

Localism Act in action

Case study of a new allocation scheme

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The stated purpose of the Localism Act amendments to allocation scheme requirements was to enable 'a more focused waiting list which better reflects local circumstances'. It should not be a surprise to see that divergences in allocation policies (or proposed allocation policies) that have resulted are actually along broadly political lines, rather than driven by local circumstances. Neighbouring councils can have quite different approaches, with the result that eligibility for social housing and priority within the list can vary from one side of a street to the other. The divide in London at least, and unsurprisingly, seems to be between the Tory boroughs on the one hand and the Labour boroughs (with some exceptions) on the other. Conditions for qualifying, additional preferences, implementation of flexible tenancy policies are the main differences.

Revised policies bring with them new issues and potentials for challenge. I'll try to flag some potential issues as we go on.

In the context of the Localism Act and the Allocation of Accommodation code of guidance of 2012, it is worth looking at one of the new Allocation schemes to see how the permitted changes have been implemented and to see some of the difficulties that might arise from that implementation.

London Borough of Barnet introduced a revised Allocation policy as of November 2012. Barnet also implemented a Flexible Tenancy policy in July 2012, probably the first. Barnet are currently consulting on reducing two offers to one, and offering private sector out of borough accommodation where affordability is an issue. (<http://www.barnethomes.org/news/2013/07/have-your-say-on-how-barnet-council-allocates-housing/>)

Barnet ended their choice based letting scheme in November 2011. The current scheme operates by direct offer, with up to two offers of 'suitable accommodation' made (subject to current consultation). Barnet's old waiting list had some 14,500 people on it. There are no figures as to those on the new list, but as we will see, it is likely to be hugely fewer.

I'll run through the main areas of post Localism Act changes in Barnet's scheme, highlighting some issues and failings of the scheme as published. Square brackets indicate my additions.

Qualification.

As well as the usual exclusions on eligibility grounds, Barnet's list of those excluded from the housing list includes:

- a. Applicants with no local connection to Barnet as set out at Para 3.4 [save for applicants placed in band 4 as described below.]

- b. Applicants who are overcrowded by only 1 bedroom and this is their only housing need
- c. 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
- d. Applicants who have refused two reasonable offers of accommodation under the terms of this Allocations Scheme, [see below]
- e. Homeless applicants found to be intentionally homeless
- f. Homeless applicants to whom the main homelessness duty has been ended due to refusal of a suitable offer
- g. Homeless applicants placed in long term suitable temporary accommodation under the main homelessness duty unless the property does not meet the needs of the household or is about to be ended through no fault of the applicant see para 3,6
- h. Applicants with lawfully recoverable arrears or other housing related debt within the meaning of this Scheme
- i. Applicants whose income or assets exceeds the limits set by the Council (as these limits will change the Officers will use guidance to apply this test) [Current figures are: With child or children: household income is below median Barnet earnings (currently £36,200); A single person or childless couple and household income is below median Barnet earnings less 15% (currently £30,770)]
- j. Homeless applicants but assessed as having no priority need under the homelessness law
- k. Applicants who owe arrears of rent or other accommodation charges to the Council in respect of the current tenancy or former accommodation, unless an appropriate agreement has been reached and sustained for a reasonable period. In assessing the application for registration, the Council will take into account the size of the debt, the means to pay and the degree of need
- l. Applicants in breach of another condition of their Tenancy Agreement and this is accepted by both parties.

Barnet does state that a discretion is retained to waive these categories in exceptional circumstances.

Some of these exclusions are unclear. Others troubling.

At (a.), local connection, Barnet's scheme does not, as yet, take follow the requirement of The Allocation of Housing (Qualification Criteria for Armed Forces) (England) Regulations 2012, in force from August 2012, which provides that local connection does not apply to a

person who:

3(3)

(a) is serving in the regular forces or who has served in the regular forces within five years of the date of their application for an allocation of housing under Part 6 of the 1996 Act;

(b) has recently ceased, or will cease to be entitled, to reside in accommodation provided by the Ministry of Defence following the death of that person's spouse or civil partner where—

(i) the spouse or civil partner has served in the regular forces; and

(ii) their death was attributable (wholly or partly) to that service; or

(c) is serving or has served in the reserve forces and who is suffering from a serious injury, illness or disability which is attributable (wholly or partly) to that service.

The intent to introduce this regulation was spelled out at 3.27 of Code of Guidance 2012.

