviour.

(8) The only behaviour which may be regarded by the authority as unacceptable for the purposes of subsection (7)(a) is –

- (a) behaviour of the person concerned which would (if he were a secure tenant of the authority) entitle the authority to a possession order under section 84 of the Housing Act 1985 (c. 68) on any ground mentioned in Part 1 of Schedule 2 to that Act (other than ground 8); or
- (b) behaviour of a member of his household which would (if he were a person residing with a secure tenant of the authority) entitle the authority to such a possession order.

92. Sections 84 and 84A of the HA 1985, and Part 1 of Schedule 2 to that Act provide:

**84 Grounds and orders for possession.**

- (1) The court shall not make an order for the possession of a dwelling-house let under a secure tenancy except on one or more of the grounds set out in Schedule 2 or in accordance with section 84A (absolute ground for possession for anti-social behaviour) or section 107D (recovery of possession on expiry of flexible tenancy).
- (2) The court shall not make an order for possession—
  - (a) on the grounds set out in Part I of Schedule 2 (grounds 1 to 8), unless it considers it reasonable to make the order,
  - (b) ...,
  - (c) ....
- (3) ....
- (4) ...

**84A Absolute ground for possession for anti-social behaviour**

- (1) If the court is satisfied that any of the following conditions is met, it must make an order for the possession of a dwelling-house let under a secure tenancy.

This is subject to subsection (2) (and to any available defence based on the tenant's Convention rights, within the meaning of the Human Rights Act 1998).

- (2) Subsection (1) applies only where the landlord has complied with any obligations it has under section 85ZA (review of decision to seek possession).
- (3) Condition 1 is that—



- (a) the tenant, or a person residing in or visiting the dwelling-house, has been convicted of a serious offence, and
- (b) the serious offence—
  - (i) was committed (wholly or partly) in, or in the locality of, the dwelling-house,
  - (ii) was committed elsewhere against a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or
  - (iii) was committed elsewhere against the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and directly or indirectly related to or affected those functions.
- (4) Condition 2 is that a court has found in relevant proceedings that the tenant, or a person residing in or visiting the dwelling-house, has breached a provision of an injunction under section 1 of the Anti-social Behaviour, Crime and Policing Act 2014, other than a provision requiring a person to participate in a particular activity, and—
  - (a) the breach occurred in, or in the locality of, the dwelling-house, or
  - (b) the breach occurred elsewhere and the provision breached was a provision intended to prevent—
    - (i) conduct that is capable of causing nuisance or annoyance to a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or
    - (ii) conduct that is capable of causing nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.
- (5) Condition 3 is that the tenant, or a person residing in or visiting the dwelling-house, has been convicted of an offence under section 30 of the Anti-social Behaviour, Crime and Policing Act 2014 or section 339 of the Sentencing Code consisting of a breach of a provision of a criminal behaviour order prohibiting a person from doing anything described in the order, and the offence involved—

- (a) a breach that occurred in, or in the locality of, the dwelling-house, or
  - (b) a breach that occurred elsewhere of a provision intended to prevent—
    - (i) behaviour that causes or is likely to cause harassment, alarm or distress to a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or
    - (ii) behaviour that causes or is likely to cause harassment, alarm or distress to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.
- (6) Condition 4 is that—
- (a) the dwelling-house is or has been subject to a closure order under section 80 of the Anti-social Behaviour, Crime and Policing Act 2014, and
  - (b) access to the dwelling-house has been prohibited (under the closure order or under a closure notice issued under section 76 of that Act) for a continuous period of more than 48 hours.
- (7) Condition 5 is that—
- (a) the tenant, or a person residing in or visiting the dwelling-house, has been convicted of an offence under—
    - (i) section 80(4) of the Environmental Protection Act 1990 (breach of abatement notice in relation to statutory nuisance), or
    - (ii) section 82(8) of that Act (breach of court order to abate statutory nuisance etc.), and
  - (b) the nuisance concerned was noise emitted from the dwelling-house which was a statutory nuisance for the purposes of Part 3 of that Act by virtue of section 79(1)(g) of that Act (noise emitted from premises so as to be prejudicial to health or a nuisance).
- (8) Condition 1, 2, 3, 4 or 5 is not met if—

- (a) there is an appeal against the conviction, finding or order concerned which has not been finally determined, abandoned or withdrawn, or
  - (b) the final determination of the appeal results in the conviction, finding or order being overturned.
- (9) In this section—
- “relevant proceedings” means proceedings for contempt of court or proceedings under Schedule 2 to the Anti-social Behaviour, Crime and Policing Act 2014;
  - “serious offence ” means an offence which—
    - (a) was committed on or after the day on which subsection (3) comes into force,
    - (b) is specified, or falls within a description specified, in Schedule 2A at the time the offence was committed and at the time the court is considering the matter, and
    - (c) is not an offence that is triable only summarily by virtue of section 22 of the Magistrates' Courts Act 1980 (either-way offences where value involved is small).
- (10) The Secretary of State may by order amend Schedule 2A as it applies in relation to dwelling-houses in England by—
- (a) adding an indictable offence;
  - (b) removing an offence.
- (11) .....
- (12) An order under subsection (10) ...—
- (a) is to be made by statutory instrument;
  - (b) may make different provision for different purposes;
  - (c) may include incidental, supplementary, consequential, transitional or saving provision.
- (13) A statutory instrument containing an order under subsection (10) ... may not be made unless a draft of the instrument has been laid before and approved by a resolution of—

- (a) each House of Parliament (in the case of an order of the Secretary of State)...
- (b).....

**Schedule 2**

**Part I Grounds on which Court may Order Possession if it Considers it Reasonable**

*Ground 1*

Rent lawfully due from the tenant has not been paid or an obligation of the tenancy has been broken or not performed.

*Ground 2*

The tenant or a person residing in or visiting the dwelling-house—

- (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality,
- (aa) has been guilty of conduct causing or likely to cause a nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions, or
- (b) has been convicted of—
  - (i) using the dwelling-house or allowing it to be used for immoral or illegal purposes, or
  - (ii) an indictable offence committed in, or in the locality of, the dwelling-house.

*Ground 2ZA*

The tenant or an adult residing in the dwelling-house has been convicted of an indictable offence which took place during, and at the scene of, a riot in the United Kingdom.

- “ adult ” means a person aged 18 or over;
- “ indictable offence ” does not include an offence that is triable only summarily by virtue of section 22 of the Magistrates' Courts Act 1980 (either way offences where value involved is small);
- “ riot ” is to be construed in accordance with section 1 of the Public Order Act 1986.

This Ground applies only in relation to dwelling-houses in England.

...

93. By section 166A of the HA 1996, every local housing authority in England: (1) must, inter alia, have a scheme (its ‘allocation scheme’) for determining priorities and as to the procedure to be followed in allocating housing accommodation; (2) subject to specified subsections, and to any regulations made thereunder, may decide the principles on which the scheme is to be framed; and (3) must not allocate housing accommodation except in accordance with its allocation scheme. Section 169 of the HA 1996 provides that, in the exercise of their functions under Part VI, local authorities shall have regard to such guidance as may from time to time be given by the Secretary of State, who may give guidance generally, or to specified descriptions of authorities.
94. In March 2016, the Welsh Government issued guidance for local authorities on the allocation of accommodation and homelessness, which (1) included consideration of the three-stage test of unacceptable behaviour to be applied before an authority could use its power to decide that an applicant was ineligible for allocation or would be given no preference; (2) provided that there was no obligation on a local authority to treat an applicant as ineligible by reason of his behaviour, or that of a household member; and (3) set out the Welsh Government’s requirements for local authorities which were developing policies on unacceptable behaviour. To the extent relevant, I shall return to consider the Welsh guidance later in this judgment.

