Neutral Citation Number: [2020] EWCA Civ 445

Case No: B2/2019/1100

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CLERKENWELL AND SHOREDITCH
HER HONOUR JUDGE BLOOM
D00LU819

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 March 2020

Before :

LORD JUSTICE PATTEN
LORD JUSTICE MOYLAN
and
LORD JUSTICE NEWEY

- -

Between :

LUTON COMMUNITY HOUSING LIMITED	**Appellant**
- and -	
NARGISH DURDANA	**Respondent**

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- -

Mr Jonathan Manning and Ms Stephanie Lovegrove (instructed by Perrin Myddleton) for the Appellant
Mr Toby Vanhegan and Ms Katie Lines (instructed by Duncan Lewis) for the Respondent
Ms Shu Shin Luh (instructed by The Equality and Human Rights Commission) for the Intervener
Hearing dates : 4 and 5 February 2020

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Approved Judgment

Lord Justice Patten :

1. This is an appeal by Luton Community Housing Limited ("LCH"), the claimant in these proceedings, against an order of HH Judge Bloom dismissing its claim for possession of premises at 3 Griggs Gardens, Luton ("the Premises"). Possession was sought in reliance on ground 17 of Schedule 2 to the Housing Act 1988 ("HA 1988") which permits the Court to order possession where the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by the tenant or someone acting at the tenant's instigation. The ground is discretionary so that, even if made out, the Court must then decide whether it is reasonable to make the order: see s.7(4) HA 1988.

2. The respondent tenant, Ms Durdana, and her husband are former employees of Luton Borough Council ("the Council"). They have two children, the youngest of whom is now three years old. I shall call her "A". She suffers from cerebral palsy. It is also common ground that Ms Durdana suffers from PTSD as a result of the trauma associated with A's birth.

3. In 2009 the respondent applied to the Council for homelessness assistance. The main housing providers in Bedfordshire operate a joint allocations policy which uses a banding system to assess housing need. This requires applicants for housing assistance to complete the Bedfordshire Housing Register Application form ("the BHRA form") in which details of their current housing situation and means must be provided.

4. In March 2013 the Council nominated the respondent to LCH for an allocation of accommodation at the Premises. At the time both the respondent and her husband worked for the Council. She completed a pre-allocation visit form stating that since 2009 her address had been 41 Maidenhall Road, Luton. In June 2013 both the respondent and her husband completed the BHRA form and stated falsely that their current address was 41 Maidenhall Road; that the respondent's only bank account had a credit balance of £1,000; that she was living with her parents and had been asked to leave due to overcrowding; and that she had lived at 34 Highbury Road, Luton from September 2005 until 2009 and then at 41 Maidenhall Road since that date. LCH granted the respondent an assured shorthold tenancy of the Premises commencing on 5 August 2013.

5. In fact, at the time when both the visit form and the BHRA form were completed, the respondent, her husband and children lived in a ground floor flat at 425 Dunstable Road, Luton under an assured shorthold tenancy. They had also rented another property in Maryport Road, Luton between September 2001 and March 2012. The respondent's husband had another bank account into which he had been paying a second income. The combined annual income of the respondent's household amounted to £70,734.40. The credit balance in an account of hers was more than £6,000.

6. In March 2017 the respondent accepted a caution in relation to three offences of dishonesty arising from the false information contained in the application forms. Her husband pleaded guilty at Luton Crown Court to the offence of providing false information in order to obtain housing. Both have been dismissed by the Council.

7. On 17 May 2017 LCH served a notice seeking possession ("NOSP") and then commenced proceedings for possession relying on ground 17. The respondent denied

all but one of the false statements relied on but accepted that she had made a false statement about never having had any legal or financial interest in rented property. It was therefore common ground that ground 17 was made out. But she contended that it was not reasonable for the Court to make an order for possession having regard to the effect which a possession order would have on both her and her daughter. She also alleged that LCH had not performed its duties under s.149 of the Equality Act 2010 by properly considering in advance the impact on the respondent and A of seeking and obtaining possession of the Premises.

