CO/5892/2016

Neutral Citation Number: [2017] EWHC 802 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 9 March 2017

B e f o r e:

MS SARA COCKERILL QC
(Sitting as a Deputy High Court Judge)

Between:

THE QUEEN ON THE APPLICATION OF HALVAI

Claimant

v

LONDON BOROUGH OF HAMMERSMITH AND FULHAM

Defendant

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Mr Conor McCarthy (instructed by Osbornes) appeared on behalf of the **Claimant**
Mr Tazafar Asghar (instructed by Tri-Borough Legal Services) appeared on behalf of the **Defendant**

J U D G M E N T
(Approved)

1. MS SARA COCKERILL: In this case, the claimant, Tara Halvai, seeks to challenge by way of judicial review the decision of the defendant, the London Borough of Hammersmith and Fulham, of 17 August 2016. By that decision, the local authority refused the claimant's application for discretionary housing payment, to which I shall refer hereafter as "DHP".

2. The facts of the case are as follows. The claimant, Tara, suffers from a severe autistic spectrum disorder, learning difficulties, as well as related serious behavioural difficulties, including self-harm. She is non-verbal and requires one-to-one care twenty-four hours a day on a permanent basis. Her severe autism and severe learning difficulties, as well as her behavioural difficulties, manifest in her having a series of critical and complex needs in relation to accommodation and care. She suffers from extreme anxiety hypersensitivity, especially to noise, and a severe difficulty with changes to her daily routine.

3. She has very limited understanding of risk or safety and, therefore, requires one-to-one care at all times to keep her safe and to help her with all daily living tasks. She suffers from hormonal imbalances and sudden mood changes, which further impact on her behaviour, at times with no warning. She expresses agitation, anxiety, pain or discomfort through non-verbal self-harming behaviour, as well as screaming or shouting. This behavioural disturbance can be prolonged once triggered and can occur on many occasions during the day - the evidence before me suggests sometimes up to 20 to 25 times a day. Owing to her particular form of autism, she suffers from hyper-acute sensitivity to noise and this means that she needs to live in a very quiet environment.

4. At the moment, the claimant resides at 338 Goldhawk Road, Hammersmith. The claimant grew up living with her mother and sister at number 340 Goldhawk Road, to which I will refer as "the family home". As she grew older, however, it became near to impossible for the claimant's mother and sister to cope with her needs and behaviour at home. The slightest noise, especially in the evening or at night, could make the claimant anxious and cause a severe and prolonged behavioural and non-verbal reaction, as already described.

5. As a result of the claimant's complex portfolio of needs, in around 2010, following some informal contact with the local authority, the claimant's mother, Mrs Halvai, decided that it would be in her best interests for Tara to live independently and to move out of the family home, albeit continuing to receive close support from her family and others. It was clear that number 340 was not capable of meeting her needs and did not provide viable accommodation for those purposes. Mrs Halvai, therefore, contacted the defendant in 2010 and the claimant was placed on the list for social housing following an application. She remained on the waiting list for around two years and, after that time, the defendant told her it had been unable to find accommodation and that it would be almost impossible to find suitable accommodation for the claimant. The claimant's family was also unable to find any private sector rented accommodation for her, given her specific housing needs.

6. As a result of this situation, Mrs Halvai decided to remortgage her home and build an extension to number 340. What then occurred was that a number of changes to number 340 were paid for by the local authority. These changes included a high fence, a gate, and paving over the ground. At the same time an extension was made to build 338, which was funded by a mortgage taken out by Mrs Halvai on 340. Certain other specific features were incorporated in that extension.

7. The claimant presently lives in 338 with a carer and supported by her family. The adaptations on account of her severe disabilities include, as I have said, the high fence and a garden wall to prevent the claimant climbing onto the road where she could injure herself; an electric/motorised gate at the front, again to prevent the claimant leaving unaccompanied; a high gate at the side of the property; bars on a neighbour's glass window to prevent the claimant from breaking the glass; tarmacking and tiling over grass and flowerbeds to the extent possible to prevent the claimant from ingesting these and the installation of a lockable cover over the electricity and gas meters. It should be noted that number 338 is a separate address from Mrs Halvai's home at 340. There is a separate door to enter number 338. There are no connecting doors. 338 is treated as a separate address by the council and the post office.

8. The financial backdrop to the application for DHP is as follows. As I have indicated, Mrs Halvai had to remortgage her home to fund the building of number 338. This mortgage now costs £1,530.87 a month. In addition, there are other expenses associated with number 338, which include building insurance, occasional repairs, upkeep of the garden and other miscellaneous expenses. Mrs Halvai charges the claimant a rent of £450 a week or £1,950 a month. This, she says, is at the lower end of market rates in the local area. Whether that is the case is a matter which is in issue between the claimant and the defendant; but the answer does not matter for the purposes of this application. In any event, the rent must be set on a commercial basis in order for the claimant to be eligible for housing benefit. It is to be noted that the First Tier Tribunal's decision ("the FTT decision"), to which I shall come shortly, found that the accommodation arrangements are necessary and the cost is reasonable. The claimant presently receives £302.33 a week in housing benefit which she uses towards her rent. This amount is the maximum amount of housing benefit given for a two-bedroom flat.

9. The issue between the parties is essentially this. Between the two-bedroom housing benefit rate which Mrs Halvai receives and the rental rate there is a shortfall of £147.67 a week. This shortfall is, I believe, the result of changes to local housing allowance rates. It has nothing to do with the so-called "bedroom tax". The defendant says that there are matters included within the rental which are ineligible for housing benefit, such as the garden upkeep, the building insurance and so forth. But even so there is certainly a shortfall between the housing benefit rate and the mortgage payment.

10. Another factor which comes into the background of this application is the FTT decision which fills out some of the backdrop in this story. In essence, the payment of housing benefit at all is the result of an earlier dispute between Mrs Halvai and the local authority. In 2014, following the completion of works to 338, Mrs Halvai sought payment of housing benefit from the defendant local authority. In October 2014, the

defendant refused on the basis that the tenancy was non-commercial. There was a hearing before the First-tier Tribunal in October 2015. The decision of the First-tier Tribunal was that, on the basis of the various expenses she faces, Mrs Halvai has sound commercial reasons for renting the property. They also found that Mrs Halvai would evict Tara because of the financial necessity that she faces to be able to meet her mortgage payments if housing benefit was not paid and also that she had managed thus far by using her savings. The First-tier Tribunal also found number 340 was not appropriate accommodation for the claimant, that a change in accommodation was necessary both for Tara and her family's well-being and that there was no suitable alternative accommodation other than 338.

