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Case No: CO/420/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
27/07/2016

B e f o r e :

MR PETER MARQUAND
(sitting as a Deputy Judge of the High Court)

Between:

YA **Claimant**

- and -

London Borough of Hammersmith and Fulham **Defendant**

Ben Chataway (instructed by Steel and Shamash) for the Claimant
Christopher Baker (instructed by London Borough of Hammersmith and Fulham) for the Defendant

Hearing dates: 15th and 16th June 2016

MR PETER MARQUAND :

Summary

1. This is a claim by way of judicial review challenging the Defendant's decision of the 29th October 2015 to refuse to enter the Claimant on the Defendant's housing register. The Claimant has for a number of years been in the care of the Defendant and has a criminal record, although at the time of the decision those convictions were spent under the Rehabilitation of Offenders Act 1974. The issues are whether it was lawful to take account of those convictions and whether there was indirect discrimination in the Defendant's housing allocation scheme.

Facts

Housing allocation scheme

2. The relevant elements of the Housing Act 1996 are contained in Part VI. Every local housing authority is required to have a housing 'allocation scheme' (section 166 A (1)) for determining priorities and for the procedure that must be followed in allocating housing accommodation. Section 166A (3) requires the allocation scheme to give reasonable preference to certain specified groups including people who are homeless and those who need to move on medical or welfare grounds. Subject to any regulations and the requirements of the section, it is for the local housing authority to decide on what principles the allocation scheme is to be framed (section 166A (11)). Housing must not be allocated except in accordance with the local authority's allocation scheme (section 166A (14)).

3. Under the allocation scheme, the local housing authority may only allocate accommodation to 'qualifying persons' (section 160ZA (6)). However, the local housing authority has a broad discretion to decide what classes of persons are or are not qualifying persons (section 160ZA (7)). There are some further specific requirements and exclusions, which are not relevant to this case. The qualification criteria become part of the allocation scheme (*R(Jakimaviciute) v Hammersmith & Fulham LBC [2014] EWCA Civ 1438*).

4. The Defendant's allocation scheme provides that it will operate a register of housing applicants. Only those who fall into one of the reasonable preference groups listed in section 166A (3) of the Housing Act qualify for admission to the register. Certain classes of applicant are disqualified from the register even though they fall within a reasonable preference category. Those that are relevant to this case appear under the heading 'Exceptional Cases including Classes of Persons that do not Qualify' as follows:

> "2.14 Having considered the changes made to the Housing Act Part VI in the Localism Act, the following classes of persons will not normally qualify for registration:
>
> …
>
> (b) Applicants who have been convicted of housing or welfare benefits related fraud where that conviction is unspent under the Rehabilitation Offenders Act 1974. Any person caught by this may re-apply once this conviction is spent.
>
> …
>
> (h) Applicants who have been guilty of unacceptable behaviour which makes them unsuitable to be a tenant. Examples of such unacceptable behaviour include: persistent failure to pay rent and/or service charges; anti-social behaviour which has caused a nuisance by the applicant or a member of his or her household; illegal or immoral behaviour; threats of and/or actual violence; racial harassment; obtaining a tenancy by deception and/or an attempt at tenancy fraud;
>
> …
>
> 2.15 There is discretion to waive these classes in exceptional circumstances as approved by the Director of Housing Options, Skills and Economic Development or delegated officer who shall be a Head of Service…"

5. The allocation scheme states further, under 'assessing your application':

> "2.27 Housing Options Officers will work together with social services and other agencies looking at supply and demand to identify clients currently in supported housing who are ready for independent living. Subject to these discussions and agreement that the client's housing needs cannot be met outside of social housing [sic]. In consultation with other officers of the Council, these clients will be placed in Band 2, unless there is an urgent need to move in line with the Band 1 criteria."

6. The allocation scheme provides that unsuccessful applicants will have a right to request that the decision is reviewed by a team leader, manager or other delegated officer within the council's housing service who has no previous involvement with the case.

7. In addition, the Defendant also operates a 'Care Leavers' Quota'. A 'Care Leaver' is a person, who as a child was 'looked after' by a local authority and is now leaving that care. The Claimant is such a person. The Children Act 1989 imposes duties upon local authorities to assess and meet needs of 'eligible' and 'relevant' children in certain respects and to have a 'Pathway Plan.' This plan replaces the care plan and runs until the person is at least 21 and covers various matters including education and other support, for example to move into supported lodgings (The Children Leaving Care Act 2000 amending the Children Act 1989). The Care Leavers' Quota is not referred to within the publicly available allocation scheme but in correspondence from the Defendant to the Claimant, the following provisions were quoted:

> **"7.0 The Care Leavers' Quota (social housing)**
>
> 7.1 Each financial year, a quota of social housing units is allocated for Care Leavers by Housing Options within its Housing Allocation Scheme. This is referred to internally as the 'Care Leavers Quota'. It is recognised by Children's Services and Housing Options that because of the shortage of social housing supply, these nominations should be targeted to the most vulnerable of Care Leavers. Vulnerability is established through panel discussion and using the assessment framework as set out in 2.3 (above).
>
> 7.2 Even if a Care Leaver is considered by the panel to be sufficiently vulnerable for social housing, the Care Leaver must also meet the qualification criteria for social housing as set out in the Housing Allocation Scheme (April 2013).
>
> 7.3 the Care Leavers Housing Panel has the discretion, by exception, to recommend people where the decision outcome does not support a social housing nomination, but the professional judgement of the CLH Panel deems the social housing to be the most appropriate option. However, the CLH Panel Chair cannot override the qualification criteria for social housing as set out in the Housing Allocation Scheme. There may be cases where the Panel Chair recommends social housing but the Care Leaver does not qualify under the Housing Allocation Scheme. Where it is thought that the circumstances of the case are so exceptional as to override the qualification criteria, the CLH Panel Chair will request that discretion be exercised by the Director of Housing Options, Skills and Economic Development. For ease, this request will be

made through the Panel's Housing Representative. The Director's decision is final."

The Claimant

8. The Claimant is a Somali national and was born on 1 April 1996. At the time of the decision that he is challenging he was aged 19. He came to the United Kingdom in around 2002 as a refugee and thereafter lived with his sister. However, at the age of about 11 he was taken into care by the Defendant's social services team after suffering a serious assault. In 2010 he was granted indefinite leave to remain in the United Kingdom.

9. Between July 2008 (aged 12 years 3 months) and 20th January 2012 (aged 15 years and 9 months) the Claimant committed a number of criminal offences for which he was convicted. The offences included theft, assaulting a police officer, assault occasioning actual bodily harm, criminal damage, robbery, receiving stolen goods, possession of class A drugs, burglary and fraud offences. There is no evidence of any criminal offences being committed after January 2012.

10. In December 2012 the Claimant, then aged 16 was moved into semi-independent accommodation with the Tavistock Supported Independent Living Project. He was granted an assured shorthold tenancy on 1 April 2014. In February 2015 the Claimant's social worker forwarded a 'Care Leavers Accommodation Panel Nomination Pack' to the Care Leavers Housing Panel (CLHP) to commence the process referred to above. Section A of this pack was completed by the Claimant where he recorded his belief that he was ready for his own accommodation because he had developed the necessary independent living skills, he had no difficulty paying his bills and he was well organised. He stated:

> "I also keep to myself (sic) away from antisocial behaviour and very careful on whom I make friends with (sic). Lastly I would like you to consider my application as soon as possible and offer me a place to live by myself so I can start moving forward with my career and life."

