

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
East Lindsey District Council
(reference number: 19 018 986)**

28 October 2020

The Ombudsman's role

For more than 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

Mr and Mrs X the complainants

Report summary

Housing/Allocations

Mr and Mrs X complain the Council refused to let them join the housing register (waiting list).

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council accepts our recommendations to:

- apologise;
- review its allocations scheme to have regard to the statutory guidance on housing allocations and to the Public Sector Equality Duty (PSED). It should demonstrate proper consideration of the statutory guidance and only depart from it with good reason. It should also provide documentary evidence of its consideration of the PSED when completing the review;
- following the review of the policy, reconsider Mr and Mrs X's applications and backdate any reasonable preference (if the application is accepted) to the date of their application;
- following the review of policy, identify and review those cases since October 2019 where it has refused applications on similar grounds and remedy any injustice to those cases; and
- provide us with a written report of the review of other cases.

The complaint

1. Mr and Mrs X complain East Lindsey District Council (the Council) refused to let them join the housing register (waiting list). They say this deprived them of the chance to bid for social housing in East Lindsey. They want to be allowed on to the housing register.

The Ombudsman's role and powers

2. The law says we cannot normally investigate a complaint when someone could take the matter to court. However, we may decide to investigate if we consider it would be unreasonable to expect the person to go to court. (*Local Government Act 1974, section 26(6)(c), as amended*)
3. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word 'fault' to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
4. It is for us to decide whether a particular set of circumstances are maladministration (fault). The term is not defined in law and we interpret maladministration to include service failure. In our statements and reports we refer to fault rather than maladministration or service failure because it is easier for the public to understand. Caselaw has confirmed we do not have to make separate findings for maladministration and service failure. (*R(ER) v Local Government Ombudsman [2014] EWCA Civ 1407*)
5. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*)

How we considered this complaint

6. We produced this report after examining relevant documents. We gave the complainant and the Council a confidential draft of this report and invited their comments. We considered their comments before issuing this final report.

Investigation

Law and guidance

Housing allocations law and guidance

7. Councils must have a scheme describing how they allocate social housing. (*Housing Act 1996, section 166 A (1)*)
8. An allocations scheme must give reasonable preference to certain applicants including those who need to move to avoid hardship to themselves or others. (*Housing Act 1996, section 166A(3)*)
9. 'Allocation of accommodation: guidance for local housing authorities in England' is statutory guidance which a council should have regard to when devising its allocations policy. It explains the following.

- In framing their qualification criteria, authorities will need to have regard to the requirement to give overall priority for an allocation to people in the reasonable preference categories. (3.20)
 - Housing authorities should avoid setting criteria which disqualify groups of people whose members are likely to be accorded reasonable preference for social housing (such as medical, welfare or hardship grounds). (3.21)
 - The hardship category includes people with a need to move to a different area to give or receive care. (4.11)
10. Councils must write to applicants giving reasons if they do not qualify to go on the housing register. There is a right to request a review of a decision.

The Council's housing allocations scheme

11. The Council changed its housing allocations scheme in 2019. A report to members of the Executive Board at the end of July summarised the proposed changes including the proposal for the Council to manage allocations (previously a housing association had managed them on behalf of the Council). The report said an Equality Impact Assessment (EIA) had been completed and no issues identified. The EIA was not included with the report to brief members and the minutes did not indicate members considered the Public Sector Equality Duty (see paragraph 14, below) when they decided to approve the changes set out in the report. The new policy took effect in October 2019.
12. The scheme says to be considered for registration, applicants need to have a local connection to East Lindsey. A local connection includes living in the district, previous residence in the district and a need to move to *receive* support which cannot be provided at the current location. The scheme does not allow an applicant from another area to gain a local connection to register if the reason they need to move is to *give* support.
13. The scheme goes on to explain the Council places applicants who are eligible to go on the housing register into one of four priority bands based on their current circumstances. Band three (medium need) includes households whose welfare is being severely affected by their current accommodation or location including a need to move to provide long term care and support or where the applicant is severely isolated and must move to access vital services. Band four (low need) includes applicants whose welfare is being affected (though not severely) or they are isolated and wish to move (rather than need to move) to access services.