11. Following the FTT hearing, the claimant is therefore in receipt of housing benefit at £302.33. That is a result of the FTT's decision that she was entitled to housing benefit. But while housing benefit is now being paid, there is a shortfall. The result of that shortfall is that the claimant applied for the DHP payment which is the subject of this application. That application for a DHP payment was refused by the defendant on 14 April 2016. The claimant requested that this decision be reviewed. A review was then carried out. The award was again refused on 26 May 2016. The claimant's legal representatives then wrote to the defendant in respect of the refusal on 4 August 2016. The defendant withdrew its decision of 26 May 2016 and then issued a new decision on 17 August 2016. That is the decision which is the subject of this application. That decision says as follows:

> "Dear Miss Halvai.
>
> **Discretionary Housing Payment (DHP) Review**
>
> I refer to your solicitors' letter of 4 August 2016 that the Council reconsider decision of 26 May 2016. I have now reconsidered that decision not to award you DHP.
>
> **Decision**
>
> I have decided that the decision to refuse your application was correct and this letter is to notify you of that decision and the reasons for it.
>
> **Reasons for decision**
>
> DHPs are an additional award outside of the benefit scheme for people in receipt of housing benefit and who need further assistance in order to meet their housing costs. The authority has a limited budget from which to award DHPs and so cannot award automatically to anyone who applies for it.
>
> In deciding on awards, each case is decided on its own merits, looking at the individual circumstances around each application along with due regard for the DHP policy. The objectives of making a DHP award are set out in the DHP policy and include the following:
>
> (i) Reduction of arrears;

(ii) Further assistance with housing costs; and (iii) Averting the threat of eviction.

One of the key objectives of the DHP policy is to help vulnerable people live more independent lives. Of course, the Council cannot award a full DHP to all applicants with a disability, particularly in circumstances where demand exceeds supply and where the budget from which to award DHPs is limited. The council's duty towards any individual applicant also has to be balanced against the interests of all applicants, including those with Equality Act protected characteristics, who make an application.

In your case, we accept that you have disablement needs that would not arise with a non-disabled claimant. We considered these in full when we made our original decision.

While your disablement is an important factor, there are other matters for the council to consider when deciding if it should granted you a DHP.

The amount of DHP that you are asking for

The shortfall between your housing benefit entitlement and your rent of almost £150 a week is far higher compared to other DHP awards. The average DHP award since 2014 is about £50 per week.

Whilst our DHP policy refers to DHPs of up to £150 a week being awarded, this would generally be in the context of short term awards to prevent immediate risks of homelessness while other arrangements for cheaper and more sustainable accommodation are being made.

In your case, there is little prospect of you moving to cheaper accommodation so any award would have to be on an ongoing basis. As the DHP budget is not guaranteed from year to year and will be subject to increasing pressures caused by welfare reform the council is in no position to provide such a high DHP on an indefinite basis. Furthermore, as the government has announced that there will be no increase to the Local Housing Allowance rate which applies to you until 2020, any increase in your rent will require an even higher award.

Threat to tenancy

Our DHP policy aims to alleviate the risk of homelessness and will award DHPs (sometimes higher than £150 per week) where the award will stop someone being homeless.

In your case, I note that you have considerable arrears (in the tens of thousands) and you have not had any possession proceedings started against you. I cannot see therefore that you are under any threat from being made homeless.

Furthermore your landlord (your mother) built this property specifically for you and the evidence on file suggests that it is unlikely it will be rented to anyone else.

Landlords who let to housing benefit tenants are increasingly aware of the limitations of the scheme and would not rent a property to a benefit reliant tenant at a top end commercial rent in the expectation that the tenant would be able to afford it.

Prudent and commercially minded landlords often accept a shortfall in the rent in return for the certainty of guaranteed long term income.

I note the First-tier tribunal's decision that the agreement between you and your landlord (your mother) was a commercial agreement entitling you to housing benefit. It does not follow that entitlement to housing benefit is an automatic guarantee to a DHP award as DHP is separate scheme with independent discretionary decision making.

Conclusion

To conclude, the DHP that you are asking for is at the top end of our policy and these would normally be reserved for short term awards. There is no prospect of your circumstances changing so your award would be ongoing. Furthermore, even though you have a disability we have decided that you do not need the further support of a DHP payment as we do not think you will be made homeless without it.

It is for these reasons that I agree it is not appropriate to award you a DHP. There are no further rights of appeal against this decision.

Your sincerely.

Paul Rosenberg.

Head of operations."

12. Following that decision, these proceedings were issued on 22 November 2016 under the urgent applications procedure. It was considered on paper by Leigh-Ann Mulcahy QC, sitting as a deputy High Court judge, on 24 November. She directed that the papers be submitted for consideration within three days of receipt of acknowledgement of service or the time for acknowledgement of service. No acknowledgement of service was served in time and Goss J then granted permission on all grounds and ordered expedition. Detailed grounds were served on 1 February 2017, permission being given for late service on 13 February 2017.

13. The claim advanced by the claimant is brought essentially under three heads. The first is an alleged failure of the defendant to apply its own policy or misdirection as to the terms of its own policy. There are two aspects within this head. If the claimant does not succeed on this head, the second head is a failure to consider the exercise of

discretion in accordance with the local authority's policy. The third head is irrationality or failure to take into account relevant considerations, essentially to treat the findings of the FTT as a starting point for its decision, or failure to provide reasons.

14. The evidence before me comprised, as well as the pleadings and their supporting documents, a bundle of the materials which were available to the decision-maker at the time. There were two statements of Mrs Halvai, Tara's mother, exhibiting a statement from Mariya Mircheva, who is one of the qualified carers who looks after Tara. There was a witness statement of the Official Solicitor, who is Tara's legal representative, and also of her sister, Ava, who is one of her carers. For the defendant, there was a statement from Mr Paul Rosenberg, who, as I have mentioned, made the decision which is under question. I should mention that the second statement of Mrs Halvai was initially objected to by the defendant as being late and not in compliance with the timetable. That objection was rightly not pursued, given that there had been ample opportunity to object to that evidence or to deal with it between the service of the evidence and the hearing and that by the time the objection was taken, not being aware that the statement was objected to, I had already read the evidence.