11. The social worker completed part B of the form and in the section to record reasons why the Claimant was suitable for permanent housing he stated:

> "[The Claimant] had previously been involved in offending behaviour but he has completely disengaged from such behaviour since moving to his current placement. Since this time he admits to have made good progress having mixed in the wrong circles in the past. He has been able to reflect on these negative experiences and been able to move on with his life in a more constructive and mature manner… [The Claimant] has signed a house rules agreement and he has not broken any rules but abides by them.
>
> … [The Claimant] is currently attending South Thames College undertaking BTEC level 2 in business. He is considering doing Access course in engineering next year in the hope of attending university as his longer term plan.
>
> …

> [The Claimant] has made very good progress in the last 2/3 years, having had the conviction to change his previous behaviours and make a conscious decision to give up a negative lifestyle. He is determined and focused in wanting to achieve his academic goals and to succeed in his chosen career path. [The Claimant] has the personality and character to fulfil his ambitions through hard work and endeavour. [The Claimant] has the necessary independent living skills, which will enable him to maintain a tenancy. He has no rent arrears and I feel confident that he will be able to manage a tenancy by paying bills, rent and other service charges on the property.
>
> I feel that [the Claimant] would make an ideal candidate for social housing as he has shown the necessary degree of maturity over the past two years, has been able to turn his lifestyle around, is committed to successfully achieving his academic goals and possesses the relevant independent living skills in order to maintain a tenancy."

12. The CHLP met to consider the application on 22 April 2015 and completed a pro forma headed 'Care Leavers' Accommodation Panel Decision Sheet'. The CLHP considered a number of eligibility criteria set out in the proforma, all of which the Claimant met. In particular the criterion headed 'to show that they are/can be a good tenant, can care for their flat, respect neighbours and keep noise to reasonable and acceptable level' was answered 'yes'. If any of the eligibility criteria are answered 'no' then the referral is to be rejected. The panel also completed in section B a 'vulnerability assessment'. There are 10 criteria to be scored between zero – three. The Claimant scored five out of a maximum 33, scoring 1 for 'traumatic childhood/adolescence experiences that are still impacting on young person's life; 3 for 'in EET and living on low income (automatically score three)'; and one for 'at risk of/already offending'. The scoring scheme states that where the score is between 0 – 6 points: 'consider young person for private rented options'. However, in the written panel decision the panel chair has recorded:

> "[The Claimant] has made great progress with all aspects of his life reducing his current level of vulnerability. Panel acknowledge/note that whilst [the Claimant] should be commended in terms of the progress made, there are still underlying vulnerabilities due to the fact he has spent the majority of his childhood looked after – his family although part of his life are somewhat fragmented in terms of distance – i.e. – living outside the UK. Panel feel that [the Claimant] should be nominated for social housing – flexible tenancy."

13. In other words, notwithstanding the outcome of the scoring, the panel considered the Claimant should be nominated for a flexible tenancy in social housing rather than for private rented accommodation options. On 28 April 2015 the Claimant completed the 'application of entry to the housing register' form.

14. On 12 May 2015 Lucy Baker, PATHS manager [Placement And Assessment Team for Homeless Singles] sent an e-mail to the Claimant's social worker stating:

> "At the Care Leavers panel we asked if you could please find out from YOS [youth offending service] what [the Claimant's] offending history was so that I could seek discretion for social housing from my director. Do you have this information?

I have received the Housing Register Form however cannot process it until discretion has been granted."

15. The social worker replied by e-mail on the same day attaching a document (the 'Convictions Document') setting out in detail the Claimant's offending history, which I have referred to above. I will not set out every entry on the document but some examples are:

> "04/11/2008 [the Claimant] sentenced to a nine-month referral order for attempted robbery on 20/07/2008
>
> …
>
> 21/07/2010 [the Claimant] sentenced to 12 months youth referral order with supervision for robbery offence committed on 10/02/2010…"

16. As can be seen, the document refers to criminal offences and the dates on which the Claimant had committed those offences and the sentence passed. The document concludes with the following:

> "[The Claimant] has not been involved in offending behaviour since March 2012. Since this time [the Claimant] has thrived in his placement with the Tavistock Avenue supported independent project. He has made great strides in turning his life around and come on leaps and bounds in terms of his behaviours; adopting a more compliant role and focusing and engaging in advancing his educational opportunities.
>
> [The Claimant] is ready to move into independent accommodation, having acquired sufficient independent living skills to manage in all aspects of his life."

17. The bundle includes a form entitled 'supporting people Quota, Care Leavers Quota and HLP cases.' Its subheading is 'Request for Directors Discretion under Section 2.21 and/or Section 2.14 (h) of the Housing Allocation Scheme, April 2013.' Which, although not signed is believed to have been completed by Miss Baker. In the section entitled 'reason for discretion' has been written:

> "Young person leaving care, UASC. Now ready to live independently.
>
> Client has a not insignificant offending history; however he has not offended since 2012."

18. The decision is recorded as 'not agreed' and is dated 12 May 2015. Miss Baker sent an e-mail to the social worker on 19 May 2015 recording that the director's discretion was not granted due to the Claimant's offending history and stating that the Claimant did not qualify for an allocation of housing through the Care Leavers Quota. It attached a letter setting this out to the Claimant.

19. The letter dated 19 May 2015 from Miss Baker to the Claimant confirmed that his application to join the council's housing register through the Care Leavers' Quota was rejected. The reason that was stated was because of his significant offending history he had been 'guilty' of unacceptable behaviour and therefore considered unsuitable to

be a tenant. It had been noted that he had not been found guilty of any offences since 2012 but nevertheless no discretion was 'awarded in [his] case.'

20. In accordance with the allocation scheme, the Claimant sought to have that decision reviewed by letter dated 9 June 2015. The Claimant's social worker e-mailed in support and included the following 'however, I would just like to add that [the Claimant] has not been involved in offending and criminality since 2012 and offering him support in terms of providing a further and second chance could only be a positive step in terms of his continued rehabilitation.'

21. The review was carried out by Mr Toby Graves, Head of Housing Advice and Assessment and his decision was communicated to the Claimant by letter dated 17 July 2015. Mr Graves, having considered the various submissions made concluded that the previous decision was correctly made. He set out his reasoning in detail but I do not need to go into this here because that decision was subsequently withdrawn. The Claimant instructed solicitors and on 13 October 2015 a pre-action protocol letter was sent by them to Mr Graves. In summary, it stated that the Claimant's previous convictions should not have been taken into account by the Defendant by virtue of the Rehabilitation of Offenders Act 1974. On 15 October 2015 Mr Graves wrote to the Claimant's solicitors and withdrew the decision letter dated 17 July 2015.

22. In an e-mail dated 21 October 2015 the Claimant's solicitor wrote to Mr Graves and included the following:

> "[The Claimant's] previous convictions are entirely spent and should therefore not have been disclosed or taken into account by the council's housing department when considering his eligibility to go on housing register. He does not fall into any of the 'exceptional cases including classes of person that do not qualify' categories detailed in section 2.14 of the council's housing allocation scheme. His recent pathway plan which was disclosed you under cover of the pre-action letter dated 15.10.15 confirms he has not been in any further trouble since he was 15 years old and has not caused any problems in his current placement. Indeed in the recent past he has been used by social services as a model Care Leaver when promoting the council's work to business leaders. It therefore seems inconsistent of the council to on the one hand use [the Claimant] for the purpose of promoting the council's success with young people in the care system and at the same time refusing him support on the grounds he is considered unsuitable to be a council tenant relying on spent convictions committed in his early teens."