*The Defendant’s allocation policy and the point of construction*

95. The Defendant’s allocation policy, dated June 2018, was implemented at a time when section 160ZA(7) of the HA 1996 was in force, permitting local authorities in England to decide which classes of person were, or were not, qualifying persons. The salient parts of the policy have been recited above and reflect an apparent intention to adopt an approach similar to that for which sections 160A(7) and (8) of the HA 1996 had provided, prior to their repeal. Rule (d) applicants, who, amongst others, do not qualify to join the housing register, are initially defined as ‘*applicants whose anti-social behaviour (ASB) is serious enough to make them unsuitable to be a tenant*’, a definition which is considered on the following page, under the heading, ‘*Applicants whose anti-social behaviour is serious enough to make them unsuitable to be a tenant do not qualify.*’ That, too, makes clear the overarching test to be satisfied. The five paragraphs which follow are, undoubtedly, poorly drafted. The first repeats the overarching need for behaviour which is (1) unacceptable; and (2) serious enough to make the applicant unsuitable to be a tenant of the council. The second identifies types of behaviour which ‘*can*’ be regarded as unacceptable ‘*for these purposes*’ (and the use of permissive, rather than mandatory, language is to be noted) as including that which would ‘*have entitled the Council to a possession order under certain Grounds contained in the Housing Act 1985*’. It does not articulate which grounds, nor, in terms, the requirements imposed by the relevant statutory provisions. Whilst, at first blush, the linguistic focus of the first to third paragraphs of the rule might appear to be on the nature of the applicant’s behaviour per se, rather than on its causative or contributory factors, or effect for the purposes of legal proceedings, the policy is to be read in a common sense way and not to be construed as one would a statute, or parsed in such a manner, in particular given the wording of the fourth paragraph: ‘*The test is whether the behaviour would have entitled the Council to a possession order if, whether actually or notionally, the Applicant had been a secure tenant.*’ It is that ‘test’ which gives rise to the Defendant’s argument that the policy obliges the decision-maker to consider not only the nature of the behaviour itself, but whether it would have entitled the Defendant to a possession

order, itself said to extend to a consideration of all factors to which a court must have regard in determining that latter question, encompassing, where relevant, the impact of the applicant's personal circumstances, including any disability. On balance, I incline to the view that that construction is correct, for the following reasons:

- a. The reference in rule (d) to the HA 1985 and to the entitlement to a possession order thereunder is suggestive of the need for the reasonableness of such an order to be considered, in accordance with sections 84(1) and (2) of that Act. That is underlined by the wording of the fourth paragraph of rule (d), whereby the focus is, once again, on whether the relevant unacceptable behaviour would have entitled the council to an order for possession. Under section 84(2)(a), there can be no entitlement to an order on the grounds set out in Part 1 of Schedule 2, unless the court considers it reasonable to make one. As Ms Cullen submitted, and Mr Bano did not demur, depending on the facts an applicant's mental health and any disability would be factors, amongst others, of potential relevance to that issue.
- b. Mr Bano's objection that a judge determining whether to make a possession order would be addressing a question fundamentally different from whether an applicant should be rehoused lacks force; the test for which rule (d) provides is framed by reference to the Defendant's entitlement to an order for possession and there is no irrationality challenge to that test.
- c. Nor do I accept that, even on the Claimant's construction of rule (d), the question for the Defendant under the scheme is one of simple fact. As the heading and first paragraph of rule (d) make clear, an applicant will not qualify if s/he, or a member of his or her household, is *'guilty of unacceptable behaviour serious enough to make them unsuitable to be a tenant of the Council'*. Whether framed in that way, or as set out in the fourth paragraph of the rule, the rule requires evaluation of, at least, (1) the nature of the relevant behaviour; and (2) whether it is sufficiently serious to render the applicant unsuitable to be a tenant of the Defendant council. That is very different from the assessment of eligibility required by, for example, rule (a) in the same section of the policy: *'Applicants without a local connection to the Eastbourne borough'* (the definition of 'local connection' being set out later in the policy). I do not accept that the fact that a possession order has already been made on the basis of anti-social behaviour at the time at which an application is being considered would inevitably mean that the rule (d) test was satisfied. Whilst, in such cases, the evaluative exercise is unlikely to prove taxing, I note that paragraph 2.33 of the Welsh code of guidance provides (with emphasis added), *'Authorities will need to satisfy themselves that there has been unacceptable behaviour which falls within the definition of s160A(8) of the 1996 Act. If a court has already made a possession order on one of the discretionary grounds, or on the absolute ground, then an authority may accept that as evidence of unacceptable behaviour, and proceed to paragraphs (ii) and (iii) below'*, indicating that the fact of a possession order made on one of the specified grounds does not oblige the council to conclude that there has been the requisite unacceptable behaviour, though would permit it to do so. The wording of the second paragraph of rule (d), on its face, admits of the same approach. There is nothing inherently illogical about that position, which recognises that the evaluation both of the

character of the behaviour in question, and of whether it renders the applicant unsuitable to be a tenant of the Defendant, is a matter for the Defendant, rather than for the court. It is itself indicative of the entitlement conferred by rule (d) to take account of the Applicant's personal circumstances, including as they exist at the time at which the application is being considered, which, inevitably on this hypothesis, would post-date the order for possession.

- d. The construction which I have found to be correct is also that which best accords with the fifth paragraph of the policy rule. Although, as the Defendant acknowledged, that paragraph is forward-looking, in relating to a fresh application, it states (with emphasis now added) that, '*Unless there has been a considerable lapse of time it will be for the Applicant to show that their circumstances or behaviour have changed...*' As any fresh application would itself be considered having regard to the test in rule (d), it would follow that account may be taken of an applicant's personal circumstances when determining whether that test is met, yet, on the Claimant's construction of the rule, the sole focus would be on the character of the behaviour itself.
- e. Thus, inherent in rule (d) is the decision-maker's need to have regard to all factors to which a court would have regard when determining whether it would be reasonable to grant a possession order under the HA 1985. Once the 'test' is found to have been met, there is no residual discretion as to its consequence, but all of the factors to which the Claimant submits that a residual discretion should enable the Defendant to have regard will have been considered in order to determine that the relevant behaviour would have entitled the Defendant to a possession order. In short, a discretion as to an applicant's eligibility to join the housing register is built into the framework of the test.
- f. Such a construction is also more favourable to an applicant than is that for which the Claimant contends, and allows for 'a sensible degree of flexibility when it comes to dealing with individual cases' (*R (Flores)* [40], citing *R (Ariemuguvbe)* [31]). In such circumstances, unless the language of the policy compelled me to do so, it would not be appropriate to adopt the narrower construction.

96. Against that background, I turn to consider the grounds of review.

### **Ground One**

97. In issue between the parties is whether there is a requirement that a housing allocation scheme contain a residual discretion to make extraordinary decisions in appropriate cases. I have found that a discretion to consider all relevant circumstances is inherent in the rule (d) test. Recognising that the discretion for which the Claimant contends is one which would enable waiver of the rule, if the test were found to have been satisfied, I must first consider whether the law requires that such a discretion form part of the scheme. The Claimant submits that strong support for such a requirement is to be found in *Holley v Hillingdon BC* [27] and that a number of cases support the existence of a requirement that a housing scheme cannot unlawfully fetter the council's discretion by being over-rigid or inflexible. The Defendant accepts that there should be no fetter on any discretion required, but contends that its policy is neither over-rigid, nor inflexible.

98. Having regard to the case law on which each party relies:

- a. There is limited material to be mined from *Holley*, in relation to the first issue raised by ground one. At [27], Briggs LJ (as he then was) disagreed with the respondent's primary submission that the effect of *R (Ahmad)* had been to do away with any requirement for the inclusion of a residual discretion within a housing allocation scheme. He observed that the allocation scheme under review in *Ahmad* plainly had contained provision for the exercise of a residual discretion, but that the challenge had been based on irrationality, rather than on the unlawful fettering of discretion, and that, as such, the case did not provide a short answer to the latter question, albeit requiring the court to think long and hard before finding that an allocations policy was unlawful. In the event, it was held that whether the allocation policy in *Holley* conferred a sufficiently general residual discretion depended upon a deeper analysis of the relevant authorities than had been undertaken during the hearing of that appeal, but that the question did not need to be decided in that case.
- b. As characterised in *Holley*, the challenge in *Ahmad* was advanced on the ground of irrationality, not in issue here. Nevertheless, at [62], Lord Neuberger held:

‘This point also highlights how inapt it is for the courts to interfere with housing allocation schemes, save in clear and exceptional circumstances. This follows from the striking imbalance between supply and demand for housing, the very large number of families with an urgent need to be housed under Part VI of the 1996 Act, and the almost infinite number of different permutations of circumstances giving rise to the urgency. 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 [the local authority].’

- c. In *R (YA)* [89] Peter Marquand, sitting as a Deputy Judge of the High Court, observed, as a fact, that the existence of a discretion in that case allowed consideration of special circumstances and avoided a blanket application of the relevant section of the allocations policy. He did so in the course of considering whether the discrimination which he had found had been justified and did not address whether such a requirement was imposed, as a matter of law.
- d. In *R (Yazar)*, Simon J characterised the root of the challenge to the defendant's housing allocation scheme as being that it was obliged to have a fair, transparent and rational policy for assessing housing need and allocations and that it did not have such a scheme [5]. At [47], he held that, ‘*It is rightly conceded that the [decision letter] disclosed the application of a policy which was plainly flawed, since it implied a fetter on discretion and the application of uncertain criteria*’, but, no doubt in light of that concession, undertook no analysis of the legal basis for it.



- e. In *R (Conway)*, the challenge was to a housing allocations policy which declared ineligible for entry on the housing register, ‘*Any person under sixty years of age or their partner who is a tenant of a Local Authority or Registered Social Landlord.*’ The policy did not concern an allocation within Part VI of the HA 1996. Wilson J held:

20. In *R v Canterbury City Council ex p. Gillespie* (1986) 19 HLR 7 the claimant, who was the joint tenant with her ex-cohabitant of accommodation owned by Thanet District Council which she had vacated but in which he and a child remained living, applied to the defendants for entry on their housing register. They told her that their policy was not to accept an application from an existing tenant of another local authority. Thereupon she tried to relinquish her tenancy but Thanet District Council refused to allow her to do so because of arrears of rent. In due course the defendants allowed her to be entered on the register but recast their policy so as, subject to two immaterial exceptions, to preclude the allocation of accommodation to anyone on the register who was a tenant of another local authority. The defendants’ resolution, in accordance with that policy, not to give further consideration to the claimant’s application was quashed. At 15 Simon Brown J, as he then was, said:

“In my judgment, this challenge succeeds not essentially because the policy is intrinsically irrational, but rather because it constitutes a rule which requires to be followed slavishly rather than merely a stated general approach which is always subject to an exceptional case and which permits each application to be individually considered.