15. The first ground is the complaint that there was a failure by the defendant to apply its own policy regarding shortfalls. For that one needs to turn to the relevant policy framework, in particular the Department of Work & Pensions DHP Guidance Manual, which includes the local authority Good Practice Guide and was issued in May 2016. That document provides, in part, as follows:

> "1.0 This guidance manual is for local authorities (LAs) in England, Scotland and Wales who are responsible for administering Discretionary Housing Payments (DHPs). It provides guidance and advice on good practices that should be taken into account when payment of a DHP is being considered...
>
> ...
>
> 1.6. A DHP may be awarded when a LA considers that a claimant requires further financial assistance towards housing costs and is in receipt of either housing benefit (HB) or Universal Credit (UC) with housing costs towards rental liability...
>
> ...
>
> 1.9 Although the regulations give local authorities very broad discretion, decisions must be made in accordance with the ordinary principles of good decision making ie. administrative law. In particular, local authorities have a duty to act fairly, reasonably and consistently. Each case must be decided on its own merits, and your decision making should be consistent throughout the year.
>
> 1.10 ... Once an authority's overall cash limit is met, no additional DHPs can be awarded in that tax year...

...

5.1. There is no limit to the length of time over which a DHP may be made. A time-limited award may be appropriate when an impending change of circumstances will result in an increase in benefit. It may also be appropriate to make a short term award to give a claimant time to organise their financial or housing circumstances, particularly if they are trying to find alternative accommodation or gain employment...

5.2 Alternatively, you may wish to make a long term or indefinite award until the claimant's circumstances change. You should remember it may be more appropriate to make a long term award in cases where are claimant's circumstances are unlikely to change, and making a short term award will cause them undue distress...

5.3 The start and end dates of an award are decided by LAs on a case by case basis. For example, where a DHP is awarded to a disabled claimant who lives in significantly adapted accommodation in the social rented sector and is subject to the removal of the spare room subsidy, you should consider making the DHP on a longer term basis, including an indefinite award, which is subject to a relevant change in their circumstances. DHPs should also be considered on a longer term basis for claimants who have a medical condition that makes it difficult to share a bedroom or for disabled children or non-dependants who need an additional bedroom for a non-resident overnight carer or team of carers..."

16. Within the Good Practice Guide, I note:

"2.5 For claimants living in specially adapted accommodation, it will sometimes be more cost-effective for them to remain in their current accommodation rather than moving them into smaller accommodation which needs to be adapted. The Department therefore recommends that local authorities identify people who fall into this group and invite an application for DHP.

...

2.7 There is no definition of significantly adapted accommodation. It is up to your local authority to decide what constitutes significantly adapted accommodation, based on local knowledge and individual circumstances.

...

2.9 For example, where there has been no significant adaptation to the property, but a member of the household has a long term medical condition that creates difficulties in sharing a bedroom, we recommended that DHPs are considered in these circumstances.

...

6.14 Given the numbers of people affected by the welfare reform changes, awarding DHPs to meet all the shortfalls is not a viable option. Therefore you will need to consider how best to target the funding within priority groups, whilst remembering that each case must be considered on its own individual merits."

6.15 You may wish to assist certain groups to stay in their home...Disabled people who need, or have had, significant adaptations made to their property, or where they are living in a property particularly suited to their needs. This includes properties which have been adapted for other members of the household, such as disabled children or non-dependants."

17. Hammersmith and Fulham have a policy also. That is dated July 2013. At page 2 of that document under, "**Deciding on a DHP**", they explain:

"DHPs are a discretionary scheme. The council will consider each case on its own merits rather than on a set of rigged pre-defined criteria.

It is not possible to define exactly who will and will not be awarded a DHP. There has to be room for unusual cases meaning there may be cases that do not fall within this policy but should still be awarded a DHP.

Objectives of making a DHP award

The policy should reflect the priorities of the council where relevant to the benefit claim. The decision maker should have regard for the borough priorities when deciding on a DHP request.

...

Delivering high quality, value for money public services

...

Our decisions will have regard for the consequences of not making the award and the possible costs to the council if the tenants then declare as homeless.

...

Setting the framework for a healthy borough

Helping vulnerable people live more independent lives.

How this will be achieved:

...

• We will support those with properties that have been adapted for

disabled usage and applicants with a disability who can demonstrate reasons for not being able to move to affordable accommodation."

18. The key passage within the Hammersmith and Fulham policy is headed "**Level of DHP**" and says:

> "As a guide, we will not look to award a Discretionary Housing Payment where the shortfall is less than £20 a week. In these instances we will expect the tenant to come to some arrangement with their landlord.
>
> In cases involving shortfalls due to the under occupancy charge, where appropriate smaller DHPs will be considered. If the shortfall is greater than £150 per week, then normally the gap is too large for a DHP to provide a long term solution. In some cases we may make a short term award to stop the applicant going into unnecessary arrears.
>
> Most DHPs will therefore cover shortfalls between £20 and £150 per week.
>
> **Length of award**
>
> We will not award a DHP for more than a year. Where entitlement may be continued, we will require a new application. This will enable us to review circumstances annually for on-going DHP recipients.
>
> The decision on how long to award a DHP for depends on the circumstances of each application. Where the reasons for requesting a DHP are not likely to change (for example, the need for children who should be sharing having their own room due to disability issues) the award may last a year.
>
> As a general rule, the larger the DHP amount, the shorter the period of the award."

19. In terms of the approach that I must take to this issue, the defendant rightly reminds me that the remedy of judicial review is exceptional and that a public body exercising discretion should not be subject to review, except where on one of the very limited public law grounds review is established. It is not part of this court's remit to substitute its views for those of the decision-maker, but only to interfere where it is established to the requisite hurdle that something has gone wrong with the decision-making process. This is, however, what the claimant says has happened here.

20. The claimant essentially says that in reaching its decision the defendant failed to adhere to the terms of its own DHP policy or misdirected itself as to its terms. I was referred to a passage in the judgment in R(Lumba) v Secretary of State for the Home Department [2012] 1 A.C. 245 at paragraph 26 of Lord Dyson's judgment where he said this:

> "... a decision-maker must follow his published policy (and not some

> different unpublished policy) unless there are good reasons for not doing so..."