The overcrowding by one bedroom (b.) is unclear. By what standard is this measured? The policy doesn't state, but if the measure is statutory overcrowding, is this reasonable? How does this not fall under the reasonable preference category for overcrowded conditions (4.4(c) of the Guidance), let alone be excluded from qualification?

The disqualification at (d.) for anyone refusing two suitable offers lasts for 12 months, para 4.25 (the second 4.25) of the scheme states:

An applicant whose housing priority has been reduced under 4.24 will not be entitled to be reconsidered for housing under this allocations scheme for a period of 12 months from the date that the Council notified them of its decision, except where there has been a material change in circumstances such that the offer of rehousing would no longer be suitable, for example because of an enlargement of the applicant's household or a deterioration in ill health.

Quite what this means is unclear. If the circumstances had changed at the time of the second offer, that offer would not be suitable, so would not be a second offer. But if circumstances change in the 12 month suspension, does this mean a retrospective assessment of the suitability of the last offer in the new circumstances?

Homeless applicants placed in long term suitable temporary accommodation (g.). The policy goes on to state that a non-exhaustive list of 'long term temporary accommodation' includes "private sector properties let via the council or a housing association under a leasing arrangement, and non-secure tenancies on the regeneration estates."

It is hard to see the basis for this, where there has been no discharge of duty. Why not homeless reasonable preference (4.4(a) of the Guidance)? How come exclusion simply on the basis of the apparent security of temporary accommodation?

Homeless applicants assessed as having no priority need (j.). The Guidance states at 4.4(a) that reasonable preference **must** be given to:

people who are homeless within the meaning of Part 7 of the 1996 Act (including those who are intentionally homeless and those not in priority need)

Barnet's exclusion from qualifying of 'homeless but not in priority need' would appear to run contrary to the requirement to give reasonable preference.

Local Connection

Barnet specify local connection as:

Local connection within the terms of this scheme will normally mean that an applicant has lived in this borough, through their own choice, for a minimum of 2 years up to and including the date of their application, or the date on which a decision is made on their application whichever is later.

Accepted homeless households placed by this authority in accommodation outside Barnet will also have a local connection as long as they fulfil the two year residential qualification (time spent placed by Barnet in temporary accommodation outside the borough will count towards time spent in Barnet.

Local connection may also be awarded to people who need to move to a particular locality in the borough, where failure to meet that need would cause exceptional hardship to themselves or to others. Those without a local connection will not be eligible to be placed in bands 1, 2 or 3 until this condition is satisfied.

People in the following categories will not normally be considered as having a local connection:

- *Those placed in the borough of Barnet in temporary accommodation by another borough*
- *Those placed in the borough of Barnet in residential or supported housing by another borough*
- *Secure or flexible tenants of other boroughs*
- *Those who do not meet the residential criteria but who have family members in this borough.*

So, what if you have spent two years in Barnet but were placed there in temporary accommodation by another borough? Apparently you have no local connection as regarded as not being there 'by your choice'.

A decision that an applicant does not qualify is subject to a review process, which I'll come back to below.

Preference and priority

The preference tables are attached at the end of these notes. The key point is that nobody without a reasonable preference under s.166A(3) Housing Act 1996 as amended will be allocated any band at all. Barnet label these as s.167(2) preferences, but that only applies to Wales.

A further significant element in Barnet's scheme awards an additional preference for Community Contribution (from Band 3 to Band 2). The terms of this are set out in the annex 3 to the Policy, attached at the end of these notes. What is counted as a Community Contribution is in most instances, strictly defined - eg Employment is one member of

household in employment or self employed for 6 of the last 12 months. (Though whether full time or part time is not specified).

Voluntary work must be for a minimum of 10 hours per month and can only be for

a not-for profit organisation that is registered with the Volunteer Centre Barnet or recognised by the Council, or a charity that is registered with the Charity Commission or is funded by the Council or another local authority or a faith based community group or organisation. Tenants and Residents Associations which are constituted are classified as not-for-profit organisation [sic.] They must be registered with Barnet Council or a Registered Social Landlord to qualify.

In other instances, such as awarding a community contribution preference to 'older' residents or the disabled, where 'frailty or disability' prevents them from working, the decision is left as an exercise of discretion by the housing officer.

There is also an age distinction drawn. Someone who is under 25 would have to be volunteering for 20 hours a month for at least 6 months, rather than the 10 hours per month required of the over 25s.

Registered foster carers are acknowledged as performing a community contribution, although ironically, the bedroom tax penalty still applies.