8. At the trial the judge found that the respondent had made false statements both as to her accommodation and as to her means and savings. She rejected the respondent's evidence that she had forgotten about the £6,000 held in one of her accounts. She also rejected the respondent's case that the Council and LCH had not been induced by the false statements to grant the tenancy. But she was satisfied that the appellant was in breach of the Public Sector Equality Duty ("PSED"). For this reason the claim, she held, must be dismissed. In these circumstances, it was not strictly necessary to consider whether the claim should also fail because it was not reasonable to make the possession order. But the judge indicated that in her view the fact of the breach of the PSED did make it unreasonable to order possession because it was at least a possibility that on a proper consideration by the claimant of all relevant factors the possession proceedings might not have gone ahead. The judge did not, however, attempt to carry out that assessment herself.

9. LCH appeals against the judge's order on three grounds, all of which relate to her dismissal of the possession claim for non-compliance with the PSED. The respondent has cross-appealed on the issue of inducement but this has not been pursued. Prior to the hearing we gave permission to the Equality and Human Rights Commission to intervene, both orally and in writing, and Ms Shu Shin Luh has appeared on its behalf. Before I come to s.149 and the issues which arise in this case, it is useful to summarise what, on the judge's findings, actually happened.

10. The NOSP which was served on 17 May 2017 had been prepared by Ms Zoe Wilson, a customer relations manager with LCH. She had worked for LCH since 2016 but had not been involved in the decision to grant the tenancy. She made a witness statement and also gave live evidence. In her witness statement she said that LCH had not been made aware of either the respondent's or her daughter's condition during the tenancy but that, even in the light of those conditions, it was still considered proportionate and reasonable to seek a possession order because the false information provided in the application forms had misled LCH and had prevented a more needy and deserving applicant from being granted a tenancy of the Premises for which they were eligible. The stock of available social housing is very limited and it would be unfair for the respondent to be permitted to benefit from her dishonest conduct.

11. To support its case that it had complied with the PSED by carrying out an Equality Act assessment, LCH relied on a two-page "Equality Act Review" document signed by Ms Wilson on 20 September 2018. This therefore post-dates the commencement of the possession proceedings. Ms Wilson explained to the judge that she had prepared the document after consulting a solicitor who told her what to look at. She had no previous experience of dealing with Equality Act assessments; did not know what s.149 provided or what the PSED comprised of; and had not previously considered the PSED in relation to these proceedings.

12. The review document sets out six questions and a conclusion. The first paragraph identifies the nature of the disabilities suffered by the respondent and her daughter but with no detail as to how they impact on them. The evidence of Ms Durdana in her witness statement was that the right side of I body is weak and that she cannot use her right hand. The doctors' reports which she produced and relied on at trial indicate that she often falls down, has some difficulties speaking but is otherwise generally fit and well. She is, of course, still a small child. The report of Dr Korzinski also deals with the respondent's disability caused by PTSD. He says that the threat of homelessness has placed the respondent's marriage under extreme duress; that her condition and ability to cope is likely to deteriorate; that she has not yet completed her treatment for PTSD and that the treatment cannot be completed whilst the conditions of stress and instability he describes continue.

13. In one of the reports there is mention of the Premises being purpose-built to cater for A's disabilities. But Mr Manning has told us that this is not correct. The Premises have not been specially built or adapted for use by a disabled child and LCH was not asked to provide such accommodation.

14. Ms Wilson accepted in cross-examination that she did not know what the effect of A's disability was on her day-to-day living or what impact their eviction would have on either A or her mother. This is evident from paragraph 2 of the review document. Under the heading "What issues are arising as a consequence of the tenant's disability?" Ms Wilson has summarised the circumstances in which the respondent and her family came to be granted the tenancy but says nothing about the effect of an eviction on their disabilities.

15. Paragraph 3 recognised eviction as "unfavourable treatment" and the review document then turns to consider whether LCH is pursuing a legitimate aim in seeking an order for possession; whether the unfavourable treatment is rationally connected to the legitimate aim; and whether eviction is no more than is necessary to achieve the legitimate aim. In those sections of the review Ms Wilson summarises the nature of the fraud which the respondent and her husband perpetrated; its effect in depriving other more deserving applicants of accommodation; and why eviction would be reasonable and proportionate in this case. The conclusion is that LCH does consider that it would in all the circumstances be proportionate to continue the possession proceedings.