Counsel for the applicant recognises that a public authority such as this respondent council is well entitled to adopt a general policy as to how it will exercise its statutory powers and discharge its statutory duties ...

[He] recognises that the council could have worded the policy here in language which would have been proof against successful legal challenge provided only and always that it admitted of the possibility of there being exceptional cases and provided that it was not applied in such a way as to preclude the authority from the need to examine each individual application.

As I have indicated, however, those provisos were not here satisfied.”

21. ...
22. I am clear that it would be unlawful for the defendants to apply their new policy in such a way as to preclude their acceptance of an application which fell foul of it but of which the

circumstances were exceptional. But does that mean that I should declare the policy itself to be unlawful? It seems to me that there are two possibilities. Either I could say that the absence from the terminology of the new policy of any proviso for exceptional circumstances makes the policy unlawful. Or I could say that the policy is lawful, provided that the defendants never forget that indeed it is but policy which, of its nature, must never be so applied as to preclude acceptance in exceptional circumstances of an application which falls foul of it. I prefer to say the latter.’

- f. The circumstances giving rise to *Gillespie* appear from the passage cited immediately above. The relevant powers and duties in that case derived from the Housing Act 1957. Simon Brown J characterised the challenged raised thus:

‘The essential basis upon which the applicant challenges the respondent's continuous stance, as manifested in their various decision letters to which I have referred, throughout the long period of this dispute, is that the respondents have fettered their discretion by adopting and implementing a fixed policy which precludes their giving proper individual consideration to such cases as fall within that policy. Putting it slightly differently, the complaint is that the adoption of the policy operates as a rule and precludes the authority taking into consideration all the relevant matters upon any individual application.’

- g. In *Hussain*, Turner J held that the absence of a discretion to disapply a particular rule in a housing allocations policy devised in connection with Part VI of the 1996 Act, which had related to removal of the applicant from the housing register (by way of two-year suspension), constituted an unreasonable fetter on the discretion of the local authority, though he did not identify or address the legal basis upon which he had concluded that a discretion was required.
- h. In addition to the cases arising in the housing allocations context, summarised above, the Claimant relies upon the dicta of Singh LJ in *R (Adath Yisroel Burial Society)* [77] to [78] (emphasis added):

### **‘Issue 1: Fettering of discretion**

77. It is a well-established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers.

78. The principle was stated in the following way by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407, 496–497:

“When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power nunc pro tunc. By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise.

“These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases: see *R v Port of London Authority, Ex p Kynoch Ltd* [1919] 1 KB 176; *British Oxygen Co Ltd v Board of Trade* [1971] AC 610 . But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful ...’

It is convenient to observe here that the construction of rule (d) which I have found to be correct would not rule out of consideration factors which may be relevant to its exercise. I shall return to consider *R (Adath Yisroel Burial Society)* having considered *Hillsden*, below.

- i. Acknowledging the principles set out in *Gillespie* and *Conway* in particular, Ms Cullen relied upon an obiter dictum of Lewison LJ in *R(Z)* [84]:

‘The last argument asserted that [the] policy was a blanket policy, and that the Divisional Court were wrong to hold otherwise. It was not clear to me where acceptance of this argument would lead. In answer to a question from Sir Stephen Richards, Mr Wise accepted that, even if the policy were a blanket one, that would not necessarily invalidate it...’

*R(Z)* concerned the practice of a housing association, which had been invested with the final decision as to whether a property would be allocated to a particular applicant, of allocating social housing only to members of the Orthodox Jewish community. Absent identification of the question posed by the court in the passage cited above, it is difficult to draw any meaningful conclusion from the above comment, made in the course of the court’s consideration of the relevant policy’s aim and its legitimacy, but Ms Cullen further relied upon the judgment of Lord Sales JSC, in the Supreme Court [2020] UKSC 40 [77] (emphasis my own):

‘...Lewison LJ rightly rejected (at paras 84-85) a further criticism made by Mr Wise, that the Divisional Court was wrong to dismiss his argument that AIHA’s allocation policy was an illegitimate “blanket policy”. There is some flexibility in the policy as it is formulated, in that it allows for AIHA to allocate properties to non-members of the Orthodox Jewish community if AIHA has properties surplus to the demand from that community. However, in circumstances in which demand from that community far exceeds supply, allocation to non-members is not a realistic prospect in the foreseeable future. As Lewison LJ pointed out, the market circumstances are such that AIHA’s allocation policy (in combination with the limited number of properties AIHA owns) does not achieve the aim of meeting the needs of the Orthodox Jewish community in Hackney, but only goes some way towards achieving that aim. There are still many Orthodox Jews in Hackney whom AIHA cannot accommodate and who still suffer the disadvantages associated with the relevant protected characteristic. Unless and until the aim of elimination of such disadvantages is achieved, it would be proportionate for AIHA to operate a simple “blanket policy” to allocate its properties to members of the Orthodox Jewish community as a means of promoting that legitimate aim. So even though market circumstances give AIHA’s policy, in practice, a “blanket” effect, that does not show that it is a measure which is disproportionate to that aim.’

As the emphasised text makes clear, the Supreme Court was not there opining that there could be no objection in law to the adoption of a blanket allocations policy per se, but that the application of a policy in such a way, on the right facts, could be capable of justification as a measure proportionate to the policy’s aim. That is a separate question which is not engaged by ground one in this case.

- j. In *Hillsden*, McCloskey J observed [4] that Epping Forest Council had *‘consistently maintained the stance that the Claimant, by virtue of the terms of the impugned Scheme, does not qualify for admission to its Housing Register and, therefore, cannot be considered for allocation of any Council or registered social landlord (per s 159 of the Housing Act, 1996).*’ Amongst the challenges raised to the scheme in that case were that: (1) it was unlawful because it unlawfully fettered the council’s statutory powers under the HA 1996 and/or absent a residual discretion to disapply the qualifying criteria in exceptional circumstances. McCloskey J’s findings at [24] to [39] bear reciting in full:

24. The second issue ... is whether the impugned Scheme had to compulsorily include provision for a residual discretion to admit to the Housing Register applicants who do not satisfy the “Local Eligibility Criteria” viz the qualifying criteria. This issue focuses attention closely on the relevant provisions of the 1996 Act. It is agreed by both parties that the question which this aspect of the Claimant’s challenge poses has not been considered in any decided case.

25. Approaching this question from, firstly, the perspective of statutory construction, I consider that the housing accommodation allocation regime established by Part 6 of the 1996 Act has the following main components:
- a) In allocating housing accommodation, every local housing authority (“LHA”) must comply with the provisions of Part 6: per section 159(1).
  - b) Every LHA is empowered to allocate housing accommodation in such a manner as it considers appropriate – however, this is “subject to” the provisions of Part 6: per section 159(7).
  - c) A LHA shall not allocate housing accommodation to certain classes of persons, who are decreed ineligible: per section 160ZA(1).
  - d) While the determination of what classes of persons constitute “qualifying persons” is a matter for each LHA, this is subject to four limitations – the last mentioned exception viz section 160ZA(1), section 160ZA(2), section 160ZA(4) and, finally, any regulations made by the Secretary of State under section 160ZA(8): all of these restrictions are enshrined in section 160ZA.
  - e) It is obligatory for every LHA to have a HAS. Fundamentally, every such scheme is designed to determine priorities in the allocation of accommodation and the procedure to be followed in accommodation allocation decisions: per section 166A(1).
  - f) It is obligatory for every such scheme to contain certain provisions: per section 166A(2), (3), (9) and (10).
  - g) Certain other types of provision within the schemes are optional, to be included or, as the case may be, excluded in the LHA’s discretion: see section 166A(3)(i) – (iv), section 166A(5) and section 166A(6).
  - h) Where the Secretary of State has, by regulations, prescribed the principles to be observed in the procedure to be followed, every LHA’s scheme must be framed in terms compatible therewith: per section 166A(10).
  - i) The formulation of the principles on which the scheme is to be framed is a matter for the LHA, subject to the foregoing provisions of section 166A and any regulations made thereunder: per section 166A(11).