21. He went on to say:

> "There is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and lack of arbitrariness."

22. What the claimant says in relation to the decision of 17 August is that the defendant in that letter demonstrates a misunderstanding of the terms of the defendant's own policy, because it essentially finds that awards of up to £150 a week could only be given as short-term awards. It refers me to the passage in the letter which says:

> "Whilst our DHP policy refers to DHPs up of £150 a week, this would generally be in the context of short term awards to prevent the immediate risk of homelessness."

23. It then refers to the ongoing nature of the award. The claimant says that essentially in that passage the decision-maker has failed to understand the defendant's policy in a number of ways. Firstly, the decision-maker has failed to understand its own policy in relation to the level of awards. There is a suggestion that the level of the award sought is too high, but, contrary to what is asserted in the defendant's decision letter, the shortfall impact falls within the range of most DHPs, as defined in the defendant's policy. Under the defendant's policy as read normally, it is only if a shortfall is greater than £150 a week that it is normally treated as too large for a DHP to provide a long-term solution.

24. The second criticism raised is as to the approach of the defendant to the period of the award in that the letter suggests there will essentially be no long-term awards. They point to the clear terms of the defendant's own policy to say that the decision-maker is wrong to assert that the council is in no position to provide such a high DHP on an indefinite basis, because the defendant's policy expressly envisages longer-term DHP awards, unless the shortfall is greater than £150 and, in this case, the claimant's application does not fall into this category.

25. I am also reminded that the DWP Guidance says, again, in the few places to which I have already referred, that it is possible to make a long-term award and authorities should make long-term awards in certain circumstances. So, if there was a policy to make short-term awards only, that would be inconsistent with the government guidance to which the local authority is told it must have regard.

26. The third mistake which the claimant suggests is made in this letter is essentially the nexus with homelessness, because, on any fair reading of the policy of Hammersmith and Fulham, it does not in terms give priority to avoiding homelessness in the way which is suggested in the letter. The claimant says the decision-maker may have assumed, contrary to the terms of the policy, that because the case was close to £150 that they were entitled to refuse a DHP payment to the claimant long-term or

short-term, but that of course is not consistent with the defendant's policy. In essence, the claimant suggests that what one can see in comparing the wording and approach in the decision letter of 17 August is an inconsistency with the policy and, in fact, not just a failure to act consistently, but also apparently an approach which indicates following a policy which is not expressed in Hammersmith and Fulham's own policy.

27. The defendant's response to this is effectively unashamedly to say, no, that is misunderstanding the policy and, on the true construction of the policy, it is not the local authority's policy to provide long-term help by way of DHP. That approach has been reiterated in argument for them before me. It has been said that there is nothing unlawful in the DHP policy or the decision of 17 August. DHP awards in excess of £50 and up to £150 are intended to be a short-term solution to prevent the immediate risk of homelessness pending arrangements for cheaper accommodation and that an award may last a year, but essentially no more than a year where the reasons for requesting the DHP are unlikely to change. It says that the authority was properly entitled to reach that decision, because any award of DHP would be on an indefinite basis and that is effectively contrary to their policy.

28. The Defendant says that as a matter of construction the two elements of the local authority's DHP policy, the level of the DHP and the length of award, do not exist in isolation and must be read together; and that the policy is essentially that there will be a maximum period of an award of one year and the smaller the DHP amount, the more likely that it will be awarded for that maximum period of a year.

29. It points out that given the potential numbers of applicants and the limited funds available to meet all shortfalls, it is not possible to meet every claim and so it is policy for that reason. They say it is clear from the policy that provision of DHPs is intended to be a short-term measure to tackle immediate risks, such as the loss of a home. They rely on the words within the policy, "We will not award a DHP for more than a year. The larger the DHP amount, the shorter the period of the award " and "where the reasons for requesting a DHP are not likely to change, the award may last a year." In essence, therefore, the defendant says that on the true construction of the policy it is designed for short-term relief only.

30. My conclusion on this issue is this. I understand that what the defendant says may be how it subjectively thought of its policy, but I cannot accept that that is what the policy says on any fair reading of the policy. It is quite clear, in my view, that the policy, in line with the DWP Guidance, does not confine itself to short-term assistance. It is plain from the facts that there are wordings which talk about an annual review, an annual reapplication for longer-term solutions and the wording which says, "if the shortfall is greater than £150 a week, then normally the gap is too large for DHP to provide a long term solution." There is a specific implication that the DHP may well be providing a long-term solution in smaller amounts. So, while grants may be for a maximum of a year on their face, it seems to me that it is clear from the terms of the policy (and that policy, as I say, is consistent with the guidance which the DWP issued which should be followed by the local authority) that awards of DHP may go on for longer in appropriate cases.

31. I therefore conclude that the claimant's case, as regards the first ground, is correct and the local authority did misapply their policy in prioritising something which was not on the face of it a priority and in essentially failing to understand that DHP can be regarded as a long-term solution at any level and, in particular, under the own terms of their own policy at the level below £150.

32. The second part of the first ground is an argument that there was a failure to have regard to borough priorities. The claimant's case on this is effectively as follows. The claimant says that the defendant's policy requires decision-makers to have regard to particular policy priorities when making decisions on individual DHP applications and, again, that is in line with the DWP guidance, and that the policy says the decision-maker should have regard to the priorities when deciding on a DHP request. Then they rely on the particular provisions of the policy, which say, "We will support those with properties that have been adapted for disabled usage and we will support applicants with a disability that can demonstrate reasons for not being able to move to affordable accommodation."

33. The claimant's counsel says that she, on any view, falls into both of these categories. He reminds me of the evidence that it has been impossible to find accommodation elsewhere and it must be nearly impossible to contemplate that there could be any suitable accommodation for her elsewhere. The FTT had indeed so found in the light of the length of time that she had spent on the waiting list. The claimant says that notwithstanding this and notwithstanding the fact that the application form for DHP effectively references, in particular boxes of that form, both of those priorities, the defendant did not consider his own policy commitments.