The decision

23. The decision complained of in this case is contained in a letter dated 29 October 2015 from Mr Graves to the Claimant. The letter upholds the decision that the Claimant is a 'non-qualifying person for the council's housing register via the children's leaving Quota.'

24. The Claimant's submissions are reviewed including the e-mail of 21 October 2015 quoted above. The reasons are provided and Mr Baker summarises them in his skeleton argument as follows:

a) the Claimant's behaviour remained relevant even if the convictions resulting from it were spent;

b) the behaviour included incidents which were 'hardly minor matters' which the decision maker was entitled to take into account;

c) although [Mr Graves] 'acknowledge[d] the argument that… you are no longer offending and that you are a model Care Leaver… I do not accept that it automatically follows from this that you should receive an offer of accommodation via the quota;'

d) he did 'not think it is of necessity unreasonable to accept that you have made significant progress yet still to conclude that your application should be disqualified;'

e) and accordingly that [Mr Graves] was 'satisfied that this decision was made correctly and in accordance with the relevant provisions of the scheme…'

25. The letter goes on to record that Mr Graves asked the Director of Housing Options if the further submissions made on the Claimant's behalf persuaded him to exercise his discretion, but records that they did not.

26. The Claimant's solicitor sent a further letter before claim dated 20 November 2015 and the Defendant replied on 3 December. The claim was issued on 25 January 2016 on 17 February the Defendant filed an acknowledgement of service and summary grounds for contesting the claim. On 25 February the Claimant filed brief submissions in response.

The Grounds

27. By order dated 14th March 2016 Mr Justice Males gave the Claimant permission to bring judicial review upon two grounds:

> The Decision amounted to a breach of section 4 (1) of the Rehabilitation of Offenders Act 1974
>
> The Decision was irrational.

28. Permission was refused on two further grounds, one of which is no longer pursued namely that the Defendant's review officer misdirected himself. However, the Claimant made a renewal application for permission, dated 21 March 2016, in relation to the following ground:

> The decision was unlawful for breaching article 14 of the European Convention on Human Rights on the basis that it gives rise to indirect discrimination against the Claimant as a "Care Leaver".

Procedural

29. The hearing before me was a rolled up hearing to deal with permission as well as a substantive hearing on the Article 14 ground. I had before me a bundle of authorities and a bundle of documents, including a witness statement from the Defendant's Head

of Housing Options, Glendine Shepherd. At the hearing I gave the Claimant permission to rely upon further materials namely:

> a) the London Borough of Hammersmith and Fulham 'Looked After Children and Care Leavers' Annual Report' dated 19 January 2015
>
> b) 'Care Leavers' Transition To Adulthood' published by the National Audit Office dated 17 July 2015
>
> c) 'Outcomes for Children Looked After by Local Authorities in England as at 31st of March 2014' published by the Department of Education.

30. Although service of these further documents was late, the Defendant did not object to their introduction. I have read all of the documents even though I may not refer to each one within this Judgment.

The Defendant's decision amounted to a breach of section 4 (1) of the Rehabilitation of Offenders Act 1974

31. It is common ground between the parties that the Claimant's convictions, which I have referred to above, were 'spent' by 29 October 2015 and had been for well over a year. Convictions that are 'spent' do not, except in certain circumstances which are not applicable to this case, have to be disclosed by virtue of the provisions of the Rehabilitation of Offenders Act 1974 (ROA).

32. In setting out his reasons Mr Graves accepts the convictions were spent but states:

> a) 'I do not accept… that the behaviour which led to those convictions was an irrelevant factor in considering whether you should be disqualified…'
>
> b) 'I do not actually see how it is possible to disentangle the history of your period in care from the offending behaviour which led to disqualification.'
>
> c) '… It is not an applications (sic) convictions as such but the behaviour which may (or may not) have resulted in convictions (or any other sanction or none) and the consequent question of an applicant's suitability to be a tenant which is the legitimate concern of the decision maker.'
>
> d) 'In your case the behaviour in question includes incidents of assault (including assault of a police officer and assault occasioning actual bodily harm), criminal damage, burglary, fighting and possession of class A drugs.'

33. The relevant parts of the Rehabilitation of Offenders Act 1974 are set out below:

> **"4 Effect of rehabilitation**
>
> (1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—

(a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in [England, Wales or Scotland] to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and

(b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.

(2) Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority—

(a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and

…

(5) For the purposes of this section and section 7 below any of the following are circumstances ancillary to a conviction, that is to say—

(a) the offence or offences which were the subject of that conviction;

(b) the conduct constituting that offence or those offences; and

(c) any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction, any proceedings (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence, and anything done in pursuance of or undergone in compliance with any such sentence.

(6) For the purposes of this section and section 7 below "proceedings before a judicial authority" includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power—

(a) by virtue of any enactment, law, custom or practice;

(b) under the rules governing any association, institution, profession, occupation or employment; or

(c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question."

34. Section 7(3) is headed "Limitations on rehabilitation under this Act, etc." and is as follows:

"(3) If at any stage in any proceedings before a judicial authority in [England, Wales or Scotland] … the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which

has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions."

The section 4(1) issue

35. The Claimant's case is that the wording of section 4(1) is plain. Where the provision applies the person must be 'treated for all purposes in law as a person who has not committed… the offence'. Therefore, Mr Graves was wrong in his letter 29 October as the Claimant should have been treated as not having committed the various criminal offences referred to and section 2.14 (h) of the allocation scheme should not have been applied. The Defendant however says that the special treatment of section 4 (1) relates to the process of criminal justice against a person by the state. Whether a person's behaviour has amounted to the commission of a criminal offence, or given rise to criminal process, is however different from consideration of the behaviour itself. In oral argument Mr Baker said that it was 'quite unreal' to try and separate off part of the Claimant's life and background from the matters which were relevant for the Defendant to consider. There is a distinction between 'conduct' and 'offences'.

36. Mr Baker's submissions were that this was clear when the phrase 'circumstances ancillary to a conviction' were considered in section 4 (5) (b) as including 'the conduct constituting that offence or those offences', which serve to draw the distinction between criminal process and the behaviour which led to it. Mr Baker pointed out that the phrase 'circumstances ancillary to a conviction' did not appear in the first part of section 4 (1), in other words section 4(1) was not directed at ancillary circumstances but to the offence itself. Mr Baker also pointed out that this phrase did not appear in section 4(1)(a) but did in section 4(1)(b) and so there were circumstances where it was permissible to refer to the behaviours that amounted to the conviction. It was therefore possible to refer to behaviours separately to the conviction – the person who committed and was convicted of an offence of violence could still be described as a 'violent person'. Examples of violent conduct without referring to the criminal offence itself were permissible. Mr Baker pointed out that if that was not correct then a very strange result would arise, namely behaviour that was less serious but antisocial and did <u>not</u> result in a criminal conviction could be taken into account. However, behaviour that was more serious and resulted in a criminal conviction, which then became spent under the ROA, could not.