- j) It is obligatory for every LHA, in devising or modifying a housing allocation scheme, to have regard to the matters specified in section 166A(12).
  - k) Procedurally, it is obligatory for every LHA to consult in accordance with section 166A(13) before adopting or significantly changing its housing allocation scheme.
  - l) A LHA shall not allocate housing accommodation except in accordance with its HAS: per section 166A(14).
  - m) In devising its HAS, every LHA must have regard to the Ministerial Guidance: per section 169(1).
26. The analysis above demonstrates the extent to which a LHA has freedom to choose the contents of its housing allocation scheme and to make housing allocation decisions. Some measure of liberty and choice is indeed conferred by the legislature. However, this is explicitly constrained in the respects specified in the legislation and, further, by regulations to be made by the Secretary of State. Part 6 of the 1996 Act, as amended, regulates these matters in clear and comprehensive terms. There is nothing in the governing legislation which requires a LHA to include within its housing allocation scheme provision for the discretionary admission to the Housing Register of applicants who do not satisfy the qualifying criteria. No such duty is imposed by the 1996 Act. This is the first obstacle confronting this aspect of the Claimant's challenge, signalling an unpromising start for the quest.
27. As the submissions of Mr Luba unfolded, it appeared to me that their central thrust was that the duty for which the Claimant contends, namely a requirement to make provision in the LHA to accommodate applicants who do not satisfy the eligibility criteria, is to be found in principles of public law. While I have considered the arguments of Mr Luba in full, I shall endeavour to identify their main ingredients. One of the main contentions advanced is that the impugned Scheme, in the respects under scrutiny, is incompatible with the "British Oxygen" principle. While this is frequently one of those taken as read principles in the world of judicial review, it is instructive to reflect a little more closely on its genesis and scope. In *British Oxygen Co Limited – v- Minister of Technology* [1971] AC 610, the relevant Minister was empowered by statute to make discretionary grant payments to business persons whose industrial processes fell within the terms of a statutory scheme. The case is less memorable for one less glamorous aspect of what it decided, namely that the Appellant's tankers and hydrogen trailer assembly did not rank as "machinery or plant" within the relevant statutory provision and, thus, were not

eligible for grant payments. This was the primary ground on which their application for grant had been refused by the public authority.

28. More pertinently, the authority further decided that no grant would be payable in respect of the Appellant's single gas cylinders having regard to the Minister's general policy to withhold grant aid for items or articles costing less than £25.00. However, the single gas cylinders were indeed plant within the embrace of section 1(1) of the statute. They cost some £20.00 per unit and the Appellant had expended over £4 million in their acquisition during a three year period. The complaint was that the Respondent's refusal to pay any subsidy in respect of these items was unlawful, as it reflected an inflexible policy to subsidise anything costing less than £25.00. The starting point in Lord Reid's analysis was the statute. This conferred on the Respondent a discretion to make payments in respect of qualifying items: see page 623H. A key consideration was the absence of any indication in the statute of the circumstances in which a grant should be paid: this, I consider, requires some emphasis. Thus, in the absence of statutory constraint, it was permissible to devise a related Ministerial policy. Lord Reid, having noted that the statutory discretion must not be exercised either in bad faith or unreasonably, at page 625C, continued:

*"But the circumstances in which discretions are exercised vary enormously .....*

*The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application' .....*

*I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all."*

Within this passage are the fons et origo of the celebrated "British Oxygen" principle.

29. Ascertainment of the true character and contours of this principle requires careful analysis. In my view, the essence of the principle is as follows. A decision which is the product of an inflexible rule or policy adopted by a public authority governing, or informing, the exercise of its statutory discretion, in circumstances where the statute allows its adoption, is liable to be held unlawful, since the discretion must not be fettered in this way. The main reason for this, in my estimation, is that decisions of this kind defeat the intention of the statute and do not represent a true and proper exercise of the discretion

conferred by Parliament. In De Smith's Judicial Review (7th Edition) a somewhat different rationale is offered, at paragraph 9-005:

*“The underlying rationale of the principle against fettering discretion is to ensure that two perfectly legitimate values of public law, those of legal certainty and consistency (qualities at the heart of the principle of the rule of law), may be balanced by another equally legitimate public law value, namely that of responsiveness.”*

While this analysis does not mirror precisely that which I have formulated above, it nonetheless illustrates the elasticity of general principles of public law.

30. Thus, at heart, the “British Oxygen” principle applies to contexts where a statutory discretion is to be exercised. The Claimant is unable to point to a discretion of this kind in the relevant statute. As the analysis of the governing statutory regime in [25] above demonstrates, the absence of a residual, or overarching, discretionary provision in the impugned Scheme is not attributable to the erection by the Council of some inflexible rule or policy relating to how it will exercise a statutory discretion. I consider that the legislation did not give the Council a choice in this respect. Thus it cannot be said that the absence of such a provision from the impugned Scheme is incompatible with the terms of the legislation. I consider that the fundamental duty imposed on the Council was to devise a HAS which accords with the multiple requirements of the statutory regime. The Claimant's challenge fails to identify any disharmony or incompatibility in this respect. The essence of the Claimant's case is that the Council has acted unlawfully by failing to confer on itself an overarching, or residual, discretion to be exercised when making decisions on who is a qualifying person. The requirement to include a provision of this nature cannot be linked to any statutory obligation or discretion to do so. Thus there is a fundamental flaw in the Claimant's challenge. As this analysis demonstrates, the “British Oxygen” principle is not engaged. As Mr Knafler put it, this is not “British Oxygen” territory. I consider this submission well made.
31. Another of the central planks of the Claimant's case is the decision of the House of Lords in R (Ahmad) -v- Newham LBC [2009] UKHL 14. This concerned the previous version of section 166A (then section 167) of the 1996 Act. Common to both versions are the threefold requirements that a LHA must have a scheme for determining priorities and procedures in the allocation of its housing, it must not allocate housing except in accordance with such a scheme and its power to devise its own scheme and to decide the applicable principles is subject to the



provisions of the statute and any regulations made by the Secretary of State. Each scheme was also required to give reasonable preference to certain categories of persons, by section 167(2), now section 166A(3). A challenge was made to this aspect of the Respondent Council's Scheme.

32. Notably, both parties sought to rely on this decision. It undoubtedly confirms that a HAS is, in principle, vulnerable to challenge on the well-established public law ground of irrationality. However, it is clear from the decision that a challenge of this species will have difficulty in succeeding. It is equally clear from the decision that an ultra vires challenge is also, in principle, available. One of the themes of the decision is the degree of latitude available to every LHA in framing its scheme. The conceptual explanation for this is neatly expressed in the opinion of Lord Scott, at [7]:

*“The unfortunate fact of the matter is that where a council is faced, as this appellant council is faced, with a demand for council housing that greatly exceeds the available housing stock, there is no allocation system that can be devised to avoid hard cases .....*”

Two basic touchstones for measuring the legality of such a scheme are also encapsulated in the same passage:

*“The section 167(1) scheme devised by the Appellant council complies with the statutory requirements of the 1996 Act, as amended, and, insofar as its provisions for the allocation of housing to those in the section 167(2) priority band are concerned, cannot ..... be described as irrational or unlawful.”*

The degree of latitude available to housing authorities in devising their allocation schemes also features in the other opinions of the House: see, for example, per Baroness Hale at [16] and, in trenchant language, Lord Neuberger at [25]:

*“The allocation of social housing is a difficult and potentially controversial matter, which gives rise to very hard choices, at all levels of decision making, whether strategic, policy or specific. Social housing is an increasingly scarce (and correspondingly valuable) resource, for which demand considerably outstrips supply, in some areas (such as Newham) by an enormous margin, even if one restricts one's assessment of demand to those whose claims would be characterised by most people as very pressing.”*

In the next passage, Lord Neuberger speaks of the “considerable discretion” accorded to LHAs in the formulation

of their allocation policies, subject of course to the statutory constraints which have been devised from time to time.

33. The steep hurdle confronting an irrationality challenge to a scheme of this kind emerges with particular clarity in the opinion of Lord Neuberger, at [49] – [55]. This further supports the proposition that the twin touchstones for measuring the legality of such schemes include those of ultra vires and irrationality. While, during the course of the hearing, I suggested to Counsel that other public law grounds of challenge such as bad faith or improper motive or, indeed, a breach of section 6 of the Human Rights Act 1998 might also, in principle, be sustainable, it is unnecessary to decide this issue in the present case. I also derive from Ahmad support for Mr Knafler’s submission that the rules contained in housing allocation schemes may lawfully be of the hard edged variety: see [15] – [16] and [51] especially. My review of the decision in Ahmad impels to the conclusion that it contains nothing which supports the Claimant’s challenge.
34. Mr Luba’s arguments also prayed in aid the decision in R (Conway) – v – Charnwood BC [2002] EWHC 43 (Admin). In that case, the Council refused to admit the Applicant to its housing register because she did not comply with an age eligibility criterion enshrined in its revised policy. Significantly, the allocation policy under scrutiny was not governed by what the Judge describes as “*the mandatory provisions for a local authority’s allocation of accommodation, by reference to a housing register and a scheme for determining priority, under Part VI of the Housing Act 1996*”. As a result, the challenge proceeded within a public law framework, shaped particularly by the principle that the Council did not have an unfettered discretion: see particularly [16] – [17]. The rule, or criterion, which operated to exclude the Applicant from admission to the Council’s housing register was framed in inflexible terms. Wilson J, finding in favour of the Applicant and quashing the impugned decision, stated at [22]:

*“I am clear that it would be unlawful for the Defendants to apply their new policy in such a way as to preclude their acceptance of an application which fell foul of it but of which the circumstances were exceptional.”*

This statement is to be understood within the context which I have sketched above. I am satisfied that it does not provide authority for the proposition that a HAS made under the current incarnation of Part 6 of the 1996 Act must, in its provisions for qualification for admission to the housing register, contain an overriding, or residual, discretionary dispensation. Its ratio decidendi cannot be applied to the matrix of the present

challenge. Stated succinctly, this decision is not an authoritative guide to the correct construction of the current legislation.