16. As the judge observed, the language and contents of parts of this document are very much those of a proportionality review carried out in order to justify treatment of a person with a protected characteristic that might otherwise be regarded as discriminatory: see Equality Act s.19(2). But in this case we are not concerned with allegations of indirect discrimination. The respondent relies on a breach of the PSED which is set out in s.149 of the Equality Act. So far as material, this provides:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
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> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
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> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
>
> (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
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> (a) tackle prejudice, and
>
> (b) promote understanding.
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act."

17. The duty which this section imposes is in many ways aspirational in the sense of providing encouragement to public authorities in the exercise of their functions to achieve the objectives set out in s.149(1). The Equality Act 2010 is an amalgam of earlier legislation dealing, *inter alia*, with discrimination on grounds of race, sex or

disability. But the PSED embodied in s.149 is derived from s.49A(1) of the Disability Discrimination Act 1995 which was introduced by way of amendment in 2006. Its focus is on the general advancement of equality aims. It is not concerned to prohibit or regulate conduct which is discriminatory or with the imposition of the duty to make adjustments, all of which were existing features of the law in relation to disabled persons and have been continued in the provisions of Part 2 of the Equality Act. Nor is the duty, at least in terms, one to do anything specific in addition to or independently of the performance of the functions which the authority is carrying out. As Elias LJ observed in *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) at [76], the duty is not a duty to achieve a particular result. The duty is one to have due regard to the need to carry out the s.149(1) objectives as part of the discharge of the various functions of the public authority concerned so as to equalise opportunity and eliminate discrimination. "Due" means appropriate in all the circumstances: see *R (Baker) v Secretary of State for Communities and Local Government* [2009] PTSR 809 at [31]. There Dyson LJ said:

> "[31] In my judgment, it is important to emphasise that the s 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to *have due regard to the need* to achieve these goals. The distinction is vital. Thus the inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have *due* regard to it. What is *due* regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing."

18. The scope for action will therefore vary from case to case depending upon the particular statutory or other function which is performed and the restrictions or obligations which may be imposed on the authority by that particular regime. As McCombe LJ said in *Powell v Dacorum Borough Council* [2019] EWCA Civ 23 at [44]:

> "In my judgment, the previous decisions of the courts on the present subject of the application and working of the PSED, as on all subjects, have to be taken in their context. The impact of the PSED is universal in application to the functions of public authorities, but its application will differ from case to case, depending upon the function being exercised and the facts of the case. The cases to which we have been referred on this appeal have ranged across a wide field, from a Ministerial decision to close a national fund supporting independent living by disabled persons (*Bracking*) through to individual decisions in housing

> cases such as the present. One must be careful not to read the judgments (including the judgment in *Bracking*) as though they were statutes. The decision of a Minister on a matter of national policy will engage very different considerations from that of a local authority official considering whether or not to take any particular step in ongoing proceedings seeking to recover possession of a unit of social housing."

19. Consistently with this, s.149 does not amend the statutory powers and functions of a public authority prescribed by other legislation. So in this case it does not limit or qualify the power of a housing authority to seek possession of premises let to persons with a protected characteristic. But in deciding whether to take or continue such proceedings the authority must perform the duty of consideration which s.149 imposes on it.

20. There was some discussion during the hearing of this appeal about the content of that duty. Looked at simply in terms of s.149(1), the duty is expressed at a high level of generality. It is common ground that we are concerned only with s.149(1)(b) which speaks of advancing equality of opportunity: a concept which has no immediately obvious application to the position of a social housing provider seeking to obtain possession from even a disabled tenant. But the respondent relies on the extended definition in s.149(3) and, in particular, (3)(b) which requires the authority to have due regard to the need to take steps to meet the needs of (in this case) the respondent and her daughter as disabled persons so far as they are different from the needs of other non-disabled persons. These steps include, in particular, taking account of their disabilities: see s.149(4).