37. First, it is clear from the evidence that the Convictions Document did not contain any details of 'behaviours' but rather details of criminal convictions and the sentence passed in relation to those convictions. That document clearly falls within section 4 (1). Secondly, although Mr Graves refers to the behaviours linked to those offences he clearly does refer to them as criminal offences in his letter in particular see paragraph 32(d), and I do not think that calling them 'behaviours' changes what he is referring to, namely, criminal convictions based upon the information provided in the Convictions Document. There is no other evidence of the Claimant's 'bad' behaviour and it can only be that inferences have been drawn from the information in the Convictions

Document. However, Mr Graves does refer to other behaviours and it is necessary to deal with whether section 4 (1) deals with, not just a criminal conviction, but includes the circumstances ancillary to a conviction, in particular 'the conduct constituting that offence or those offences'.

38. In my judgement it is necessary to look at section 4 as a whole and to consider the purpose behind it. Section 4(1) provides that once a conviction is spent a person 'shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences…'. The purpose is to seek to prevent the past offences coming to light and to ensure that the rehabilitated person is treated as not having committed the offence in question. Section 4 (1) (a) prohibits evidence of spent convictions being produced in legal proceedings and section 4 (1) (b) prohibits questioning about spent convictions and 'any circumstances ancillary', the definition of which is referred to above. This is doing no more than making it clear within the particular circumstances of those subsections that information about the conduct that constituted the offence should not be disclosed. If the section is not looked at in this way then it seems to me that the whole purpose of it is undermined. I asked Mr Baker during his submissions how a person who had been convicted of stealing a car could be described in accordance with his analysis of section 4. He replied that it would be permissible to state that the person had taken a car without the permission of the owner. To my mind those are the elements of the offence and an individual could not be a rehabilitated person unless it was permissible for them to refuse to provide such information or without a prohibition on such information being provided. Anyone hearing such a description would know that the person had committed a criminal offence.

39. Furthermore, section 4 (1) when outlining the relevant circumstances refers to a person as being treated as someone 'who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction.' Section 4 (1) (a) also refers to the prohibition relating to a person who has 'committed or been charged with or prosecuted for or convicted of or sentenced for any offence…'. In contrast section 4 (1) (b) refers to 'spent conviction or spent convictions' and includes the phrase 'or any circumstances ancillary thereto.' It is necessary in section 4 (1) (b) to refer to 'any circumstances ancillary thereto' because the drafting of the section only uses the word 'conviction' and this makes it clear that the prohibition is wider than just the conviction itself. This is not necessary in the rest of section 4 as the drafting is wider and includes circumstances that are ancillary to the conviction, such as committing the offence and sentencing. Section 4(5) supports and reinforces the requirements of section 4(1).

40. It may be possible to identify in a person who has been convicted of a series of criminal offences 'bad' behaviours that do not form part of the conduct constituting the offences. If so, it would be permissible to disclose those behaviours. For example, if a person is generally violent then he/she might be described as a violent person notwithstanding any convictions. However, if he/she had committed one violent offence then, if it was spent, it would not be permissible to disclose it. In this case, there was no substantive evidence of 'bad' behaviour other than the evidence provided by way of the Convictions Document.

The section 7(3) issue

41. The Defendant has advanced a further position however based on section 7(3) – see paragraph 34 above. The Defendant says that its statutory power under Part VI of the Housing Act to allocate housing accommodation comes within the provisions of section 7(3) and that the allocation process amounts to 'proceedings before a judicial authority'. Furthermore that section would permit the admission of evidence concerning not just the conviction itself (on the Defendant's interpretation of section 4 (1)) but also the behaviour. The Claimant says that those arguments are wrong because consideration of a housing application does not amount to 'proceedings before a judicial authority' and/or the Defendant came nowhere near to exercising the careful judgement required before any exercise of that power. It is however agreed that Part VI of the Housing Act does not give an individual a right to a house.

42. The first question therefore is whether the process the Claimant underwent involving the CLHP and with Mr Graves amounted to 'proceedings before a judicial authority'. The definition in section 4(6) of this term includes proceedings before any person or body who has power by virtue of any enactment or law. This aspect would be made out if there is a power to determine any questions affecting rights etc. within the Housing Act.

43. Mr Baker submitted that section 4 (6) needed to be looked at carefully to arrive at a sense of its scope and that it covered a wider scope than just quasi-judicial. He pointed out in the Housing Act the following features which, he said, identified the power to determine questions affecting rights and privileges etc.:

    a) it controls the process up to the point of an individual securing a tenancy, which will include rights;

    b) once on the housing register, individuals have certain rights and take their place 'in the queue'.

    c) Section 160ZA(7) provides a general power to determine the class of persons who are or are not 'qualifying persons' and section 160ZA(6) restrict the power to allocate housing accommodation to such qualifying persons;

    d) Section 160ZA(9) mandates the housing authority to notify the applicant of its decision and the grounds;

    e) section 166(1A) mandates a housing authority to notify an applicant that 'he has the rights mentioned in section 166A';

    f) section 166A(1) requires a housing allocation scheme containing all the necessary procedures;

    g) section 166A(9) includes the following:

        i) the right for an applicant to request general information about how an application is likely to be treated, the appropriateness of the accommodation and how long it will be before it is available;

        ii) the right to request the housing authority to inform the applicant of any decision about the facts taken into account in considering whether to allocate housing;

        iii) the right to request a review of the decision in (ii) above.

44. I do not agree with Mr Baker's submissions and in my judgement the process followed under the Housing Act is not one that is 'proceedings before a judicial authority'. My reasons for reaching this conclusion are as follows:

    a) I agree with Mr Chataway's submission that the process under Part VI is an administrative one. Section 159(1) requires the housing authority to comply with the provisions of Part VI 'in allocating housing accommodation.' In subsection 2 of that section it refers to persons being selected or nominated. Section 166A(1) requires a housing authority to have an allocation scheme 'for determining priorities'. Part VI contains other requirements and prohibitions on the housing authority which affect the allocation scheme. This does not create a process to determine any questions affecting rights etc. of any person, but rather a process concerning the allocation of housing and the identification of a pool of people to whom it may be allocated.

    b) Part VI creates a 'target duty' i.e. an obligation to a whole population as identified under that part of the Act (see *R(on the application of Ahmad) v London Borough of Newham [2009] UKHL 14* in particular paragraphs 12, 13 and 15);

    c) The 'rights' that Mr Baker refers to are rights that the individual has against the housing authority. They are not rights that are being determined by that authority. Just because there is a statutory process that includes rights for the applicant does not make it proceedings before a judicial authority.

    d) The housing authority has a direct interest in the allocation of housing accommodation. It has to allocate its own resources in accordance with the scheme. Where there is such a direct interest it seems to me that it is incompatible with the definition of proceedings before a judicial authority in section 4 (6). Such a direct interest is incompatible with the status of a body that has the function to determine questions affecting rights privileges and obligations etc.

    e) I agree with Mr Chataway's submission that the definition is directed towards bodies which have the power to adjudicate on rights between third parties, or rights conferring status in relation to third parties. The power under Part VI does not have such effect.