35. Given my analysis of the decision in Conway, I consider that Mr Luba's further, related argument based on the Barras principle (see [1933] AC 402) is of no avail to the Claimant. The thrust of this principle is that where a statute employs language with a previous legal history, this may be relevant to its interpretation. In Bennion, Statutory Interpretation ( 6th edition), page 550, it is stated:

*“Under the Barras principle, where an Act uses a form of words with a previous legal history, this may be relevant in interpretation. The question is always whether or not Parliament intended to use the term in the sense given by this earlier history.”*

Mr Luba's submission was that in enacting the amended version of Part 6 of the 1996 Act in June 2012, Parliament must be presumed to have been aware of the decision in Conway and, armed with such knowledge, has essentially repeated the former statutory wording. The essence of Mr Knafler's argument, which I prefer, was that this principle has no application since the decision in Conway does not provide a clear and authoritative interpretation of the earlier corresponding statutory provisions. He referred the Court to the decision of the House of Lords in Galloway – v – Galloway [1956] AC 299, in particular the speeches of Lord Oaksey and Lord Radcliffe, at pages 317 and 320 respectively. I consider that this submission prevails.

36. Mr Luba's related argument focuses on section 167ZA(7) of the 1996 Act which, for convenience, I reproduce:

*“Subject to subsections (2) and (4) and any regulations made under subsection (8), a local housing authority may decide what classes of persons are, or are not, qualifying persons.”*

It was submitted that the earlier corresponding statutory provisions relating to qualifying persons had been interpreted in the previous version of the statutory code of guidance. If one pauses at this juncture, the immensity of the obstacles confronting this argument quickly becomes apparent. The version provided to the Court is in a loose-leaf format with the earliest pages stamped “Revised 20 December 1996” and with replacement pages stamped with later dates. This, it was submitted, formed part of the pre-enacting history of which Parliament must presumptively have been cognisant. It is important to identify clearly the origins, nature, purpose and limitations of this code. First, it was made under sections 169 and 182 of the 1996 Act. Second, its author is a Government

Minister. Third, it is an instrument of guidance. Fourth, it does not bind local housing authorities: rather, their obligation is to have regard to it. The legal character of the instrument emerges emphatically in the opening paragraph:

*“The Code is not, however, a substitute for the legislation: it gives guidance on how local authorities should discharge their functions and apply the various statutory criteria in practice.”*

In this passage the Code has, commendably, avoided the temptations of self-aggrandisement. I consider this succinct statement to be an accurate exposition of the Code’s legal status.

37. I consider it an elementary proposition that an instrument of this kind, created pursuant to an enabling power contained in a statute, cannot operate as a guide to the meaning of the parent statute. There can be no presumption, or principle, that in enacting the current Part 6 of the 1996 Act Parliament must have supposed that this instrument was otherwise. Given the factors which I have highlighted, I accept Mr Knafler’s submission that this instrument does not engage the Barras principle, particularly since it cannot and does not rank as an authoritative judicial interpretation of the same or similar words or expressions used in the corresponding provisions of the earlier statute. Finally, and in any event, this earlier code went no further than, per paragraph 4.29, merely encouraging LHAs to make provision for exceptional cases in devising their rules for admission to the housing register. In this respect, the earlier code does not differ in substance from the corresponding provision in its June 2012 successor (cf paragraph 3.25).
38. The submissions of both Counsel touched on certain other reported cases. I derive no assistance from the inconclusive and obiter statement contained in R (Giles) -v- Fareham BC [2003] HLR 36, at [9]. Similarly, I find nothing in R (Elias) -v- Secretary of State for Defence [2005] IRLR 788<sup>2</sup>, a race relations case, illuminating the correct approach to this aspect of the Claimant’s challenge. Another first instance decision, Kabashi -v- London Borough of Redbridge [2009] EWHC 2984 (Admin) is also of limited assistance, being a mere illustration of the Ahmad principles in a particular context and a rejection of an irrationality challenge. The decision in R (Nichols) -v- Security Industry Authority [2007] 1 WLR 2067 is more in point. This was an unsuccessful challenge to a policy made pursuant to primary legislation based on the no fettering of discretion principle. The challenge foundered on the rock that the operation of this principle was defeated by the statutory framework, as the following passages show:

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<sup>2</sup> I interpose, a decision affirmed on appeal: [2006] EWCA Civ 1293.

“[60] *However, in this instance Parliament has deliberately, by section 7, conferred a rule making power on the authority. It is for the authority to draw up what it believes are the appropriate criteria for the grant of licences .....*

[62] *.... The statutory context must be examined with great care. In this case .... the statutory context empowers the authority to make the commission of certain serious criminal offences an absolute bar to obtaining a licence to work as a door supervisor. The rule is intra vires and rational. Not to have such a rule in respect of offences of such great gravity would tend to undermine a fundamental aim of the 2001 Act and such a failure would be truly vulnerable to challenge on grounds both of ultra vires and Wednesbury irrationality.”*

I concur with the learned deputy Judge’s formulation of principle and, in particular, the pre-eminence given to the governing statutory regime.

39. I would summarise my determination of this (the second) aspect of the Claimant’s challenge in this way. First, there is no provision in the relevant primary legislation which, expressly or impliedly, obliges a LHA to include within its HAS a provision whereby it reserves to itself an overarching, or residual, power (or discretion) to admit to its housing register applicants who do not satisfy the specified qualifying criteria. Second, while the statute may empower a LHA, at its discretion, to include a provision of this kind in its scheme, this fails to make good the Claimant’s challenge, as this rests on duty rather than discretion. Third, neither a duty nor a discretion to devise a provision of this kind can be derived from the operation of any principle of public law. Finally, the Claimant’s challenge finds no support in any principle of statutory interpretation. Accordingly, the Claimant’s contention that the Council’s HAS is unlawful must fail.’

99. I respectfully agree with McCloskey J’s analysis, for the reasons which he gave, which apply equally to the policy and rule here under consideration. Mr Bano sought to circumvent that analysis by reference to *R (Adath Yisroel Burial Society)* [79] to [86]. The latter, he submitted, was authority for the proposition that the *British Oxygen* principle applied where the power in question merely *derives* from statute. The basis for that submission would appear to be the following dicta of Singh LJ:

‘[85] ... the present context is one where at most, there is only a residual common law power. Most of the functions which are exercised by a coroner in the present context derive from legislation, which we have summarised earlier...

- [86] In those circumstances, we conclude that the power being exercised by the coroner in this case was akin to a power derived from statute. The principle against fettering a discretion applies in the present context.

In my judgement, those dicta do not bear the weight which Mr Bano seeks to place upon them. First, I do not read Singh LJ's use of the word 'derived' as intended to communicate a concept different from the alternative wording which he used at [79]: *'As will be apparent from [R v SSHD e.p. Venables [1998] AC 407, 496-497] the principle usually applies where the source of a discretionary power is legislation.'* In short, the two words used were synonymous. Whether the relevant power derives or originates from statute, a requirement to include a provision of the nature for which Mr Bano contends in this case cannot be linked to any statutory obligation or discretion to do so.

100. In short, I am satisfied that, leaving aside any EqA-related considerations, there is no requirement for a residual discretion, or prohibition on the fetter of a discretion in this context.

101. It follows that the second issue raised by ground one does not arise for determination. For the sake of completeness, however, it is of note that, at [26] in *Holley*, Briggs LJ observed:

26. 'Viewed as a whole, the 2011 allocation scheme did arguably contain a form of residual discretion to address exceptional cases, in section 8.4.3, which provided, so far as is relevant:

"Direct allocations (lettings outside of the choice based lettings scheme) can only be authorised by the designated senior officer. Direct allocations may be made in the following circumstances:

1. If a nomination is required to enable best use of housing stock.

...

4. A direct allocation in exceptional or emergency circumstances for effective management of social housing stock as determined by the designated senior officer in conjunction with Hillingdon Housing services or a Registered Provider."

On one view, the effective management of social housing stock is no more nor less than a summary of the whole purpose of the local authority's social housing function, so that sub-paragraph 4 contained a sufficient general discretion. Alternatively it might be said that this provision falls short of a full residual discretion because of its emphasis on effective management.'

