10-year residency requirement to go on a local authority housing list not discriminatory to foreign nationals (R (Gullu) v London Borough of Hillingdon)

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Local Government analysis: Mostyn J, in an unexpected decision, has decided that a rule which prevents persons claiming local authority housing in the London Borough of Hillingdon unless they have lived there for 10 years is not indirectly discriminatory to foreign nationals. This was despite the fact that Hillingdon's legal team conceded indirect discrimination and the Equality and Human Rights Commission's (EHRC) counsel described the discrimination as 'obvious'. It is likely that this judgment will be set aside if it reaches the Court of Appeal. It is out of kilter with the judgment of Supperstone J, in R (on the application of TW and others) v London Borough of Hillingdon (Equality and Human Rights Commission) [2018] EWHC 1791 (Admin) who struck down the same 10-year policy on the basis of racial indirect discrimination. Written by Adam Heppinstall, barrister, at Henderson Chambers.

R (on the application of Gullu) v London Borough of Hillingdon (Equality and Human Rights Commission intervening) [2018] EWHC 1937 (Admin)

What are the practical implications of this case?

This judgment is almost certainly going to the Court of Appeal, as might also Supperstone J's judgment in *R (on the application of TW and others) v London Borough of Hillingdon (Equality and Human Rights Commission)* [2018] EWHC 1791 (Admin). See News Analysis: Admin Court sets aside housing allocation condition of ten years' residence in borough set by local authority on grounds of race discrimination and breach of children's rights (R (on the application of TW and others) v London Borough of Hillingdon)

The finding in this case that the policy was not discriminatory is unlikely to survive on appeal, not least because discrimination was conceded by LB Hillingdon. The justification of the policy is likely to be front and centre before the Court of Appeal and we already know from Supperstone J's judgment that LB Hillingdon are struggling to adduce compelling evidence to demonstrate the proportionality of the measure. For those local authorities considering similar policies, they should watch this space, as equally should those poised to issue JR claims in respect of same or similar rules.

What was the background?

The claimant is a Turkish Kurd given refugee status in April 2013. He has been in refugee directed and temporary accommodation provided by the London Borough of Hillingdon since then. He was refused entry onto the housing list because of Hillingdon's 10-year residency rule. The claimant claimed that that rule discriminated against him as a refugee and as a foreign national. Counsel for the Equality and Human Rights Commission summarised the case thus: 'Residency requirements, especially for as long as 10 years, are intrinsically liable to disadvantage non-UK nationals. The reason is obvious. UK nationals are significantly more likely to have lived in the UK, and in any particular area of it, for the past 10 years, than non-UK nationals….' So obvious, in fact, that Hillingdon conceded indirect discrimination.

What did the court decide?

The judge, however, in a surprising decision, did not find the policy to be discriminatory because he did not focus on the protected characteristic, ie being a foreign national, but instead seemed to think the relevant characteristic was being a refugee (which is not a protected characteristic). He therefore compared the position of a short-term resident refugee with a short-term resident who is not a refugee (see para 37.) Obviously, given that the policy affects all short-term residents equally, then there is no discrimination. The legal test, under section 19 Equality Act 2010 (EA 2010), requires consideration of whether a person with a protected characteristic is put to particular disadvantage by the application of a policy where a person without that protected characteristic is not put to that disadvantage.

In focusing on the claimant's status as a refugee, rather than as a Turkish national it is likely that this judgment will be overturned by the Court of Appeal, if the claimant can obtain permission to appeal from that court (the judge refused such permission).

The judge went on to consider justification (noting that 'It may be a higher court disagrees with my primary conclusion…' para 20) but misapplied the legal test by seemingly thinking that quashing the policy would amount to affording an advantage to refugees over other claimants to housing. He also seems to be completely swayed by the fact that the Government had encouraged such policies (although not in relation to residency requirements as long as 10 years). In making his judgment on this point he does not refer at all to any evidence which LB Hillingdon had produced to demonstrate the proportionality of the rule.

This can be contrasted with Supperstone J's judgment in relation to the same policy in *R (on the application of TW and others) v London Borough of Hillingdon (Equality and Human Rights Commission)* [2018] EWHC 1791 (Admin) where he found that the local authority had failed to provide a proper evidential basis to support the proportionality of the 10-residency year rule. It seems that this judgment will be vulnerable to appeal on this ground as well.

Case details

- Court: High Court, Queen's Bench Division, Administrative Court (London)
- Judge: Mostyn J
- Date of judgment: 26 July 2018

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