45. If I am wrong in the above conclusion, I have considered whether even if section 7(3) did apply, Mr Graves applied it lawfully. I was referred to *Adamson v Waveney District Council [1997] 2 All ER 898*, a decision of Sedley J. The case concerned a local authority's decision to reject an application for a hackney carriage licence. The issue was the admissibility of a list of spent convictions which had been provided by the local authority to the justices making the determination. It was agreed that the local authority and the justices to whom an appeal had been made were both 'judicial authorities' for the purposes of section 7(3). The judge formulated guidance for the process to be followed by a judicial authority under section 7(3). The essence of that guidance is as follows;

    a) Section 7(3) was 'a matter of judgement, not discretion' (page 903 paragraph c);

b) the judicial authority has to identify the issue to which any spent conviction must relate if they are to be admitted (page 904 paragraph a);

c) those responsible for presenting material must give their own objective, professional consideration to whether any or all of the spent convictions are capable of having real relevance to the issue (page 904 paragraph b);

d) providing all of the information and leaving it to the judicial authority to put out their minds irrelevant material 'would be wrong and dangerous' (page 904 paragraph d);

e) only the broad terms of the offence should be put to the judicial authority to enable it to determine whether or not to admit the spent conviction (page 904 paragraph e);

f) once admitted in evidence natural justice requires the applicant to be heard to persuade the judicial authority that the spent convictions should not jeopardise the application (page 904 paragraph j)

g) the judicial authority then has to decide whether to exercise the exceptional powers bearing in mind the interests of the applicant and the public interest (page 905 paragraph a).

46. As Mr Baker stated, the issue of the ROA was not considered by the CLHP as it was not until the Claimant's solicitors raised the point that the Defendant considered it. This covers the position up until the decision made by Mr Graves. Mr Baker correctly stated that under those circumstances that Mr Graves could not rewrite history but he submitted that the exercise conducted by Mr Graves was sufficient to meet any process requirements as he considered the nature and merits of the case. Mr Baker referred me to Mr Graves's letter dated 29 October 2015 where he states '… I do not accept that the fact that your convictions were spent means the behaviour which led to those convictions was a relevant factor in considering whether you should be disqualified on the basis of section 2.14 (h)'. I was also referred to the following extract:

> "As it is the young person's care history that first entitles them to consideration by the [CLHP] it seems reasonable to me that all panel members (including representatives from the housing service) should have access to full details of that history and that any or all of those details may legitimately be considered in determining whether or not you should receive an allocation of accommodation via the children leaving care quota. In your case I do not actually see how it is possible to disentangle the history of your period in care from the offending behaviour which led to disqualification."

47. Mr Baker also submitted that the process set out by Sedley J was not a complete bar even if it wasn't followed. He pointed out that in *Adamson* Sedley J concluded that despite the justices having erred in the process, that even if they had properly directed themselves they would have admitted the evidence of the spent convictions (page 95 paragraph f). I do not agree with this submission because at paragraph c on page 905 Sedley J clearly identifies the process that he has set out as 'the proper procedure' and the conclusion reached in paragraph f is the disposal of the case on its particular facts. It is not an authority to say the process does not have to be followed.

48. In my judgement, the process required under section 7(3) cannot be said to have been followed in this case by the CLHP or Mr Graves. The CLHP apparently requested the information and it was provided in full to Miss Baker. It is not clear whether Miss Baker passed the Convictions Document back to the CLHP or concluded herself that the information it contained meant that the director's discretion was required. There is no evidence of any consideration given to relevance or any of the other matters that I have referred to in paragraph 46. I do not consider the references I have been shown in Mr Graves' letter as amounting to such, or sufficient, consideration. Therefore, even if I am wrong in relation to my conclusions on whether these were proceedings before a judicial authority I find that the process required under section 7(3) was not followed.

49. In my judgement, in this case, it was not lawful to base a decision about the Claimant on the offences that he was convicted of and it was not lawful to base a decision on the conduct constituting those offences because section 4 of the ROA prohibits it where the convictions are spent and section 7(3) is not applicable.

The Decision was irrational.

50. In Court Mr Chataway confirmed that his complaint on this ground was directed towards the application of the Defendant's allocation scheme to the Claimant. It was not alleged that the policy as a whole was irrational. There was no evidence of 'bad' behaviour available to the decision maker in the absence of the Convictions Document. Given the conclusions that I have reached above about the application of the ROA I do not think that it is necessary or proportionate for me to deal with the question of irrationality/perversity.

The Decision was unlawful for breaching article 14 of the European Convention on Human Rights

51. Mr Chataway's complaint under this Ground related not just the decision in relation to the Claimant but also in relation to the policy as a whole. It is also necessary for me to consider giving permission for this ground to be pursued, as I have stated above.

52. Article 14 of the European Convention on Human Rights is as follows:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

53. Article 14 is sometimes referred to as the 'parasitic' right or right that has 'no independent existence' because it applies solely in relation to the enjoyment of the rights and freedoms set out in the Convention. There is no need to establish a breach of one of the other Convention rights or even an interference with that right. What needs to be established is that the provision is 'linked to, or (as it is usually described) within the scope or ambit of' another Article (*Mathieson v Secretary of State for Work and Pensions [2015] UK SC 47* at paragraph 17*).* Article 14 also extends to provisions which have been voluntarily adopted by the State and go beyond the minimum requirements set out in the Convention (*Bah v UK (2012) 54 EHRR 21* at

paragraph 35). In this case, the Claimant says that article 8 is engaged, although that is disputed by the Defendant. However it is agreed that Article 8 itself does not provide the right to a home (see *Chapman v UK* *(2001 33 EHRR 18* at paragraph 99) and neither does Part VI of the Housing Act (see reference to *Ahmad* above)

54. There are four elements to be established. First, the Claimant has to show that the process applicable to Care Leavers under the Defendant's allocation scheme does come within the scope or ambit of article 8. Secondly, that Care Leavers are a group that come within 'other status' at the end of the list of grounds of discrimination in article 14. Thirdly, there is a potential for discrimination and fourthly, if there is discrimination whether it can be justified by the Defendant.

Is the process within the scope or ambit of article 8?

55. Article 8 is a qualified right, in other words in the circumstances set out in the second paragraph of the Article, the State may be able to justify any interference with the rights identified in the first paragraph. For these purposes it is not necessary to set out the second paragraph of the article but the first paragraph is set out below as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence."

56. I have been referred to a number of authorities. In *R (Morris) v Westminster City Council* *[2006] 1 WLR 505* Sedley LJ held that provisions under Part VII of the Housing Act concerning homelessness did come within the ambit of article 8 'because, albeit within a larger social welfare measure, it sets out to give effect to legislative policy of preserving family life for the homeless.' In that case a woman who obtained British citizenship was not deemed as a priority need by the local authority because her daughter was not thought to be eligible for British citizenship. In *Bah*, referenced above, the applicant was renting a room; however, the landlord was unwilling to accommodate her son. The applicant was told she and her son would have to move out but the local authority did not consider her to be a priority need (and therefore in effect she would not receive housing) because her son was subject to immigration control. The applicant was not actually homeless but rather faced homelessness. The court at paragraph 40 stated that 'where a contracting state decided to provide [social] benefits, it must do so in a way that is compliant with article 14. The impugned legislation in this case obviously affected the home and family life of the applicant and her son, as it impacted upon their eligibility for assistance in finding accommodation when they were threatened with homelessness. The court therefore finds that the facts of this case fall within the ambit of article 8.'