102. In this case, the Defendant's allocations policy contained the following provision (emphasis added):

**'DIRECT ALLOCATIONS**

The Council reserves the right to directly allocate housing to

- Applicants in circumstances where remaining in their current accommodation may cause risk of death or serious injury.
- Applicants with multiple needs that fall within Band A
- Applicants who have been accepted as homeless where the Council has a duty to house
- Applicants who are currently living in approved supported housing within Eastbourne and are ready to move on
- Tenants requiring a Temporary or Permanent Decant
- Applicants oppose a potential risk to the public as assessed by the Multi-Agency Public Protection Assessment Panel (MAPPA)
- Non-statutory successors
- Existing tenants of the Council requiring an urgent move
- Under-occupiers, who have succeeded to a tenancy and have refused an offer
- Other Applicants in exceptional circumstances, including Applicants from Eastbourne Borough Council, and at the discretion of the Head of Homes First'

Viewed as a whole, and independent of the Defendant's ability to take account of personal circumstances which I have found to be inherent in the framework of rule (d), the Defendant's scheme did contain a form of residual discretion to address exceptional cases, in the form of the last such category. Unlike the provision in *Holley*, that afforded a full residual discretion which did not limit the circumstances in which it might be invoked. It allowed departure from rule (d), inasmuch as it permitted an applicant to qualify to join the register, notwithstanding the provisions of that rule, by reference to the exceptional circumstances relevant to the particular case. The fact that direct allocation is not choice-based letting is immaterial, and I note that the distinction did not cause Briggs LJ to sound any note of caution on that basis.

103. Ground one fails.

**Ground Two**

104. Section 19 of the EqA provides:

**19 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—

- ...;
- disability;
- ...

Section 6(3)(b) of the EqA provides:

‘In relation to the protected characteristic of disability—

- (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
- (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.’

Section 23(1) of the EqA provides:

‘On a comparison of cases for the purpose of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case.’

Section 29(1) of the EqA provides:

‘A person (a “service provider”) concerned with the provision of a service to the public or 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.’

Section 136 of the EqA provides (materially):

- ‘(1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A)



contravened the provision concerned, the court must hold that the contravention occurred.

- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

...’

105. There is no dispute that: (1) in allocating accommodation under Part VI of the HA 1996, the Defendant was providing services to a section of the public, such that section 29(1) of the EqA was engaged; (2) the Claimant was disabled by virtue of her ASD and ADHD; (3) the Defendant had applied a PCP, in the form of rule (d); or (4) that it applied, or would apply, rule (d) to persons with whom the Claimant did not share her protected characteristic. The issue is whether sections 19(2)(b), (c) and (d) are satisfied. The burden is on the Claimant to establish the matters in section 19(2)(b) and (c) and, should 19(2)(d) be engaged, on the Defendant to establish justification: *Dziedziak v Future Electronics Ltd EAT 0271/11* [42]. There is no requirement that the Claimant show why the PCP puts members of the protected group at a disadvantage when compared with others — it is enough that it does so: *Essop* [24] and [33] — but there must be a causal link between the PCP and the particular disadvantage suffered by the group and the individual: *Essop* [25], [32]. This may be easier to prove if the reason for the group disadvantage is known, but that is a matter of fact, not law: *Essop* [33].

106. Notwithstanding the warnings issued in *Ahmad* ([46] and [62]) against the court’s over-interference in the policy choices made by a local housing authority, a court must be satisfied that such a policy does not unlawfully discriminate: *Ward and Gullu* [49]. In addition, paragraph 16 of the Secretary of State’s statutory guidance, issued in 2013, requires housing authorities to have regard to their duties under the EqA. Section 169(1) of the HA 1996 requires housing authorities to have regard to guidance issued by the Secretary of State in exercising their powers under Part VI of that Act. For the purposes of section 19(2)(b), as counsel agree: (1) the relevant comparison is between groups rather than individuals: *Essop* [41]; (2) there is no requirement that every member of the group which shares the relevant protected characteristic be put at a disadvantage by the PCP in question: *Essop* [27]; and (3) the question in this case is whether rule (d) puts or would put those who share the Claimant’s disabilities at a disadvantage when compared with those who do not. 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 suffers that disadvantage: *Ward and Gullu* [59]. Whilst it is commonplace for disparate impact, or particular disadvantage, to be established on the basis of statistical evidence (*Essop*: [28]), there is no requirement that it be established by that means.

#### *Group and personal disadvantage*

107. It is first necessary to define the disadvantage asserted by the Claimant (*Essop* [31]), which is said to be exclusion from the housing register. Thus, her contention is that rule (d) excludes from the housing register a greater number of those who have ADHD and ASD than of those who do not have those disabilities (19(2)(b)); and that it puts, or would put, her at that disadvantage (19(2)(c)). The Defendant’s case is that the evidence

on which the Claimant relies for the purposes of both sections is inadequate to its purpose.

108. I begin with a consideration of group disadvantage. No statistics have been produced, or, seemingly, kept, as to the proportion of those who have been excluded under rule (d) who have ADHD or ASD. The Claimant's approach to establishing group disadvantage proceeds in three steps:
- a. Rule (d) bites on those who have been responsible for (in shorthand) unacceptable anti-social behaviour of the requisite gravity;
  - b. There is evidence to show that ADHD and ASD are significantly associated with anti-social behaviour and that a large percentage of those subject to anti-social behaviour measures appear likely to have, or be given, a diagnosis of (at least) ADHD; from which it is to be inferred that
  - c. A greater proportion of those excluded from the housing register under rule (d) have ADHD and/or ASD.

So put, the difficulty with the Claimant's approach becomes apparent. Albeit that it is not incumbent upon a Claimant to establish the reason for any disadvantage, there is nothing to preclude reliance upon evidence relating to that reason, if known, as a means of establishing the requisite causal link between the PCP and the relevant disadvantage. As Lady Hale observed in *Essop* [33], the causal connection between the PCP and the disadvantage suffered, by the group and by the individual, may be easier to prove, as a matter of fact, if the reason for the group disadvantage is known. But the evidence must be capable of establishing the relevant link. In this case, taking the evidence at its highest, there is neither statistical evidence of the proportion of people having the relevant disabilities who are excluded from the housing register under rule (d), or, indeed, subjected to any other anti-social behaviour measure, nor other evidence to the effect that a greater proportion of those having one or both disabilities engage in the anti-social behaviour on which rule (d) bites (or in any anti-social behaviour).

109. The Claimant relies upon the Fox and SWIFT reports, the BIJ article and the DRC Report. Whether each of those documents is considered in isolation or in combination with the others, in my judgement the Defendant is right to contend that none establishes the group disadvantage for which she contends:
- a. The express purpose of the Fox report was to provide details of the Claimant's mental health diagnosis — to include details of her symptoms, diagnosis, treatment, and prognosis; and to confirm whether she was disabled within the meaning of the EqA. Thus, Mr Bano's approach requires me to extrapolate from the opinion provided in relation to the Claimant herself that others having those same disabilities are similarly affected. The report recounted that which the Claimant had self-reported and the results of certain psychometric testing, before concluding that the Claimant had adult ADHD and an autistic spectrum condition. Her difficulties were said to be severe in nature and enduring. She was also said to have Mixed Anxiety and Depressive Disorder and mild alcohol dependence. Nothing in the Fox report addresses the connection, if any, between

either of the Claimant's disabilities and the behaviour which engaged rule (d), whether in relation to the Claimant herself or to others having either condition, nor does the report establish a disparate adverse impact of rule (d) on the protected group of persons.

- b. The SWIFT report referred to the Claimant's then current presentation as being consistent with possible traits of ADHD and ASC. That presentation was described to display *'low frustration tolerance, fast and at times somewhat disjointed speech, difficulty maintaining concentration, and a tendency to be impulsive. She also presents with high levels of anxiety, expressed as worrying, and becoming fixated on things which are said to her, and difficulties meeting new people and accessing amenities if this involves speaking to people she does not know.'* Later in the report, it was said that *'the assessor would hypothesise that [the Claimant] struggles on a basic level with social interactions in terms of relationship building, frustration tolerance, and emotional regulation, which impact on her ability to communicate reciprocally with others. Some of this is likely to be due to underlying traits of ASC and ADHD, and some of this may be due to coping strategies which she has developed throughout her life in order to cope with her negative experiences with education, relationships, etc... In summary, [the Claimant] demonstrates some traits consistent with both ASC and ADHD, which are likely to impact her ability to concentrate, focus, regulate her own emotions, empathise, and communicate reciprocally with those around her. She also reports negative educational and relational experiences which have decreased her exposure to warm, positive interactions with others, which will have been exacerbated by the traits identified above, but will also impact on how those traits may manifest within future relationships and interactions.'* Here again, in my judgement, the report does not establish the requisite connection between ADHD/ASD and the anti-social behaviour which engages rule (d), whether for the Claimant herself, or for the protected group. It includes a statement that ADHD is a neuropsychiatric condition which tends to run in families, comprising difficulties within three core areas: hyperactivity, impulsivity, and inattention, some combination of which must be considered problematic before the age of 12. Associated features are said to include low frustration tolerance, irritability, poor planning abilities, sensation-seeking/recklessness and mood swings. Whilst, it is said, symptoms usually improve into adulthood, some difficulties could persist and the presentation might be more subtle as the individual has learned to mask or control difficulties more successfully. By the age of 25, the report states, an estimated 15% of people diagnosed with childhood ADHD still have a full range of symptoms, with 65% still having some symptoms which affect their daily lives. No part of that material is expressly related, or, in my judgement, self-evidently relates, to anti-social behaviour of the nature which engages rule (d), or establishes the disparate adverse impact on the protected group for which the Claimant contends.
- c. The BIJ article is inadequate to its purpose. It is (as Mr Bano acknowledged) anecdotal; states its conclusions by reference to a limited sample; and is unrelated to the specific disabilities which the Claimant has. The fact that it is, in Mr Bano's words, *'the best material which the Claimant can produce'* does not render its conclusions satisfactory or compelling for current purposes.