34. Looking first at the question of supporting living in adapted accommodation, the adaptations, which have already been described, are well known to the local authority and were available to the local authority at the time of making the decision. Moreover, the fact that the property had been adapted was expressly referred to in the claimant's application for a DHP, which mentioned that Tara continued benefiting from the electric gate and high fencing that "existed as part of my tenancy, keeping me very safe from very busy Goldhawk Road since I have no understanding of road danger." I am pointed to the fact that the local authority had the benefit of the plans as well.

35. In addition, the fact that the claimant had good reasons for not being able to move into affordable accommodation, the second limb of this portion of the policy, was again referenced in the application form with a specific response box. In response to that question, Tara said:

> "Due to the severity of my autism, I have extreme difficulties with any slight change to my life or surroundings. I learn at a very slow pace due to my learning difficulties. Even crossing the road with my one-to-one support has taken years to master. I have no understanding of road danger and accepting a new area would not only be impossible for me, but extremely dangerous."

36. The claimant says that despite the fact that these matters were referenced in the application form and answers were given on them, these matters were not apparently referred to or grappled with at all in the decision and the decision indicates no effort to apply these aspects of its policy to the claimant.

37. The claimant also goes on to point out that, even now, there seems to be no evidence of these matters having been considered. There is nothing in the evidence of Mr Rosenberg to suggest that he ever did take any of these into account. The furthest that the defendant now goes in oral submissions is to say that the reference to disablement in the decision letter counts; but the defendant does not otherwise suggest that the matter was considered. The claimant says that that reference to disablement is a proforma reference to disablement and should not be viewed as dealing with these particular issues.

38. The claimant also says that the failure to consider the issue of adaptations engaged another aspect of borough priority, which the defendant requires its decision-makers to take into account, which is the question of value for money in public services and refers me to that passage referencing the possible cost to the council if the tenants are declared as homeless. It is submitted that the defendant's policy, therefore, requires consideration of possible costs if the claimant is declared homeless, even if those costs would not necessarily arise. The claimant identifies important costs which would arise and which should have been considered. Firstly, the costs of finding suitable accommodation for the claimant to meet her substantial or critical needs. The nature of those needs in terms of property involves two bedrooms, one for the live-in carer, soundproofing, adequate security, safe surfaces laid, all the things which have been done to 338.

39. Secondly, there is the risk of wasted public funds in duplicating the adaptations from which 338 also benefits and of course some of which the local authority had themselves funded. Thirdly, the defendant's decision, the claimant says, did not consider the possible consequences for the claimant and her family, in particular the distress caused to her and the difficulties involved in her not being close to her usual support network.

40. The defendant's case on this aspect is rather brief. The defendant says the claimant's needs comprise a second bedroom for a carer to sleep in and accommodation close to the current family home. DHP is part of the whole package making up the scheme for dealing with the problem of under occupation arising from the changes to housing benefit. The property has not been adapted for disabled use. The claimant is receiving the full housing benefit entitlement. When refusing DHP, the authority was properly entitled to consider the claimant's full housing benefit entitlement. Even if the claimant is correct that there were important costs that the authority did not consider, the claimant can obtain no useful relief from it.

41. The brevity of the defendant's case on this and the fact that it does not really grapple with the fairly complex issues which were identified, reflects, in my view, the fact that the decision letter and, to the extent that they have been available, the letters which precede it (although of course formally the previous decisions were withdraw), as well

as Mr Rosenberg's statement, do not provide any material for saying that these factors were considered.

42. There might be an argument, which was alluded to by the defendant, but not really pursued before me, that technically the property is not within the definition of having been adapted for disabled usage. However, it seems to me on its face that this would be a somewhat difficult argument to pursue, given the local authority's own involvement in those adaptations and the fact that paragraph 2.7 of the guidance indicates that there is no definition of significant adaptation. However, to an extent, this does not matter, because the significant adaptation argument presents as part of a portfolio of issues and there is no sign of considering the policy to support applicants with a disability who can demonstrate reasons for not being able to move to affordable accommodation or of a consideration of the important value for money question.

43. So far as the latter is concerned, it may be that the reasoning behind this would be because of the conclusion at which the local authority arrived regarding the risk of eviction, to which I will come in due course. It might logically be said that it was considered and dismissed, because it was not relevant, given the conclusion on the risk of eviction. That was not an argument which was explicitly run before me. However, to the extent that it was run, it seems to me that it is not sustainable. The decision, when one looks at it, is structured in a particular way. It has "Reasons for decision" and then two subheadings on the reasons for decision; "The amount of DHP that you are asking for," which also covers the long term issue, and "Threat to tenancy". It then goes on to say, "For these reasons, it is not appropriate to award you DHP". So, I would expect issues to be identified if they were identified as relevant and had been considered, so that could be indicated and seen on the face of the decision. That is not said. That is not said even now.

44. Effectively, it is tacitly conceded that the decision was on the binary basis without a wider consideration. It seems to me that the costs issue on its face, even if one said that eviction impacted on a consideration of this issue, should arise, as the claimant submitted, as a contingency, even if the overall conclusions was that there was not a risk. I therefore conclude that the defendant also erred in failing to take account of all the relevant factors and, specifically, these identified features of its own policy.

45. This brings me to ground two, which is the failure to consider exercise of the residual discretion. The claimant's case on this is that even if the claimant did fall into the category of persons not eligible for the award under the defendant's policy, the defendant retained a discretion to make an award to a claimant and failed to consider whether to exercise that discretion. It refers to the defendant's policy to consider each case on its merits, referring to "room for unusual cases", meaning that there may be cases that do not fall within this policy, but should still be awarded a DHP and the reference to "if the shortfall is greater than £150 a week, then normally the gap is too large."

46. The claimant submits there is express room within the defendant's policy to provide decision-makers with a discretion to decide whether to make a DHP award outside the circumstances. This of course reflects, as will be recalled, the DWP guidance, which

stresses flexibility and which says, "A policy that is too rigid will prevent you from exercising your discretion properly in individual cases". It also says that DHP policies must be flexible and allow for unusual cases and it contains the other passages to which I have referred about longer-term awards and unusual circumstances. In this case, the claimant says the defendant has apparently completely failed to consider whether to exercise the discretion available under its own policy in favour of the claimant and refers to the wording of the letter effectively, on its face, invoking the criteria as the local authority understood them, without going on to consider whether in the circumstances of this case the discretion ought to be exercised.