57. *R(HA) v Ealing London Borough Council* *[2015] EWHC 2375* concerns a claimant and her children who were victims of domestic violence and moved to the local authority's area to escape further violence. Although the local authority would otherwise have admitted her to its housing register as a priority need, because the claimant did not meet a minimum period of residence under its allocation scheme, it declined to do so. Goss J held that the policy was unlawful because it did not provide for the giving of reasonable preference to the prescribed category of persons as required by section 166A(3) of the Housing Act. However, he went on to consider the question of discrimination under article 14 at paragraph 29 of the judgement, having

referred to paragraph 17 of *Mathieson* he stated: 'the link here is said to be home and family life. There is no enshrined right to a physical home; the right is to the enjoyment of a family life. However, this can, in reality, only be enjoyed in settled accommodation. Accordingly I am satisfied there is a sufficient link.'

58. In *R (H) the Ealing London Borough Council [2006] EWHC 841* His Honour Judge Waksman QC had to consider a challenge to amendments to the Defendant's housing allocation policy which affected the Priority Bands and therefore the speed and likelihood of obtaining accommodation. The judge concluded that the defendant's housing allocation policy did come within the ambit of article 8 and this is dealt with at paragraphs 77 to 88 of the judgement. Initially the local authority had conceded that the allocation scheme was within article 8 but subsequently withdrew that concession and the point was argued. The authorities I have discussed in paragraphs 56 and 57 above were considered. At paragraph 82 the Judge stated 'the fact that the temporary accommodation enjoyed by the families of H and A [two of the claimants in the case] at the moment are (just about) suitable does not mean that the obtaining of permanent suitable accommodation will not directly promote enjoyment of family life'.

59. The judge records the Claimant's submissions at paragraph 77 which include a submission that there is a link between the allocation scheme and article 8 on the basis of an impact on private life. At paragraph 78 when referring to a witness statement from the local authority the judge states that the witness 'accepts that access to suitable long-term accommodation is particularly important for children and so accepts a link to family life and probably private life as well.' Having referred to the case of *Bah* the judge at paragraph 84 stated: 'Once more, I accept that the legislation in question was directly concerned with eligibility based on the fact of parent and child in the context of homelessness but this does not mean that other legislation or provision relating to allocation of housing is necessarily out with the ambit of article 8.'

60. Mr Chataway's submissions are that the Defendant's allocation scheme is within the scope or ambit of article 8 based on *R (H) v Ealing* and *R (HA) v Ealing.* He does not rely upon family life as he cannot because the Claimant is only applying for accommodation for himself. However, he says that although this was the principal basis upon which those two cases were decided it is not the only basis. In *R (H)* he refers to paragraph 78 and paragraph 87 of the judgement in particular. Mr Chataway says that there is a linkage to the provision of a home especially through the nomination for a specialist quota. In terms of private life the linkage is more obvious because the Claimant is vulnerable and in need of settled housing (see the CLHP outcome and his representations to the CLHP).

61. Mr Baker submits that *Morris* and *Bah* concern homelessness, which has different considerations because Part VII of the Housing Act does provide individuals with rights as opposed to a general or target duty. In relation to *R(HA)* and *R(H)* he submits that these relate to family life which is not relevant in this case. However, in addition, he submits that they are wrongly decided and therefore I am not obliged to follow them. Mr Baker points out that in *R(H)* it appears to be taken for granted that admission to a housing register provides a settled home. Mr Baker says it actually provides a process to select people for housing when it is available. He also submits

that the decision on article 8 and 14 were subsidiary to the main decision and not the *ratio* of the case.

62. In my judgement, the Defendant's housing allocation scheme does have an impact upon private life and therefore comes within the ambit or scope of article 8. Although as Mr Baker points out the emphasis in *H* and *RH* is on family life in *H* it seems to me that private life is also considered, although probably not the basis for the decision. I think that the cases that I was referred to show the breadth of the scope of article 8 in relation to the provisions in the Housing Act and it follows that it is capable of extending to private life. Whilst there is no absolute right to accommodation it seems to me that does not prevent the allocation scheme from coming within the scope of article 8. The Claimant is vulnerable (see the panel's assessment) and other similar Care Leavers will be vulnerable (to a greater or lesser extent). The Care Leavers' Quota, which I have set out above, in paragraph 7.1 refers to the nominations being targeted 'to the most vulnerable'. The Claimant describes in his application to the CLHP (quoted at paragraph 10 above) that he would like a place 'to live by myself so I can start moving forward with my career and life'. The CLHP in its conclusions identifies the Claimant's vulnerabilities and notwithstanding the score referred to in paragraph 12 above they recommend his placement in social housing. There are other examples where I think the evidence does demonstrate the link between the process, private life and the need for settled accommodation for vulnerable individuals. Although entry to the housing register does not guarantee accommodation I am of the view that there is a sufficient link to bring it within the scope of article 8 not least because not getting on the register has an impact on an applicant's private life.

Other status

63. In *R (RJM) v the Secretary of State for Work and Pensions [2008] UKHL 63* the question of whether homelessness was an 'other status' was considered. At paragraph 5 Lord Walker referring to cases from the European Court of Human Rights and the expression 'personal characteristics' used in this context stated:

> "Personal characteristics' is not a precise expression and to my mind the binary approach to its meaning is unhelpful. 'Personal characteristics' are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality… Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, and with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residents or domicile, and past employment in the KGB). Like him, I would include homelessness is falling within that range, whether or not it is regarded as a matter of choice… The more peripheral or debatable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

64. Lord Neuberger at paragraph 42 of the judgement states:

> " First, it seems clear that "a generous meaning should be given to the words 'or other status'" – per my noble and learned friend, Lord Hope of Craighead,

> in Clift [2007] 1 AC 484, para 48. To similar effect, at para 4.14.21 of Lester & Pannick, Human Rights Law and Practice, 2nd ed (2004), it is stated that the ECtHR applies "a liberal approach to the 'grounds' upon which discrimination is prohibited". That appears to me to be entirely in accordance with the approach one would expect of any tribunal charged with enforcing anti-discrimination legislation in a democratic state in the late 20th, and early 21st, centuries."

65. At paragraph 43 Lord Neuberger emphasises that decisions of the European Court of Human Rights support a wide reading of 'other status' referring to military rank as against civilian, residence or domicile and previous employment with the KGB as having come within the definition. At paragraph 44 he concluded that persons living in different types of home would clearly potentially fall within article 14. At paragraph 45 he stated:

> "Further, while reformulations are dangerous, I consider that the concept of "personal characteristic" (not surprisingly, like the concept of status) generally requires one to concentrate on what somebody is, rather than what he is doing or what is being done to him. Such a characterisation approach appears not only consistent with the natural meaning of the expression, but also with the approach of the ECtHR and of this House to the issue."

66. Mr Baker's submissions were that in accordance with *RJM*, a care leaver was not about personal characteristics rather it was about the obligation on a local authority towards that person. It was about what someone else was doing towards that person. He submitted that Care Leavers were on the wrong side of the line and that the wider the content concept of status became the more difficult it became to justify competing demands which were practical reasons why status should not be allowed to go too far. Mr Baker said that Mr Chataway could not point to any authority or decision that 'other status' included Care Leavers.