On ex-service personnel, the Community Contribution is awarded as follows:

Applicants who have served in the British Armed Forces and lived in Barnet for at least 6 months immediately prior to enlisting, will qualify for a community contribution award automatically, with the exception of those who have been dishonourably discharged. This includes people who have served in the Royal Navy, Royal Air Force and British Army.

Service with the armed forces will be confirmed with the Royal British Legion.

The lowest band, band 4, is reserved for those owed a full housing duty under s.193(2) but without a local connection. The Scheme notes that this is very unlikely to result in an offer of social housing, but applicants may be helped to find a home in the private rented sector.

There has to be a question as to how far this can be described as a 'reasonable preference', when it is the lowest band for those considered to qualify for the housing list. There is, quite simply, nobody to be preferred to.

It also appears to be partially putting into practice the suggestion made by DCLG 'advisor' Andy Gale that councils should ensure that:

the reasonable preference for accepted homeless cases to be reduced to the bottom of the reasonable preference groups to ensure that a social housing offer doesn't come before a PRSO offer. (<http://nearlylegal.co.uk/blog/2012/11/homeless-legislation-a-thing-of-the-past/>)

It is also worth noting that an offer of private sector accommodation, even out of borough, can be considered as a reasonable offer for the purposes of the allocation scheme as a whole. 4.23 states:

Applicants may be offered a property in the private rented sector. These offers are subject to specific regulations that protect the health and safety of tenants. Full details of these regulations are available on request.

There is, notably, no description of a process for rebanding if circumstances change.

‘Reviews and Appeals’

S166A(9)(c) provides that the applicant has a right to request a review of a decision that they are not a qualifying person. There is no prescribed mechanism for an appeal, unlike s. 202 and s.204 of Part VII Housing Act 1996.

Barnet, less than clearly, appear to have both reviews and appeals. The relevant section of the policy is attached. The mechanism for a review, at 5.4 is clear enough: written submissions and a 56 day review period. The only way to challenge a negative review, or review procedure is by judicial review, although not mentioned in the policy.

On reviews and/or appeals of suitability of offers, it is hard to know what to make of this:

5.5 Where an applicant wishes to appeal the suitability of an offer of accommodation under 5.1 of this policy, the property will be held available whilst the appeal is considered where this is not likely to lead to an unreasonable delay in letting the property.

5.6 Where an applicant requests a formal review concerning the suitability of accommodation under 5.3 of this policy, the property will not normally be held available whilst the appeal is considered. [5.3 has nothing to do with a formal review of anything!]

What is the difference between a review and an appeal? Why would one see the offer kept open while the other doesn't? We do not know. Any applicant considering requesting a review of suitability of an offer is going to have a hard time working out the possible consequences.

Again, the only route to challenge a negative review of suitability of an offer will be judicial review.

Flexible tenancies

While flexible tenancies do not form part of the main allocation policy, the separate Tenancy Strategy must be considered as part of the overall allocation policy dealing as it does with the forms of tenure to be offered, who to and for what period.

I took a critical look at Barnet's Tenancy Strategy, published in April 2012, here:

<http://nearlylegal.co.uk/blog/2012/07/barnets-brave-new-dawn/>

The Strategy is at http://www.barnet.gov.uk/downloads/download/955/local_tenancy_strategy

In effect, all new secure tenancies will be flexible tenancies save for those offered to:

- Secure tenants whose tenancy commenced before 9 July 2012 moving to another council property – already protected in law; [Actually no, only mutual exchanges, but that's fine if Barnet extend it to transfers]
- Older people who are in receipt of the state pension and will occupy a general needs property. [...] The terms of Sheltered Housing tenancies will remain the same as they are currently and will be let as secure (life-time) tenancies;
- Ex-armed forces personnel who have been both medically and honourably discharged and who have also seen active service; to be validated by the Royal British Legion;
- Households where the applicant, their spouse or a dependant child is disabled in accordance with the criteria contained in Appendix 2.
- These criteria would also be applied in the event that a household member becomes disabled during the period of a flexible tenancy and, as a result, become eligible for a life-time tenancy;
- Households where the applicant or their spouse is terminally ill; this would also apply in the event that a household member becomes terminally ill during the period of a flexible tenancy and, as a result, become eligible for a life-time tenancy;

Tenancies will be offered as a 1 year introductory, followed by a 5 year term flexible tenancy. Except if the applicant is single and under 25. Then the offer will be of a 1 year introductory tenancy followed by a 2 year flexible tenancy. The Ministerial Guidance on flexible tenancy was that terms should be 5 years save in 'exceptional circumstances'. Whether being single and under 25 counts as an exceptional circumstance is an open question. A 2 year term may be offered to a prospective tenant in other circumstances, "depending on their vulnerability and the outcome of the housing assessment."