47. The claimant refers me to the well-known authorities which establish that where a decision-maker has a discretion, the decision-maker is under a duty to consider whether to exercise that discretion in favour of the applicant. They refer me to Lord Hoffman in Stovin and Wise [1996] AC 923 at 950B:

> "A public policy almost always has a duty in public law to consider whether it should exercise its powers."

48. They also refer to R (Gopikrishna) v The Office of the Independent Adjudicator for Higher Education and Others [2015] E.L.R 190 at paragraph 165 and R v Barnet London Borough Council ex parte Nilish Shah [1983] 2 AC 309 at 349H.

49. The claimant says in the present case the defendant failed to consider properly, or at all, whether to exercise its discretion in the circumstances of the claimant's case. So far as how consideration of the discretion is to be manifested in cases like this, the claimant does not submit that the discretion must be explicitly dealt with under a paragraph saying "exercising of residual discretion", but it says that in circumstances where there is a discretion that direction must at least be recognised. In this case, it is plainly an unusual case and the mind of the decision-maker needed to be turned to the question and there is absolutely no sign that it was considered at all.

50. The claimant says there needs to be some sign, and more than a throwaway reference, to show that this has been grappled with. The duty to give reasons means that there is a need to grapple with the issues, including discretion, and points again to the need to show that the decision-maker has reflected on this.

51. In terms of the structure of the decision, again, it says that that is the very opposite of what one sees; one actually sees a structure name-checking two points within the policy (as understood by the decision-maker) and saying "for these reasons", without any indication that the discretion was considered. The claimant says that this was a particularly compelling case which cried out for a detailed consideration at least of the discretion, given the severity of Tara's disability and the complexity of her needs; the fact that because of that she can never pay rent and must always be reliant on the local authority for support; the absence of suitable alternative accommodation, which the local authority was well aware of; the potential for financial hardship, including to Mrs Halvai, which the local authority again was well aware of because of the FTT, and that there is plainly no sign of this having been considered.

52. Again, the defendant's case on this is relatively brief. It says the authority took into account the claimant's particular circumstances and the shortfall was not one that was greater than £150 a week. It would not have prevented unnecessary arrears. The local authority says it may be complained that there is a suggestion that a smaller amount could have been awarded if the local authority was not prepared to award the full amount, but if that had been done, there would have been a challenge because it was too small.

53. My conclusion is that it appears that the defendant's case was predicated on an assumption that DHPs were only for short-term cases and, effectively, the decision letter did not grapple with the point I have already decided and does not really engage with the point as to discretion. I agree on this discretion point that the claimant is correct. On any fair reading of the decision, it appears to be an application of the policy as understood by the decision-maker and nothing more. It does not refer to or indicate that the decision-maker understands that it has a further discretion and that it may be appropriate to make an award of DHP even if the criteria are not strictly met.

54. It does not look beyond its face, and see this case is an unusual case, but refers to it simply as a case of disablement. That is the only mention of Tara's circumstances. It does not mention the discretion at all. As I have previously said, it appears to be based on primary binary reasoning. Mr Rosenberg does not now say that this issue is considered. The skeleton argument which was served for the local authority does not suggest anything more than individual circumstances where considered before referencing the policy as understood, as if to suggest the discretion only applied to the larger amounts.

55. The decision does not appear to take into account the wider policy issues which might engage in an exceptional discretionary grant. Again, it seems to me that it is possible this is underpinned by the conclusion as to the lack of risk of homelessness, but, in any event, there was a requirement essentially to engage with the possibility of a discretion being appropriate to be exercised and there appears to be no sign that that was done. Accordingly, I agree that the defendant failed to consider the exercise of its discretion.

56. This brings me to the final ground, irrationality. The claimant's case on this really relates to the passage in the decision letter, which says:

> "I cannot see therefore that you are under any threat from being made homeless. Even though you have a disability, we have decided you do not need the further support of a DHP payment as we do not think that you will be made homeless without it."

57. It also refers to the unlikelihood that the property would be rented to anybody else and so forth.

58. The claimant says that this conclusion that the claimant does not face any risk of eviction is unreasonable by reference to the evidence before the decision-maker and fails to have regard to relevant matters. It is said that she clearly does face such a risk and had this risk been identified, the decision-maker would have had to go on to

consider in accordance with its policy the consequences of not making the award and the possible cost to the council if she was declared homeless.

59. The claimant refers me in terms of approach on irrationality to R v Parliamentary Commissioner for Administration ex parte Balcin [1998] 1 PLR 1 at paragraph 27 where Sedley J observed that: "a claimant alleging irrationality does not have to demonstrate, as a respondent sometimes suggests is the case, a decision so bizarre that its author must be regarded as temporarily unhinged. What the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up, in which, in other words, there is an error of reasoning which robs the decision of logic."

60. The claimant says that the decision-making process in this case falls into this category.

61. The claimant says that the FTT essentially found that Tara would be evicted because Mrs Halvai was using her savings, but the basic problem was not resolved only partially alleviated. She did face a risk of eviction. The underlying factual findings of the FTT are relevant though not binding, but the decision-maker would have needed reasonable grounds for discounting them and suggests that there was no basis for rejecting them.

62. The skeleton argument for the claimant then goes on very thoroughly to go through the particular grounds which are dealt with under the heading in the decision letter and to analyse them against the decision for Tara. So, in so far as there is a reference to the rent arrears, but the fact that possession proceedings have not been started, it is submitted that the risk of eviction stems not from the arrears, but from the shortfall which Mrs Halvai is suffering. So, it said, the analogy is misconceived. The arrears, in a sense, are not relevant. The shortfall matters, because that is what gives rise to the risk of eviction. The defendant's reference to the property being built for the claimant does not grapple, it is said, with the fact that she has said she will have to evict the claimant. The pressure to evict has nothing to do with the fact that she had the property built or adapted for Tara.

63. The claimant then goes on to criticise the paragraphs which focus on how a prudent and commercially-minded landlord would behave and that a prudent and commercially-minded landlord would accept a shortfall in rent and points out that the application of a prudent and commercially-minded landlord test to this situation is entirely artificial in circumstances where it is plain that Mrs Halvai is not a commercially-minded landlord in that sense. While she is charging a commercial rent in order to ensure that her daughter has the appropriate accommodation and has provided accommodation which can be commercially rented, she is not in this business as a more general commercial agent. It is submitted that this approach in the decision letter has all the hallmarks of addressing the issue by reference to a some type of standard approach, rather than looking at the particular circumstances of the case and genuinely considering whether there was a risk of eviction.