67. Mr Chataway referred to *Mathieson* and in particular what Lord Wilson J SC stated at paragraphs 19 through to 23 when considering the meaning of 'other status' and reviewing what had been said in *RJM* and subsequently in *Clift v United Kingdom,* The Times, 21 July 2010. At the end of paragraph 22 concluding:

> "It is clear that, if the alleged discrimination falls within the scope of the convention right, the court of human rights is reluctant conclude that nevertheless the applicant has no relevant status, with the result that the enquiry into discrimination cannot proceed."

68. This was in the context of Mr Clift's claim for discrimination on the basis of his 'status' as someone sentenced to a term of imprisonment of at least 15 years. I do not think it is right to exclude those from 'other status' on the basis that Mr Baker suggests. The Care Leavers have had something done to them in that they have been looked after by a local authority under a statutory regime. However, as a result of that they will have personal characteristics given their experiences of being in care coming within the concentric circle described by Lord Walker as 'what happens to them.' I see no distinction between the Care Leavers as a group and those who are homeless.

Potential for discrimination

69. Article 14 prohibits direct discrimination however, it also prohibits indirect discrimination. I was referred to *Thlimmenos v Greece (2000] 31 EHRR 411* at paragraph 44 as follows:

> "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification failed to treat differently persons whose situations are significantly different."

70. *Burnip v Birmingham CC [2013] PTSR 117* it was held that the statutory criteria for calculating housing benefit for tenants in private rented accommodation discriminated against the severely disabled where they needed additional accommodation. Maurice Kay LJ at paragraph 13 stated:

> "…Indeed, one of the attractions of Article 14 is that its relatively non-technical drafting avoids some of the legalism that has affected domestic discrimination law. This was recognised by Baroness Hale in *AL (Serbia) v Secretary of State for the Home Department* **[2008] 1 WLR 1434**, at paragraphs 20-25, where she particularly identified the less complicated approach to comparators in Convention law. On the same basis, I would reject the attempt on behalf of the Secretary of State to criticise the appellants' case for not being founded on statistical evidence. Whilst such evidence can be important in an Article 14 case (see, for example, *Hoogendjik v Netherlands* **(2005) 40 EHRR SE 22**, at page 207), it is not a prerequisite. Where, as in the present case, a group recognised as being in need of protection against discrimination – the severely disabled – is significantly disadvantaged by the application of ostensibly neutral criteria, discrimination is established, subject to justification."

71. I was referred to the Defendant's 'Looked After Children in Care Leavers Annual Report' in particular paragraph 1.2 which refers to the outcomes for looked after children as being poorer than those not in the care system. Paragraph 2.3 refers to the majority of looked after children needing alternative care and accommodation and those who remain in care being subject to neglect or abuse. The statistics at paragraph 3.4 showed abuse and neglect was the largest category of need accounting for 119 of the 200 looked after children as at 31 March 2014. The Department for Education Statistical First Release 'Outcomes For Children Looked After By Local Authorities in England as at 31 March 2014' at page 241 demonstrates that the rate of children who were looked after being permanently excluded from school was two times higher than the rate for all children. At page 243 the statistics are that just half of looked after children have 'normal' emotional and behavioural health. At page 245 looked after children were less likely to be convicted or subject to final warning or reprimand than in previous years at 5.6%. Although there are no comparable figures for all children for 2014, in 2013 1.2% of all children were convicted or subject to final warning or reprimand. The executive summary (published in 2008) of the 'Centre for Social Justice Children in Care Commission Report, Breakthrough Britain: couldn't care less' lists a number of statistics about children in care which include 30% of children in custody have been in care and 23% of the adult population has previously been in

care, even though children in care and Care Leavers account for less than 1% of the total population. At paragraph 3.2 of that publication research is quoted as revealing that children who have been in care account for 49% of the under 21-year-olds in contact with the criminal justice system and that children aged between 10 to 17 who had spent 12 months or more in care were more than twice as likely as all children to have been convicted or received a final warning or reprimand during that year.

72. Ms Shepherd's witness statement at paragraphs 23 through 25 deals with statistics relating to Care Leavers. In 1 April 2015 to 31 March 2016 26 Care Leavers were nominated by the CLHP and 22 Care Leavers were allocated social housing through the Care Leavers Quota. Three out of the 26 did not qualify according to section 2.14 (h) of the allocation scheme but were successful in having the director use his discretion and as a result were allowed on the housing register. The person who was not successful was the Claimant in this case. The statistics for 1 April 2014 to 31 March 2015 were 13 Care Leavers placed on housing register. Five applicants did not qualify under section 2.14 (h) and in four cases the director exercised his discretion and in one he did not.

73. Mr Baker submitted that there was difficulty in identifying a proper comparator to see if there was a difference in treatment between people such as the Claimant and others. He also queried whether the indirect discrimination test was of disproportionate effect or the special discrimination referred to in the *Thlimmenos v Greece (2000) 31 EHRR 411* at paragraph 44 where the Court stated that the '… Convention is also violated when states without an objective and reasonable justification failed to treat differently persons whose situations are significantly different.' I was referred in particular to paragraph 42 of *R (MA) v Secretary of State for Work and Pensions* [*[2014] EWCA Civ 13*] where Lord Dyson MR discusses the Claimant's submissions concerning *Thlimmenos* case and states: 'Secondly, it is said that the absence of an exceptions mechanism in the Regulations for 'hard cases' which are disproportionately likely to come from some protected status groups… means that the disadvantage of the… criteria will be disproportionately felt by members of those groups.' The exception existed in section 2.14(h), it was said and so this counted against discrimination. Mr Baker's submissions were that to establish discrimination material had to be sufficiently clear to raise the case and it was a high hurdle. The Defendant's submission was that the evidence for discrimination was insufficient.

74. I do not accept Mr Baker's submissions on this point. I think it is clear from the extract from *Burnip* that I have quoted above that there is no need for statistical evidence or for a comparator to establish discrimination under Article 14. The point Mr Baker raises about an exceptions mechanism, which he says is already included by section 2.14 (h) of the allocation scheme is not part of the reasoning of Lord Dyson but a record of one of the claimant's submissions. At paragraph 46, although discussing the extent of justification required he states: 'it is the substance of the discrimination which matters, not its form. I doubt whether it matters whether the discrimination is properly to be characterised as direct, indirect or *Thlimmenos*.' Nevertheless, the statistics to which I have referred do indicate that those in care and therefore those who are Care Leavers are likely to have a higher level of criminal convictions and behaviours that fall within paragraph 2.14 (h) and therefore be disproportionately affected by it. The evidence from Ms Shepherd does show that only a small number of Care Leavers under the Defendant's allocation scheme are

caught by section 2.14 (h) but I do not know whether that small number is significant in proportion to the total number of Care Leavers or how that compares to how people in general applying under the allocation scheme are caught by section 2.14 (h). The best evidence in my view comes from the general statistical material that I have referred to in paragraph 72. In my judgement, following the principles set out in the *Burnip*, section 2.14 (h) is likely to discriminate against Care Leavers as a group. The question is therefore whether that is justified.

Justification

75. It was agreed that there was a wide margin of appreciation in this case for any justification and that the burden of establishing the justification is on the Defendant.

76. I was referred to what Lord Nicholls stated in *R(Carson)v Secretary of State for Work and Pensions* [2006] 1 AC 173 at paragraph 3:

> "For my part, in company with all your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometime the answer to this question will be plain. There may be such an obvious, relevant difference between the Claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

77. Lady Hale in *R(Tigere) v SSBIS [2015] UKSC 57* sets out the test as follows:

> "With those considerations in mind, I turn to the issue of justification. It is now well-established in a series of cases at this level, beginning with *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, and continuing with *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45, [2012] 1 AC 621, and *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, that the test for justification is fourfold: (i) does the measure have an legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?"