The Public Sector Equality Duty (PSED)

14. Councils must comply with the Public Sector Equality Duty (PSED) to have due regard to the need to:
- eliminate discrimination, harassment and victimisation;
 - advance equality of opportunity between those who share a protected characteristic and those who do not (protected characteristics include age and disability); and
 - promote good relations between those who have a protected characteristic and those who do not. (*Equality Act 2010, section 149*)
15. The courts have given guidance to public authorities on what having 'due regard' means. The judge in one case said that:

- the authority should be aware of the PSED before it makes the relevant decision;
 - the duty must be fulfilled before the decision is made;
 - decision makers must act with 'rigour and an open mind';
 - the duty is continuing. It cannot be delegated;
 - there does not need to be a 'disability equality policy document' but it must be possible to identify and reference a written document. Otherwise the authority would not be able to evidence it had considered all the relevant factors. (*R (Oao Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin)*)
16. In another case, a judge quashed a council's decision to restrict adult social care services. In that case, the council was aware of equality duties. But it had not carried out an assessment of the practical impact on those disabled people whose services would be cut. The council had considered how to address the needs of disabled people when it made the decision, but that was not what the law said it had to do. The council should have first considered the impact of the proposal. Then it had to ask whether a decision with that potential impact would be consistent with the need to pay due regard to the principles of disability equality. (*R (WM and others) v Birmingham CC [2011] EWHC 1147 (Admin)*)

What happened

17. Mr and Mrs X live in a different area and used to be on the Council's housing register. They re-applied in January 2020. Mrs X completed a housing support questionnaire saying they needed to move to East Lindsey to receive support from her mother Mrs Z who has a social housing tenancy in the district. The form said Mrs Z would be able to provide them with over 20 hours of support a week including support with their childcare, support with their mental health, attending appointments and overnight support. Mrs X explained on the form that she would also give support to Mrs Z like cleaning, managing finances and help to attend appointments.
18. Mr X said in an email to a housing manager that he and Mrs X needed to move to East Lindsey to give support as well as to receive it. He said they had both been in different hospitals over Christmas and they needed support with looking after their son.
19. The Council wrote to Mr X at the end of January to say he and Mrs X did not qualify to go on the housing register because they did not have a local connection. Mr X asked for a review of the decision.
20. The Council completed a review but did not change the decision. The letter to Mr X explained:
- he previously qualified under the old policy as the local connection rule used to include connections to the whole of Lincolnshire and so his support from other family members across the county was taken into account;
 - the Council changed the policy in October 2019 and now neighbouring areas were not taken into consideration when deciding if an applicant had a local connection;
 - his application said he wanted to move to East Lindsey to receive support from Mrs Z and for them to support her;

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- the policy said the applicant must need to move to receive support (and not to give support) and it was unclear how Mrs Z could give support due to her own poor health, age and lack of transport (one of the stated types of support on the application was to attend appointments); and
 - he should apply to other councils in the area where he had younger relatives who could provide regular support.
21. Mr X complained to the Council. Its response said the Council had applied the new policy when considering his housing register application and so it did not uphold the complaint. Unhappy with this response, Mr X complained to us.
22. Mr X told us when he first applied they mostly wanted to move to receive support from Mrs Z, but now her health had deteriorated and he and Mrs X wanted to move nearer to her to give her support.

Comments from the Council

23. The Council told us:
- it did not consider there was fault. It acted in good faith and there was no lack of care, judgement or honesty. It accepted there was service failure;
 - it carried out an equality impact assessment and a consultation led to minor amendments to the policy;
 - it was trying to develop a policy that reflected the higher demand for housing in the area due to the popularity of coastal resorts and the ageing population. The intention was to be open. It would not be open to allow those onto the housing register who had little hope of being rehoused;
 - it accepted it did not get the balance right and agreed to amend the policy; and
 - it provided support to Mr and Mrs X to access other housing options such as private sector lets and direct lets with a local housing provider.