64. The defendant for its part cites R(Brent) LBC ex parte Baruwa [1997] HLR 915 at page 920 where Schiemann LJ said in the context of homelessness decisions that:

65. " where an authority is required to give reasons for its decision, it is required to give reasons which are proper, adequate and intelligible and enable the person affected to know why they have won or lost. That said, the law gives decision-makers a certain latitude in how they express themselves and will recognise that not all those taking decisions will find it easy to express themselves with judicial exactitude."

66. It also points out decisions are not important because not every single matter is mentioned and decisions should not be treated as if they are statutes or judgments or subjected to pedantic exegesis, citing Osmani v Camden LBC [2005] HLR 325 by Auld LJ at paragraph 38.9.

67. The defendant says that there is nothing in the decision letter to suggest that the decision-maker did not take into account the FTT's findings that Tara would be evicted by her mother if housing benefit was not paid. The potential for eviction has been minimised by the awarding of full housing benefit entitlement and there was no credible evidence before the decision-maker that Tara would be evicted. There was no evidence of a notice to quit or a notice seeking possession having been served or possession proceedings even having been issued and there is nothing in the decision, it says, which shows that the decision-maker gave inadequate weight to the FTT's findings. Essentially, it says that this is an attempt to re-argue the merits. It points out that it was possible to start possession proceedings or to have more before the local authority in order to deal with this issue. It submits that quite simply it was plainly reasonable for the decision-maker to reach the conclusion that there was no risk of eviction and that the decision-maker's decision should not be impugned on the grounds of rationality.

68. On this, the question for me is whether on the basis of the material before the decision-maker the decision that there was no risk of eviction was irrational. The starting point is that I do not accept that it was irrational not to start with the FTT decision, which was made in a very different context and against different facts some time ago. The claimant has conceded that the financial position was alleviated by the payment of housing benefit. The scale of the problem which was before the FTT had in my view been materially changed.

69. I do accept that the decision in this respect is not admirably phrased. I do accept that it appears to have been conducted by reference to somewhat standard considerations, in particular the references to the prudent and commercially-minded landlord and the top end of the commercial scale, rather than tailored to the particular circumstances of this case and I accept that far more could have been done to demonstrate a real engagement with the evidence in relation to the risk of eviction.

70. However, particularly given the approach which the local authority has indicated that it takes to DHP payments; in particular, its own reference to the risks of homelessness as a consideration, it is plain that the risk of homelessness was very much a consideration. So far as the way that it was considered is concerned, arrears and possession proceedings, I accept that there may be a slightly false approach there in that the risk of the shortfall which Tara's mother was suffering is more the issue which prompts the risk of eviction. But at the same time that is effectively a mirror image of the question

of arrears, because the two are intimately interrelated. The relationship which gave rise to the adaptations is in my view a legitimate consideration.

71. I am of the view that a less than ideal approach to this consideration does not import irrationality, if relevant considerations are taken into account, so long as the conclusion reached does not show an error of reasoning which robs the decision of logic. On this, the decision seems to me to be one which was within the ambit of conclusions the decision-maker could reasonably have reached.

72. In this connection, I note that while it is asserted by Tara and her solicitors that there is a risk of eviction, it does not appear that the application was made with special reference to the effects of the shortfall as they were currently manifesting. Mrs Halvai's second statement does set out the evidence as it was before Mr Rosenberg. She says that Mr Rosenberg would have been well aware of Tara's circumstances; that he dealt with the appeal to the First-tier Tribunal; he was aware of the adaptations; Tara's legal representative had set out details on Tara's behalf and Paul Rosenberg over the course of the appeal to the First-tier Tribunal responded to an email by Andrew Slaughter MP which stated that she was struggling to keep up her mortgage payment and her fear that both houses would be repossessed. That indicates (and that appears to be reflected in the material which was before me showing what was before the decision-maker) that the financial situation and what was said to give rise to the risk of eviction was not really updated since the FTT decision. There was no specific evidence from Mrs Halvai which was updated since the First-tier Tribunal. Given that the question which arose for the decision-maker related to a much smaller amount at a later stage, that, it seems to me, is not immaterial. I therefore conclude that the local authority could, while having every sympathy for the claimant, properly decide that there was no evidence that the shortfall would lead to a risk of eviction and so the decision on that point was not irrational.

73. The question then becomes, given what I have found as to the mistakes as to the application of the policy and, specifically, that first mistake, which has a much lesser overlap with the irrationality point, and given that I have found no irrationality on the risk of eviction, what order should I make?

74. The defendant has reminded me in their skeleton argument that if I consider that there are valid complaints, but there is no evidence of any procedural or other error having an impact on the eventual decision, the court may refuse relief. It refers me to Holmes-Moorehouse v Richmond Upon Thames London Borough Council [2009] 1 WLR 413 and specifically Lord Neuberger at paragraphs 48 to 52 and specifically the passage:

> "Further, as the present case shows, a decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial ... to affect the outcome; sometimes it is obvious from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes, there is more than one reason for the conclusion, and the error only undermines one of the reasons;

> sometimes, the decision is the only one which could rationally have been reached. In all such cases, the error should not ... justify the decision being quashed."

75. I also have in mind the Senior Courts Act section 31A(2)(a) which provides that the High Court must refuse to grant relief if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

76. Having weighed these matters carefully, I do not conclude that it is obvious that the decision would have been the same notwithstanding the error and referencing the authority cited to me. Nor do I think that I can conclude that it is highly likely that it would have been the same. In particular, it seems to me that the initial error as to the policy operated as a very significant cut-off in the reasoning of the decision-maker. It effectively prompted the defendant to limit its consideration. This was exacerbated by the fact that the residual discretion then appears not to have been considered.

77. So, it seems to me that while there is a real possibility that the result may have been the same, in particular given the competition for these payments, I cannot conclude this it is highly likely that it would have been the same. I note that the claimant accepts in her skeleton argument that it is possible that the defendant could have arrived at the same result that it arrived at, even had it applied its policies correctly and weighed things as the claimant has suggested it ought to have done. However possible is not highly likely. It seems to me that the claimant is entitled on this basis to an order that the decision of 17 August 2016 be quashed and to an order that the matter be remitted to the defendant for reconsideration and for it to reach a new decision, taking into account the findings of this court.