78. In *MA* at para 71 Lord Dyson refers to the judgement of Henderson J in *Burnip*, (with which he also agreed) and identifies three factors when considering justification for exception to a rule that is otherwise discriminatory. First, the category of persons that

it was sought to exclude were very limited. Secondly, the cases were likely to be 'relatively few in number, easy to recognise, not open to abuse and unlikely to undergo change or need regular monitoring.' Thirdly, one scheme was less advantageous for the claimants than another. Where the 3 points are met justification is not made out. These cases were cited by Lord Thomas LCJ in *R (Rutherford) v Secretary of State for Work and Pensions* [2016] EWCA Civ 29. The case concerned a failure to make provision in regulations for female victims of domestic violence and whether this was unlawful discrimination under article 14 on the ground of gender. At paragraph 47 in reaching a conclusion on article 14, the Lord Chief Justice states: 'It cannot seriously be disputed that A [the Claimant] and those in a similar position, who are within the Sanctuary Schemes and in need of an adapted safe room, are few in number and capable of easy recognition. There would be little prospect of abuse by including them within the defined categories [in the relevant regulations] and little need for monitoring. Moreover with careful drafting [the regulations] could be amended to identify them as a discernible and certain class.'

79. Ms Shepherd in her witness statement at paragraphs 5 through to 25 deals with the Defendant's allocation scheme and the issue of 'unacceptable behaviour'. Her evidence is that the Defendant has 1,872 households on its register waiting for an allocation of social housing however it has an acute shortage of housing stock. The current average waiting period for householders is approximately 18 months and during the year 2015/16 a total of 884 properties were allocated. Ms Shepherd says that the qualifying criteria were adopted to produce a realistic relationship between the number of accepted applicants and the supply of accommodation. In 2011/12 there were just 470 lettings of social housing but there were 10,300 applicants at the beginning of April 2012. 2,766 applicants had been registered for over five years and 478 applicants have been registered for over 10 years with one registered for almost 36 years.

80. At paragraph 7 Ms Shepherd states:

> "In the allocation and management of the housing stock, a long-standing and difficult problem is to deal with unacceptable behaviour by tenants and members of the households, which can take many forms. Some of it involves contact with very serious and adverse consequences for other tenants and residents, or staff: [a long list of behaviours are identified] as well as other types of behaviour which may be less acute or apparent that are distressing to others and often repeated and long-term.…"

81. At paragraph 8 Ms Shepherd details how the Defendant has to manage its housing stock and respond to unacceptable behaviour as well as having responsibilities to tackle and seek to prevent such behaviour and promote the well-being of the district. This consumes, she states, considerable public resources. 'The court cost of seeking possession on grounds of antisocial behaviour and nuisance is approximately £4000-£5000. The court cost of seeking an injunction to end the antisocial behaviour is in the region of £2000. These are average figures and in complex cases the costs run much higher.'

82. At paragraph 9 Ms Shepherd states

> "For these reasons, the [Defendant] has long had provision in its housing allocation scheme and procedures to prevent people with histories of unacceptable behaviour, who are considered unsuitable to be tenants of the [Defendant], being allocated very scarce social housing resources for which there is such great demand particularly from respectable people with great needs. In part, this is about fairness; it is also about community safety and well-being; prudent use of limited public resources is another factor; and it reflects a concern that applicants should take responsibility for their own actions."

83. Mr Chataway's submissions are that there is no justification for the application of section 2.14 (h) to Care Leavers who are referred by the CLHP. Care leavers are nominated, they are few in number and easy to recognise and there is no possibility of abuse and no difficulty in adapting the allocation scheme to exempt them from the rule – section 2.14 (h) could just be deleted. For those Care Leavers the issue of suitability has already been looked at because first, they do not get to the CLHP at all unless the social worker says they are ready. Secondly there is then the process before the CLHP. There is no justification for the further hurdle of section 2.14 (h). In the detailed grounds at paragraph 42 (b) Mr Chataway alleged that the Defendant owed a statutory duty to provide assistance in meeting needs of relevant Care Leavers under section 27 of the Children Act 1989 where this is requested by social services. Mr Baker pointed out that as the Defendant was a unitary authority and so section 27 did not apply and this argument did not appear in Mr Chataway's skeleton argument. However, notwithstanding that position, Mr Chataway submitted that the position should be looked at in context because the Defendant has an additional responsibility to Care Leavers as Social Services are a corporate parent.

84. In my judgement the Defendant has established that the discrimination is justified. I agree with Mr Baker's submission that in so far as there was any request by social services in relation to the Claimant it was for the housing department of the Defendant to consider the nomination by the CLHP in accordance with the allocation scheme. Care Leavers do have special treatment in any case through the Care Leavers' Quota. The evidence is that section 2.14 (h) is designed to minimise the risk of those with behaviours that would have an adverse impact on others being allocated housing through the housing register. Not only does this improve the environment for relevant residents in general but it reduces the risk of the Defendant expending limited resources on legal proceedings in the event that is necessary to take proceedings as identified by Ms Shepherd. To my mind these are legitimate aims that justify the limitation on the right. It is a rational measure to limit access of people with behaviours such as those identified in section 2.14 (h) to the housing stock and it is the least intrusive measure. The assessment by the social worker and CLHP are for purposes that are different to the assessment under the housing allocation policy. I do not believe that it is necessary to exempt this group from the section 2.14(h) bearing in mind its legitimate aims. Any Claimant may still be able to obtain accommodation in the private sector (although no doubt that is not necessarily easy) and it is not a total bar on obtaining accommodation.

85. The Defendant has to consider the rights and interests of the whole of its community and as can be seen from the statistics, it is unusual for Care Leavers to be denied access to the housing register, in particular because of the director's discretion (which

allows consideration of special circumstances and avoids a blanket application of the section) and therefore I think it is a proportionate measure striking a fair balance between the rights of the individual and the interests of the community. The 3 tests from *Burnip* and *MA* referred to at paragraph 78 above are not the only tests for justification, or lack of it. The group of Care Leavers may be small and easy to identify but I do not think that is the central point in the question of justification in this case. I also have in mind what Lord Walker said in *RJM* further on in paragraph 3 namely: 'The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify.' The personal characteristic here is not at the core and so justification is not as difficult as if it were. It is as Lord Nicholls stated: '…whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.' I have concluded that in this case, the Defendant's allocation scheme in relation to its treatment of Care Leavers meets that test and the test set out by Lady Hale in *Tigere.* Accordingly, I find that the claim on article 14 fails. For completeness, bearing in mind the test for permission at paragraph 15 of *W v the Secretary of State for the Home Department [2016] EWCA Civ 82* for the same reasons given above I do not give permission for judicial review on this ground.

Conclusion

86. I have concluded that the Defendant acted unlawfully in basing its decision not to enter the Claimant on the housing register on the offences that he was convicted of and it was not lawful to base a decision on the conduct constituting those offences. However, I have also concluded that the indirect discrimination under Article 14 in the Defendant's housing allocation scheme as applied to Care Leavers, such as the Claimant, was justified and so the claim under Article 14 fails.