21. This is convoluted language but Mr Manning, on behalf of LCH, accepts that these provisions of s.149(1)(b) and therefore (3) were engaged in this case once the appellant became aware that the respondent and her daughter were disabled. It was therefore incumbent on LCH (as the proxy for the Council) to carry out an assessment which complied with the s.149 duty. But the duty so expressed cannot, he submits, be treated as one to accord to the respondent and her daughter any particular type of treatment and must be considered in the context in which it arises. In one sense, as Moylan LJ put to him in argument, a decision to seek possession, if carried successfully into effect, cannot be said to meet the needs of either the respondent or of A who will be deprived of their existing accommodation. But it cannot have been Parliament's intention, he submits, that the s.149(1) duty would operate as a complete bar to possession regardless of the circumstances and, in particular, the reasons for seeking possession. The language of s.149(3)(b) and (4) with its reference to having due regard to the need to take steps to take account of a disabled person's disabilities means, he says, no more than that. In this context, LCH was required to have proper regard to those disabilities in deciding whether to continue to seek possession. Those disabilities and their effect were therefore a factor which mandated specific consideration as part of that decision. But they were not the only considerations that LCH had to weigh in the balance. Its established policy of seeking possession in cases such as this where the tenancy is obtained by deception and the reasons for that policy remain material considerations in the performance of its housing functions. LCH was therefore required in the final analysis to decide whether, on the facts of this particular case, it was reasonable and proportionate to continue to seek possession notwithstanding the disabilities of the

respondent and her daughter. That, Mr Manning submits, is what LCH did through Ms Wilson in the Equality Review which it carried out. The fact that she had never read s.149 and did not know what it required of LCH made no difference if in fact the review which was carried out met the standards and requirements of the PSED. The judge found in this case that Ms Wilson did not know how A's disabilities impacted on her and had not factored them into the decision to continue with the proceedings. She had not considered alternatives to seeking possession partly because she considered that it was likely that the respondent would be able to obtain other accommodation in the private rented sector. The position of LCH was that where the tenancy had been obtained by fraud there were no circumstances in which it would not seek to obtain possession. The judge accepted on the authority of this Court in *Hurley* that the weight to be given to competing considerations was a matter for the decision-maker. She quoted from the judgment of Elias LJ at [78] where he said:

> "The concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

23. But she said:

> "50. Whilst the Claimant is right that the weight to pay to the information is a matter for the Claimant, the Claimant has to show that it has paid "due regard" to the equality aims as set out in section 149 and has done so "in substance, with rigour and with an open mind". I accept, of course, that the Claimant could comply with the duty without knowing about it. One can understand how this could arise when assessing whether someone is in priority need under the Housing Act 1996 as the whole focus is on the extent of the disability and the consequences of the same. However in this instance the focus was on the eviction and the policy of the Claimant was to seek eviction where someone has lied to obtain a tenancy. Ms Wilson stated that she had not considered any other alternatives to possession and that where fraud was concerned there were no circumstances in which the Claimant would not consider taking the property back. Whilst that may well be a reasonable policy, it has to be considered in the light of the PSED where the focus is on the impact that the decision to evict will have on the disabled person(s). It may be proportionate to seek eviction but that is not the same as asserting that due regard has being paid to

> section 149 and the equality aims have been considered. It is only once the court is so satisfied that the weight to attach to the factors informing the decision becomes a matter for the Claimant only.
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> 51. I am not satisfied that the Claimant has rigorously considered the duty in the sense that it has properly considered the impact of its decision to seek possession on the equality objectives and the need to promote those aims. The clear evidence of the only witness for the Claimant was she did not understand or know about the duty. The only document relevant was not focused on the issue of the PSED at all. There is nothing other than a passing reference to and acknowledgment that the Defendant and her daughter have been diagnosed with disabilities. That does not show due regard is being paid to the same. Ms Wilson had no idea how extensive the disability of the child was and indeed it is not clear she knew or considered the extent of the PTSD of the Defendant and how that would be impacted by eviction. Indeed, I am not satisfied that the Claimant can be said to have had an open mind as her evidence was that the only option was eviction. I therefore have concluded I am not satisfied that the Claimant has established that it considered its duty under PSED at all and therefore the Claimant is in breach of the same."