The only challenge to being offered a flexible tenancy is a review of the fixed term offered - Localism Act 107B(2) . Save for a challenge to a 2 year term that has been based on the unspecified 'outcome of the housing assessment', or possibly the classification of under 25s are 'exceptional', it is hard to see challenges here.

The termination of a flexible tenancy is more opaque. A review of the tenant's circumstances is to take place 8 months prior to the end date of the fixed term

The tenancy review criteria will reflect the continuing needs of tenants, any assets they might have accrued or inherited, attitude to work / training opportunities that might have presented themselves and pressures on social housing. Tenancies will not normally be extended where one or more the following apply:

- Households with children with a gross income that is equivalent to the median earnings in Barnet [currently £36,200];

- A household with no children that has a gross income that is equivalent to the median earnings in Barnet minus 15% [currently £30,800. Note income not earnings. Including benefits/tax credits etc.?];
- A tenant or a member of their household who has been convicted of an act of civil disturbance or other criminal activity;
- The tenant has breached the terms of their tenancy and has failed to reach or maintain an agreement with the Council to remedy this breach. For example, there are rent arrears and the tenant has not agreed or maintained an agreement to clear these;
- The property is under-occupied by one bedroom or more;
- The property has been extensively adapted but for someone with a disability who no longer lives with the tenant (this allows the property to be released for someone who will benefit from the adaptations);
- Assets – the tenant or their spouse has assets or savings greater than the amount stipulated in the Council’s Housing Allocations Scheme which would normally exclude someone from being granted a council tenancy [currently £30,000].
- The tenant is a young, single person on a flexible two year tenancy who has not worked or undertaken any training or education for a period of 6 months prior to the tenancy end date.

Notice to be served 6 months before the end date of the tenancy (Localism Act s.107D(3))

Tenants have the statutory right to request a review of the decision to terminate the flexible tenancy s.107E, within 21 days of the decision. Barnet’s review procedure is for written submissions and an unconnected team leader or manager to conduct the review with 56 days. There is no provision for an oral hearing. (Whether an oral hearing should take place is a matter for regulation by Secretary of State under s.107E(4)&(5). No regulation has yet been made.)

There is no statutory provision for an appeal from the review decision, nor in Barnet’s Scheme. The question is what route a challenge to the decision could take. While there may be judicial review as a route, arguably there is an alternative route of a public law defence to a subsequent possession claim on the same grounds, making judicial review inappropriate.

Barnet generously state:

Where a tenant wishes to appeal the termination of a tenancy and the notice period expires during the period of the appeal, the tenant will be permitted to stay in the property where this is not likely to lead to an unreasonable delay in the property being vacated.

But of course, until the review has been completed, it is likely that the Court would refuse possession, under s.107D(6).

Barnet’s Scheme makes no mention at all of the requirement for a second notice, not less than 2 months prior to the end date of the tenancy, s.107D(4). This is a significant omission.

Barnet's scheme does note that a possession claim may be defended, although not wholly accurately:

Our right to possession may then be challenged on the limited grounds that the landlord has made a legal error, a material error of fact, or that possession is not proportionate in all the circumstances.

Challenges

Challenges to the 'reasonable preference' aspect of allocation schemes became very difficult after *R(Ahmad) v LB Newham* [2009] UKHL 14. Indeed, so did any challenges to the previous allocation schemes so long as they weren't irrational, or didn't comply with the broad terms of the statute. However, the new post Localism Act schemes may well be subject to challenges. The introduction of flexibility for the Authorities to develop their own rules also presents issues of transparency, of reasonableness and of compliance with statute when the authorities chose to do so.

Save for a flexible tenancy possession claim, the only route of challenge to the allocations schemes or decisions made in allocation, is judicial review, once any review process has been exhausted if one is provided.

A problem in practice is that allocation issues are out of scope for legal aid. There is no funding for seeing applicants through a review, or for making transfer requests or applications for consideration.

However funding is still available for judicial review, so while advisors may not be funded to assist with allocation issues, if an issue suitable for judicial review presents itself, there is still funding available. (Subject to the latest proposals, at least.)