78. Does that encapsulate the relief that you were after, Mr McCarthy?

79. MR McCARTHY: It does. I will just briefly address you on the question of costs. We would seek our costs in relation to this matter applying the standard principles in M v Croydon LBC [2012] EWCA Civ 595. My Lady, in light of your judgment, we have obtained practical relief which we have sought. On that basis, we say we ought to be entitled to our costs.

80. In so far as it might be suggested that my Lady ought to take an issues-based approach to costs, we would just raise the following brief points. First of all, the crux of this case, if one looks at the weight of argument and evidence and process, were the detailed arguments in relation to policy both in relation to the first and second grounds both in terms of argument at the hearing, preparation for the hearing, pleadings and in the witness evidence. In some respects, all of that and, in certain respects, almost all of it would have been the same regardless.

81. Just a couple of other points. The basic point is that we say that certainly the overwhelming majority of the costs would have been incurred, in any event, regardless of the third ground.

82. MS SARA COCKERILL: Presumably, you also say, given the way that I have put it, the two are intimately interrelated.

83. MR McCARTHY: Indeed. We do rely on the defendant's conduct of this matter. I do not propose, my Lady, to take you to the points in detail, because I think you have them in mind, but we think, in particular, of the three points really, the failure to file an acknowledgement of services, summary grounds of resistance and it is clearly under CPR 54.9 at page 1810 of the White Book 2016 that it is permissible to take that issue into account when deciding questions of costs.

84. In addition, the failure to respond to inter partes correspondence until 1 February in relation to this matter and the silence other than that up until 1 February and then the late services of the detailed grounds of resistance, which did affect the trial timetable. So, we rely on those matters in respect of costs.

85. MS SARA COCKERILL: You are not seeking indemnity?

86. MR McCARTHY: No, we are not seeking indemnity costs, simply costs on the standard basis. I suppose the third point on this to flag is that we did entreat by letter of 31 January 2017, in a letter without prejudice save as to costs, a letter of settlement in light of Goss J's decision granting permission that effectively a draft order was sent to the defendant and it was suggested that settlement of this matter may be appropriate. We did not actually receive any response, so far as I am aware, to that. It certainly was not a positive one, but I think I am in right in saying there simply was no response. We rely on those matters in terms in relation to exercising the court's discretion as to costs.

87. MR ASGHAR: My Lady, on the issue of costs, I make a few points. Firstly, the funds from which costs are to be paid are public funds. Yes, the defendant is legally aided and, therefore, protected, but, equally, if an order is made against the local authority, it is from public funds that payment will be made.

88. Secondly, in terms of the grounds themselves, whilst you found in favour of the claimant in respect of the first two grounds, the claimant did not succeed on the third ground. In those circumstances, of course order is to be made, it should be based on 75 per cent as opposed to the full costs. So, when making an order for costs, I ask that you take into account the fact that the irrationality ground was not found in favour of the claimant.

89. As to conduct, this was rather unusual in that although the claimant sought for the matter to be considered on an urgent consideration basis, the order made by the Deputy Judge Leigh-Ann Mulcahy QC was not received by the defendant and the defendant was not aware that it had been expedited and, by the time the defendant was in a position to file and serve its acknowledgement of service, the order granting permission had already been made. I ask that you take into account the basis upon which the order was made and that was that the grounds raised were arguable.

90. As the claimant does not seek indemnity costs, the order is on the standard basis. The authority asks that any order be obviously subject to assessment, but that the amount payable should be that of 75 per cent.

91. MR McCARTHY: My Lady, just a very, very brief response. We acknowledge what the defendant says in relation to the costs coming out of public funds and it is in part precisely because of that we have not sought costs on an indemnity basis. Were it a private defendant, then the position might be different, but we have considered that in terms of the application we make.

92. It is of course just a contextual matter, but I know that my instructing solicitor would ask me to impress upon the court that those contextual factors arise on both sides and, my Lady, you will be aware of the costs and cuts involved in legal aid. It is particularly important for claimants' solicitors who work in this field in relation to housing that where they can properly seek costs in respect of cases that have been properly taken and pursued that they do that and obtain the appropriate order. Those are my points.

93. MS SARA COCKERILL: Thank you.

94. In relation to the costs of this matter, it is submitted to me for the claimant that costs should follow the event on the basis that the claimant has been substantially successful. The defendant, entirely understandably, says no, because I found for the defendant on the rationality basis this should effectively be an issues-based split and it fixes the figure at 75 per cent.

95. I am not persuaded that it is appropriate to follow that course. This is a case where, as the claimant has submitted, the majority of the detailed argument, and the detailed evidence, really did pertain to the policy factors. But also, for the reasons I have given, the policy factors which were in play overlapped very heavily with the reasoning which related to the rationality argument and so it is artificial to divorce the two. So, I say that costs must follow the event.

96. On the question of the defendant's conduct, in those circumstances it really does not matter what the defendant's conduct was. Since no question of indemnity costs arises, I would not have been minded to make any alteration to the order on the ground of the defendant's conduct. There was a bit of a mix up in relation to notifying the defendant. The kinds of things which are prayed in aid are really not terribly serious. Without prejudice save as to costs, again, it is interesting, but, given the approach which I have taken, I do not think it really makes a difference save to potentially give an extra basis for saying that it is reasonable to say costs follow the event.

97. The final point is that the defendant says that I should have in mind that the costs which are to be paid, if I make an order for costs, are public funds and that there should be some alteration to reflect that. I take on board the point which the claimant makes, which is that these are effectively public funds in both directions. In those circumstances, unless there is guidance or there is authority which tells me that I should not take a particular view as between the competing priorities of two different

publicly-funded bodies, I am minded to approach it in the way that I would approach other litigants in this court and the order which I would make, if neither party were publicly funded, is that the claimant have her costs to be subject to detailed assessment, if not agreed.

98. Is there anything else?

99. MR McCARTHY: I do not think there is. My Lady, would it assist for counsel to draft an order?

100. MS SARA COCKERILL: It would.

101. MR McCARTHY: I will liaise with my learned friend.