Conclusions

24. We uphold this complaint. The term 'fault' is how we describe maladministration and service failure in our statements and reports. There is fault by the Council for the reasons which follow. We do not distinguish between maladministration and service failure and we do not consider service failure to be a lesser finding of fault. Our approach is to describe whether a set of circumstances amounts to fault and to explain why. We set out our findings in Mr and Mrs X's case below.

The Council's allocations scheme

25. We have considered the Council's allocations scheme even though the complainants could have challenged this by a judicial review. We do not consider it reasonable for them to have used this legal remedy because of the high cost of bringing proceedings and the lack of availability of public funding for legal action.
26. The Council's allocations scheme does not meet the requirements set out in paragraph 9 and so it is at fault. We accept the statutory guidance on housing allocations gives the Council discretion to formulate its own criteria on who may qualify for the housing register. However, it does not permit councils to adopt policies which exclude all or most of a class of persons who would have otherwise have a reasonable preference, from being qualifying persons.
27. The Council's allocations policy as drafted fails to adhere to the statutory guidance. By excluding caregivers from qualifying for a local connection, it restricts many applicants who fall into the hardship reasonable preference group.

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28. We are not satisfied members had regard to the PSED when approving the current policy. We note the report to members discussing the policy and proposed changes references an impact assessment. But members did not have sight of this document before approving the new scheme and so there is no evidence members were properly briefed on specific relevant considerations. This was inadequate because the courts have made it clear that decision makers have to (1) consider the impact of the policy and any proposed changes and then (2) ask if their impact was consistent with the need to promote the principles of disability equality. We note published data from 2016 indicates the district has a disproportionately high percentage of people of retirement age when compared to regional or national levels. Therefore, the policy risks discriminating against those elderly groups who need the care and support of relatives living outside East Lindsey.
29. Even if members had seen the impact assessment and considered it properly in line with the PSED, it would not have remedied matters entirely because the policy was inherently flawed for the reasons given in paragraphs 26 and 27.

Mr and Mrs X's application

30. We do not find fault in the Council's assessment of Mrs Z's ability to support Mr and Mrs X. The Council was therefore entitled to reject their application on the grounds of needing to move to receive support because of Mrs Z's lack of transport, frailty and ill-health. As set out in the previous section, the Council's allocations policy should have included consideration of whether Mr and Mrs X needed to move to give care. This failure was fault.

Did the fault cause injustice?

31. The fault identified cost Mr and Mrs X the opportunity to have their applications for housing properly considered within a framework which has regard to statutory guidance on housing allocations and the PSED.

Recommendations

32. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)
33. The Council should, within three months of the date of this report:
- review its allocations scheme to have regard to the statutory guidance set out in paragraph 9 and to the PSED. The Council should demonstrate proper consideration of the guidance and only depart from it with good reason. It should also provide documentary evidence of its consideration of the PSED when completing the review;
 - reconsider Mr and Mrs X's application after the policy review and backdate any reasonable preference (if the application is accepted) to the date of their application; and
 - apologise to Mr and Mrs X for the loss of opportunity to have their application properly considered.
34. We consider there are likely to be others in a similar position who have not complained. We note East Lindsey has a high number of older people whose relatives might wish to move into the area to support them. So we recommend that following the review of policy, the Council should identify and review those

cases since October 2019 where it has refused applications on similar grounds. It should provide us with a written report of the review of other cases.

35. We are pleased the Council has accepted all our recommendations.

Final decision

36. The Council's housing allocations scheme is flawed because it does not have regard to statutory guidance which says councils should not exclude all or most of a class of applicants from qualifying to go on the housing register if they would otherwise have a reasonable preference because of hardship. The Council needs to apologise, review its policy, reconsider the complainants' applications, backdate any priority (if appropriate), consider whether there are others affected and provide a suitable remedy for their injustice.

EMBARGOED UNTIL 00:01, 19/11/20