24. The judge then turned to consider the factors relevant to the s.149 assessment which ought to have been carried out:

> "54. In this case, unlike *Forward*, whilst I have found that the Defendant lied about obtaining the premises, there is clear evidence of disability before the court which was available to the Claimant. The evidence of Dr Korzinski regarding the Defendant was clear that she had PTSD and it was accepted that [A] has cerebral palsy. There was substantial evidence that this impacts on her right arm and leg and that the child has a "massive brain defect" albeit her motor system is quite good. The Defendant receives DLA for caring for her daughter. The expert report notes that the early years development of a child with cerebral palsy were critical in laying the foundations for all areas of learning and development and homelessness would impact at this critical stage of her development. Ms Lovegrove argued that the evidence regarding [A] was limited and there were no adaptations at the home and the Claimant knew this and in effect no further enquiries would make a difference. However as against that, the Claimant has never investigated the known disabilities or considered the extent of the same or the impact that eviction would have given the disabilities that the Defendant and [A] have. Further the oral evidence of the Defendant was that the reason there were no adaptations was that the house was built in such a way that it negated the need for the same and suited her daughter's disabilities. In particular the wide stairs

> with handles on both sides meant that [A] could manage independently to use the stairs; further there was a WC downstairs. There was also evidence that the impact of losing their home could have a seriously negative impact on the Defendant's mental health. The Claimant has not considered these factors and assessed the need in particular to advance equality of opportunity between the Defendant and her daughter and those who are not disabled and whether there were other steps that needed to be taken given their respective disabilities. I am not satisfied that I can conclude that on the facts of this case the outcome would inevitably be the same if the PSED had been complied or was complied with. Whilst it is highly relevant that the Defendant has lied repeatedly to obtain housing and not been honest with the court, it does not inevitably mean that she must lose her home. It appears likely that this is the outcome. One could even argue that it appears highly likely that she will lose it. But it is arguable that the disabilities of the Defendant and [A] might make a difference and lead to a different approach being taken in order to meet the equality aims."

25. Ms Lovegrove had argued that the Court could still make a possession order and leave the PSED to be performed at the warrant stage before the order for possession was enforced but the judge rejected this. It would, she said, create the risk that LCH, armed with the possession order, would not approach the evaluation exercise required with an open mind. Given that a breach of s.149 operated as a substantive defence to the claim for possession and had been established in this case, the only proper course was to dismiss the claim.

26. The judge was, I think, right to conclude that there had been a breach of the PSED in this case. Although it is theoretically possible for the duty to be complied with in ignorance of what it consists of, such cases are likely to be rare and this is not one of them. Ms Wilson, by her own admission, had not taken into account the likely effect of the disabilities of the respondent and A in relation to their proposed eviction from the Premises, although at the time when the decision was made LCH knew what the disabilities were; knew that they were being relied on as a defence to the proceedings; and had received copies of the medical reports I referred to earlier.

27. Although the reasonableness or proportionality of continuing to seek possession may be an appropriate way of characterising the ultimate decision to be made, I think that Mr Vanhegan is right to submit that the decision needed to be preceded by more than a proportionality assessment and that what Ms Wilson should have carried out was the open-minded conscientious enquiry referred to in the authorities.

28. In these circumstances, it becomes necessary to consider Mr Manning's alternative argument which is that even had Ms Wilson scrupulously carried out the enquiry, which she should have done, the ultimate decision is highly likely to have been the same.

29. Although derived from s.31(2A) of the Senior Courts Act 1981 which deals with the refusal of relief on an application or judicial review, it is now well established that the Court will refuse to dismiss a claim for possession where a breach of s.149 is relied on by way of defence if satisfied that it is highly likely that the outcome would not have

been substantially different had no breach of the duty occurred: see *Aldwyck Housing Group Ltd v Forward* Ltd [2019] EWCA Civ 1334 at [25].

30. That case concerned a claim for possession against an assured tenant who had committed various criminal offences including drug dealing at the demised premises. Possession was sought under Ground 14. The defendant was physically disabled. The claimant had conducted a PSED assessment before trial but it was conceded to have been inadequate because no medical evidence had been obtained about the defendant's disabilities. The High Court dismissed an appeal against a possession order on the ground that although a breach of the PSED could found a defence to the action, the carrying out of an appropriate PSED assessment would still have resulted in the claim for possession going ahead.