- d. The DRC Report is of a different character from the above material. It is of some age. Amongst its findings is that there is reliable evidence to suggest that disabled people living in social housing, particularly those with learning difficulties or mental health problems, comprise a significant proportion of those individuals who are subject to interventions designed to tackle anti-social behaviour. The report states (with emphasis added) that, *'On the basis of our review, we can say, with some degree of certainty that a large percentage of those subject to anti-social behaviour measures appear likely to have or be given a diagnosis of ADHD.... there is a lack of robust evidence as to whether disabled people are disproportionately and inappropriately subject to antisocial behaviour control mechanisms and what the implications of this are. In part, this is a result of the lack of monitoring at a national and local level which means that there is currently no way to investigate whether disabled people are over-represented in the numbers subject to an antisocial behaviour measure.....Whilst our findings are not conclusive, they do point to evidence that the subject of antisocial behaviour interventions often have mental health problems, learning difficulties, and neurological disorders.'* The report refers to the conclusions of Tharpar et al (2006), to the effect that there is *'evidence from clinical and population-based research that ADHD is associated with later, antisocial behaviour...'* Whilst the DRC Report marks the high watermark of the evidence relating to group disadvantage, its findings are said not to be conclusive. It does indicate a link between ADHD and antisocial behaviour giving rise to intervention or other measures, but the DRC is at pains to point out the absence of robust evidence as to whether disabled people are disproportionately and inappropriately subject to anti-social behaviour control mechanisms and that there is currently no way to investigate whether 'disabled people' are over-represented in the numbers subject to an antisocial behaviour measure. 'Disabled people' is itself a term used to encompass those who have *'mental health problems, learning difficulties and neurological disorders'* a category far broader than those having ADHD and/or ASD.
110. I have also had regard to such 'background data' as the Defendant has been able to collect, as set out in Mr Hall's witness statement, at paragraphs 39 to 45. The data kept is broad brush and relates: (1) to the number of new applicants who have joined the housing register in the period spanning 2019 to July 2022; and (2) of those applications, the number of households having unspecified disability/mobility needs. Data recording relating to disability is captured at application stage. The Defendant is only able to capture the information volunteered in the application. In the past two years, only one applicant has been excluded from the housing register. Neither that applicant nor a member of the household was disabled.
111. Standing back and viewing all available material in the round, I am satisfied that it neither establishes the relevant comparative group disadvantage nor the requisite link between any such disadvantage and the PCP. In such circumstances, in particular, I consider Mr Bano's submission that, as a matter of logic, the relevant neurological disorders will manifest themselves in behavioural aberrations, to be misplaced. First, the underlying proposition misstates the relevant test. Secondly, it is not a matter of which judicial notice could properly be taken, in any event. Contrary to Mr Bano's submission, the Court of Appeal in *York v Grosset* did not 'have no difficulty in

finding the requisite link between a serious physical disability and certain conduct, for the purposes of section 15 of the EqA'; it simply adopted the unchallenged findings of fact which the employment tribunal had made [48]. It follows that the contention that rule (d) is discriminatory contrary to section 19 of the EqA falls at the first hurdle. Had it not done so, there would have been other obstacles to its success, which I need address only briefly, as they have become moot.

112. I accept Ms Cullen's submission that there was no causal link between rule (d) and the disadvantage suffered by the Claimant. Not only is there a lack of cogent evidence to the effect that either of her disabilities led to, or was associated with, the unacceptable behaviour which gave rise to the application of that rule, there is positive evidence, including that which emanated from the Claimant herself, that the cause of that behaviour and, by extension, of her exclusion from the housing register, was alcohol. There is no evidence that any dependency on alcohol (of which, in Professor Fox's view, the Claimant was on the cusp) was itself a product of, or related to, either disability and the Claimant is not entitled to the protection of the EqA against any discrimination experienced in consequence of it; it is an excluded condition. Alternatively, the apparent relationship between the Claimant's use of alcohol and her anti-social behaviour means that there is a material difference between the circumstances of each case, for the purposes of section 23(1) of the EqA. (See *Essop* [32].) Thus, had the Claimant established group disadvantage, she would not have established individual disadvantage under section 19(2)(c).

#### *Justification*

113. Finally, I am satisfied that, had sections 19(2)(b) and (c) been established by the Claimant, the Defendant has shown rule (d) to be a proportionate means of achieving its stated aims, the latter rightly acknowledged by Mr Bano to be legitimate. As both parties agree, the test to be applied is that set out in *Bank Mellat* [74]: (1) Was the objective of the measure sufficiently important to justify the limitation of a protected right? (2) Was the measure rationally connected with the objective? (3) Could lesser measures have been used without unacceptably compromising the objective? (4) Was the impact on the Claimant's rights, overall, disproportionate? In this case, the focus of submissions has been on the second and third limbs of that test. Mr Bano's objection under the second limb (to the effect that rule (d) simply shifts the onus of dealing with applicants excluded by rule (d) to the private sector) ignores the Defendant's second aim, with which rule (d) is plainly rationally connected, being the avoidance of the need for housing officers to deal with the relevant behaviour and of the associated opportunity cost, to the detriment of the majority of tenants. As to limb three — lesser measures, the short answer is that the only such measure proposed is the adoption of an absolute discretion to admit disabled applicants to the housing register, notwithstanding their unacceptable behaviour and associated unsuitability to be a tenant, as defined in rule (d). When considering the issue of justification, it is legitimate to have regard to the scheme as a whole: *R (XC)* [87]; *R (H)* [59], which, here, includes the Defendant's unfettered right to make a direct allocation, in exceptional circumstances (whether or not it has been exercised to date). The existence of other policies within the suite, might or might not afford an additional safety valve, but it is not possible to conclude that it does so, absent any detail regarding their content and operation. Rule (d) itself allows for consideration of the relevance of any disability within its framework (see ground one), such that it enables the Defendant to take account of a disabled applicant's disability and the

measures which can be, and have been, taken to address or mitigate any related anti-social behaviour, where relevant, amongst his or her personal circumstances. On the evidence of Mr Hall, it is operated in such a way in practice. An express discretion would add nothing of substance to rule (d). The exclusion of disabled applicants from the reach of that rule (no longer advanced by Mr Bano as the appropriate lesser measure) would unacceptably compromise the legitimate aim of ensuring that the Defendant and other social housing occupants could live free from the harassment, alarm or distress which result from anti-social behaviour, in circumstances in which Government guidance recognises a registered social housing provider's responsibility to prevent anti-social behaviour. The fact that the Welsh Government has retained legislation which has been repealed in England does not assist the Claimant and it is not suggested that the legislation in England is itself discriminatory in its effect. It would be curious if, notwithstanding the repeal of s160A(7) and (8) of the HA 1996, a housing authority would be obliged to make identical provision in order to avoid unlawful discrimination in the exercise of its responsibility to prevent anti-social behaviour. Whilst Mr Bano points to the low number of those who engage rule (d) in practice, that is to ignore the significant number of others on whom each such person's behaviour can have a seriously detrimental effect, as exemplified by this particular case, to whose interests the Defendant must also have regard. The dicta in *Ahmad*, at [15], [46] and [62], resonate here, with the qualification entered by Garnham J, in *R (XC)* [96]: '*Ahmad predated the Equality Act 2010 and does not address the 2010 Act's predecessor legislation. But in my judgement, the statements of general principle which I have set out apply with considerable force to the questions whether the measure adopted was the least intrusive possible without compromising the objective, and whether it struck the right balance.*' In short, I accept that the lesser measure now proposed by the Claimant is not, in fact, a lesser measure than that for which rule (d) provides and that any absolute exclusion of disabled applicants from the rule would unacceptably compromise the Defendant's objectives. Given the safeguards within rule (d) itself and the safety valve to which I have referred, I am satisfied that the impact on the Claimant's rights, overall, was not disproportionate.

114. Ground two fails.

### **Ground Three**

115. This ground may be addressed briefly, in light of my conclusions on ground one. I am satisfied that the matters to which Mr Hall had regard were those to which rule (d) entitled him to have regard and which were encompassed by the rule's requirement that the decision-maker consider whether the relevant behaviour would have entitled the Defendant to a possession order. Acknowledging that it would be preferable for the rule to identify them, in generic terms, expressly, there has been no major deviation from the scheme and Mr Hall's usage of the term '*in extremis*' in his review letter has been overplayed, whether or not when considered benevolently, in accordance with *Holmes-Moorhouse* [50]. It is clear from its context that, by his use of the impugned wording, Mr Hall was indicating no more than that it would require extreme circumstances for rule (d) to be engaged; that is a product of the test for which the rule provides, not of some super-imposed illegitimate consideration or administrative practice. There has been no unlawful failure to adhere to the scheme.