31. Longmore LJ rejected a submission by the tenant that once a breach of the PSED was admitted or established there was no room for the Court to exercise its discretion to grant relief on the claim. He said:

> "21. I would for my part decline to accept the proposition that, as a general rule, if there is a breach of the PSED, any decision taken after such breach must necessarily be quashed or set aside or even the proposition that there is only a narrow category of cases in which that consequence will not follow.
>
> 22. It may well be right that major governmental decisions affecting numerous people may be liable to be quashed if the government has not complied with the PSED. Thus in *R (Hurley) v Secretary of State for Business, Innovation and Skills*[2012] HRLR 13, an application to quash Regulations raising fees for university students when the department had not, in some respects, complied with the PSED, Elias LJ said (para 99): "It will be a very rare case, I suspect, where a substantial breach of the PSEDs would not lead to the quashing of a relevant decision …" The Divisional Court of the Queen's Bench Division in that case held that there had in fact been substantial compliance and, in the event, did not quash the Regulations.
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> 23. In *R (Bracking) v Secretary of State for Work and Pensions* [2014] Eq LR 60, a decision by the Minister for Disabled People to close the Independent Living Fund which provided assistance to disabled persons for whom the consequence of closing the fund would have a very grave impact, was quashed for failure to comply with the PSED in reliance (inter alia) on [2020] 1 WLR 584 at 593 the above dictum of Elias LJ. In delivering the first judgment, McCombe LJ said (para 60):
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> > "It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude."

24. These decisions cannot be applied indiscriminately to cases in which a decision is made affecting an individual tenant of a social or local authority landlord as recognised by McCombe LJ himself in *Powell v Dacorum Borough Council* [2019] EWCA Civ 23; [2019] H.L.R. 341 (para 44):-

…

In the context therefore of a typical possession action the court, while having regard to the importance of the PSED, will also have available to it the facts of the particular dispute and be able to assess the consequence of any breach of the duty more easily than in the context of a wide-ranging ministerial decision.

25. Mr Vanhegan submitted that, apart from the two categories of case he identified, the court should quash a decision made when the PSED is not complied with, otherwise local authorities will have no incentive to comply with the duty and no opportunity to learn from their breach of duty. For my part, I would resist the notion that the court should act as some sort of mentor or nanny to decision-makers. As Laws and Treacy LJJ said in *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923, in which a change in ministerial policy for the provision of affordable housing had been made without initially complying with the PSED (para 87):

> "Nothing we say should be thought to diminish the importance of proper and timely compliance with the PSED. But we have strong reservations about the proposition that the court should necessarily exercise its discretion to quash a decision as a form of disciplinary measure. During the course of argument, Mr Forsdick accepted that if an assessment, subsequently carried out, satisfied the court, there would be no point in quashing the decision if the effect of doing that and requiring a fresh consideration would not have led to a different decision. We think [2020] 1 WLR 584 at 594 this was a correct concession. The court's approach should not ordinarily be that of a disciplinarian, punishing for the sake of it, in these circumstances. The focus should be on the adequacy and good faith of the later assessment, although the court is entitled to look at the overall circumstances in which that assessment was carried out."

Rather than acting as some sort of mentor the court should, in deciding the consequence of a breach of PSED, look closely at the facts of the particular case and, if on the facts it is highly likely that the decision would not have been substantially

> different if the breach of duty had not occurred, there will (subject to any other relevant considerations) be no need to quash the decision. If, however, it is not highly likely, a quashing order may be made."

32. The decision of this Court in *Forward* came after the judgment in the present case, although Judge Bloom was aware that permission had been granted for a second appeal. Mr Manning submits that [54] of her judgment contains a material misdirection. Having explained why she considers that a breach of the PSED occurred, she addressed the consequences of that by asking herself not whether it was highly likely that on a proper consideration of the relevant factors LCH would have made the same decision, but rather whether such a conclusion was inevitable. That, says Mr Manning, sets the bar too high. Moreover, she goes on to express the view that it is likely or even highly likely that the outcome would be the same. This is relied on as indicating that had the judge asked herself the right question she would have answered it in favour of the claimants.