116. Ground three fails and the focus now shifts to the application of the scheme in the Claimant's particular case.

#### **Ground Four**

117. Section 15 of the EqA provides:

##### **15 Discrimination arising from disability**

- (1) A person (A) discriminates against a disabled person (B) if—
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
  - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

For the purposes of section 15(1)(a), the unfavourable treatment asserted in this case is the Claimant's exclusion from the housing register and the 'something' which is said to arise in consequence of one or both of the Claimant's disabilities ('the Something') is the Claimant's anti-social behaviour, as defined in rule (d). It is not suggested by the Defendant that section 15(2) applies in this case.

118. As a matter of law, the Something need not be the main or sole cause of the relevant unfavourable treatment, but it must have at least a significant (or more than trivial) influence upon it, thereby amounting to an effective reason or cause for it. The putative discriminator's motive in acting as it did is irrelevant; the enquiry is on the reason or cause for the treatment impugned and involves an objective question: *Pnaiser* [31].
119. In this case, as I have previously found when considering ground two, the available evidence does not establish that the Claimant's anti-social behaviour arose in consequence of either of her disabilities, nor, for that matter, that her use of alcohol did so. Thus section 15(1)(a) is not established. Had it been so, I would have found that the Defendant had justified its treatment, for the purposes of section 15(1)(b). As Mr Bano submitted, the focus here is on the availability of lesser measures, my conclusions in ground two as to which are of equal application here.
120. In any event, in the absence of a successful attack on the scheme itself, I consider Ms Cullen's reliance upon section 191 of, and Schedule 22 to, the EqA to be legitimate. Section 166(A)(14) of the HA 1996 requires a housing authority not to allocate housing accommodation except in accordance with its allocation scheme, meaning that the Defendant was obliged to apply rule (d) pursuant to a requirement of an enactment and, thereby, did not contravene sections 15 and 29 of the EqA (the latter falling within Part 3 of that Act). I make clear that section 191, read with Schedule 22 of the EqA does not enable a housing authority to avoid its obligations

under the EqA by formulating, and then applying, a scheme which is itself discriminatory (and, as such susceptible of judicial review), but that is not the case here (see ground two).

121. Ground four fails.

### **Ground Five**

122. I deal briefly with the preliminary objection raised by Ms Cullen, which was faintly pressed, and rightly so. There is no identifiable prejudice to the Defendant arising from the shift in the Claimant's argument, nor indication of the nature of the further evidence which the Defendant might have called had that argument been advanced from the outset, which it accepted that it had had sufficient time to produce.

123. As to the substantive issues, sections 20, 21 and 29 of the EqA and Schedule 2 to that Act provide (materially):

#### **20 Duty to make adjustments**

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) ...

(5) ...

(6) ...

(7) ...

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) ...

(10) ...

(11) ...

(12) ....

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.



*Part of this Act*

*Applicable Schedule*

Part 3 (services and public functions)

Schedule 2

...

**SCHEDULE 2 Services and public functions: reasonable adjustments**

*Preliminary*

1 This Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part.

*The duty*

2(1) A must comply with the first, ... requirements.

(2) For the purposes of this paragraph, the reference in section 20(3)...to a disabled person is to disabled persons generally.

(3) ...

(4) In relation to each requirement, the relevant matter is the provision of the service, or the exercise of the function, by A.

(5) Being placed at a substantial disadvantage in relation to the exercise of a function means—

(a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or

(b) if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment.

(6) ...

(7) If A is a service-provider, nothing in this paragraph requires A to take a step which would fundamentally alter—

(a) the nature of the service, or

(b) ...

(8) If A exercises a public function, nothing in this paragraph requires A to take a step which A has no power to take.

**21 Failure to comply with duty**

(1) A failure to comply with the first, ... requirement is a failure to comply with a duty to make reasonable adjustments.

- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, ... requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

### **29 Provision of services, etc.**

- (1) 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.

...

- (7) A duty to make reasonable adjustments applies to—
- (a) a service-provider (...);
- (b)...’

By section 212(1) of the EqA ‘substantial’ is defined to mean ‘more than minor or trivial’.

124. The comparative test required by section 20(3), read with paragraph 2(2) of Schedule 2, is between the position of disabled persons generally and persons who are not disabled. The focus is on anticipatory changes which are applicable to a category, or sub-category, of disabled persons, as distinct from changes which are applied to individual disabled persons on an ad hoc basis (*R (Rowley)*: [24]). Thus, it is first necessary appropriately to define the category of disabled persons in this case. Mr Bano contends for ‘people with behavioural disabilities’. Ms Cullen does not propose an alternative category but submits that Mr Bano’s proposal would inappropriately catch those having eating disorders, or addictions, a number of which might not be protected under the EqA in any event. I consider that the appropriate category is ‘people with neuropsychiatric conditions’, following the classification of ADHD set out in the SWIFT report, into which categorisation ASD would also fall. Whether or not that would encompass those having addictions or eating disorders, it is, to my mind, the right categorisation of the protected group. As to the comparator group, I share Fordham J’s view, expressed in (*R*)*Rowley* [25], that, consistent with the language of section 20(3) and of paragraph 7.13 of the Statutory Code of Practice (Services, Public Functions and Associations), issued by the EHRC<sup>3</sup> it should comprise people who are not disabled, but, like Fordham J, I am mindful that, in *R (MM)* [59], the Court of Appeal made reference, without criticism, to the comparison

<sup>3</sup> ‘The disadvantage created by the lack of a reasonable adjustment is measured by comparison with what the position would be if the disabled person in question did not have a disability.’ (emphasis added)

drawn by the Upper Tribunal in that case, between ‘mental health patients’ and ‘those not so disabled’, i.e. those not disabled in the same way. In the event, nothing turns on the distinction for the purposes of this case.

125. The duty to make reasonable adjustments only arises if the PCP is applied and results in there being substantial disadvantage in relation to the comparator group. Those are matters which must be established by evidence and which are for the Claimant to establish, together with an apparently reasonable adjustment. In seeking to establish the requisite substantial comparative disadvantage, Mr Bano relies upon the data and narrative in the DRC Report, expressly recognising that the former is not directly on point. I bear in mind that the comparative exercise in the context of which I must now consider the DRC Report is not the same exercise required by section 19(2)(b) of the EqA. Nevertheless, I consider the report to be inadequate for current purposes, too. Mr Bano is right to acknowledge that the data at figure 4 of the report is not on point. The cohorts do not correspond with the comparator group here under consideration and the studies (the oldest of which was undertaken in 1999 and the most recent in 2007) relate to formal control mechanisms different from the PCP in this case. The DRC report itself noted ‘a number of limitations with the data’, extrinsic to those concerns, most notably the lack of clarity over how systematic the collection of data about disability had been and the fact that *‘in nearly all of the studies, the authors are reliant on what has been recorded by those professionals working with those subject to action, who in turn may be reliant on self – reporting by clients’*. The DRC itself recognises that its wider findings are not conclusive. Albeit that, as previously noted, it states *‘with some degree of certainty that a large percentage of those subject to anti-social behaviour measures appear likely to have or be given a diagnosis of ADHD’*, that does not establish that the PCP with which this ground is concerned results in substantial comparative disadvantage to the relevant protected group. Furthermore, given the construction of rule (d) as I have found it to be, those factors which would feed into a consideration of whether to waive clause (d) (the suggested reasonable adjustment) would be considered as part of the test as it stands, itself serving to indicate that the PCP results in no comparative disadvantage. For either or both reasons, ground five falls at that hurdle and it follows that the Defendant is under no duty to make reasonable adjustments.

### Ground Six

126. I have given this ground anxious consideration, in particular having noted the poor drafting of rule (d). Per *Lumba* [34], *‘the rule of law calls for a transparent statement... of the circumstances in which the broad, statutory criteria will be exercised’* and *‘there [is] a general rule of law that policies must be published’*: see *R (Roman)* [121]. Further, an allocation scheme which does not explain the criteria applied for awarding reasonable preference, or indicating what circumstances it will be applied, will fail to comply with the HA 1996: *Calvi v Waltham Forest LBC* [2007] HLR 1 [46].
127. Here, rule (d) in the Defendant’s published scheme does set out the circumstances in which the broad, statutory criteria will be exercised. I acknowledge that it does so in shorthand form and by reference to whether the behaviour would have entitled the Defendant to a possession order under certain grounds in the HA 1985. There is no

doubt that a fuller recital of the steps and considerations entailed in that test would be of assistance and preferable. But that is not synonymous with Mr Bano's contention that the current approach is unlawful.

128. This ground fails.

**Disposal**

129. All grounds of review having failed, the claim is dismissed and questions of remedy do not arise.