33. I agree that the judge has misdirected herself and we must therefore decide whether, on the facts of this case, it is highly likely that a proper PSED assessment would have not led to a different decision. Mr Vanhegan stressed that the correct approach to this question is not to ask whether Judge Bloom is highly likely to have reached a conclusion in the claimant's favour but what the decision-maker would have decided had it acted in accordance with s.149. I accept that, although Judge Bloom's own view on that matter is not without significance. It is also true, as Mr Vanhegan says, that we have no direct evidence as to what LCH's decision would have been. But we do know what the medical and other evidence relied on by the respondent was and what the countervailing policy and other considerations taken into account by LCH were. Those are set out very clearly in the Equality Review which Ms Wilson prepared. The task for us is to form an objective view based on that material as to whether it is highly likely that the decision would have been the same. If it is not possible to establish such a conclusion with that degree of certainty then the judge's order must stand. Mr Manning also submitted that the judge had been wrong not to adjourn the proceedings once she was satisfied that a breach of the PSED had occurred so as to allow his client to re-consider the matter afresh in a way which complied with s.149. But the judge was never asked to take that course nor is her failure to do so one of the grounds of appeal.

34. The evidence adduced by the respondent indicates that A has a serious disability caused by cerebral palsy which imposes physical limitations on her ability to move freely around and on her ability to communicate. But she is still a very young child and at the date of the decision in 2018 was even younger. The reports do not suggest that she is at the stage of development where she requires any particular facilities and they confirm that her general state of health is good. It cannot be said on the basis of that evidence that a move to other accommodation will impact on her disproportionately as a result of those disabilities. But there may be some impact as there will be as a result of any move. The respondent is in an anxious and stressed state due to what has occurred and has not been able to finish her course of treatment. The uncertainty and disruption involved in a move will clearly have an impact on her. How severe that will be is likely to depend on the circumstances. I proceed on the basis that it will not be negligible but the evidence does not suggest it will be irreversible.

35. The question therefore is whether LCH, in paying due regard to this evidence and in considering whether it was still appropriate to seek possession, is highly likely to have made the same decision. My own view is that it would. Housing authorities operate under severe constraints in terms of available accommodation. There is no question that had the respondent and her husband provided honest answers to the questions in the application form they would not have been granted this tenancy. The Premises would have been allocated to other qualifying applicants of whom there were and are many. The respondent could have afforded to have rented accommodation in the private sector and should have done so.

36. In the face of a continuing shortage of public housing, LCH is justified in operating a policy of seeking to remove tenants who have obtained their accommodation by deception. The duties owed to other homeless applicants support and justify that policy. Mr Vanhegan has not sought to contend otherwise on this appeal. The weight to be accorded to these policy considerations as opposed to the position of the respondent and her daughter as disabled persons is, of course, a matter for LCH as the decision-maker but it seems to me to be completely unrealistic to suggest that the balance of reasonableness would in this case have come down in favour of the respondent. This was not a case where the medical evidence suggested that the impact of eviction on the respondent and A as disabled persons would have been either acute or disproportionate. And nothing else could have acted as a sufficient counterbalance to the social objectives which underpinned the policies of LCH. Even after paying due regard to these disabilities LCH could lawfully have decided to continue with the claim for possession and are highly likely to have done so. For these reasons, I would allow the appeal against the judge's order dismissing the claim.

37. That leaves the subsidiary question of what should now happen in the proceedings. Mr Manning submitted that we could ourselves make an order for possession but I do not think that would be appropriate. Although for the reasons which I have given the judge was wrong to have dismissed the claim for a breach of the PSED, had she rejected that defence, she would still have needed to consider whether it was reasonable in all the circumstances to make the order. The judge in [58] of her judgment expressed the view that it would not have been reasonable to make the order because the claimant had not complied with the PSED but she declined to carry out any appraisal of her own as to whether it would be reasonable to make the order. The consideration of reasonableness which the Court is required to carry out under s.7(4) HA 1988 will undoubtedly bring into account many of the factors I have already referred to but it will be a consideration of matters as they stand now rather than in 2018 and the scope of the enquiry may be wider. In any event, it is not something which this Court is equipped to carry out on the material available for the purposes of this appeal.

38. I would therefore allow the appeal but remit the claim back to the judge to decide whether it is reasonable to make the order for possession.

Lord Justice Moylan :

39. I agree.

Lord Justice Newey :

40. I also agree.