



Neutral Citation Number: [2014] EWHC 2617 (Admin)

Case No: CO/633/2014

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT IN BIRMINGHAM**

Birmingham Civil Justice Centre  
Priory Courts, 33 Bull Street  
Birmingham

Date: 30/07/2014

**Before:**

**MR JUSTICE HICKINBOTTOM**

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**Between:**

**THE QUEEN on the application of**

**(1) SHEILA WINDER**

**(2) LISA MARIE DOWEN**

**(3) SARAH HAMPTON**

**Claimants**

**- and -**

**SANDWELL METROPOLITAN  
BOROUGH COUNCIL**

**Defendant**

**- and -**

**THE EQUALITY AND HUMAN RIGHTS  
COMMISSION**

**Intervener**

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**Richard Drabble QC and Tom Royston (instructed by Child Poverty Action Group)  
for the Claimant**

**Kelvin Rutledge QC and Sian Davies (instructed by Legal and Governance Services,  
Sandwell Metropolitan Borough Council) for the Defendant**

**Chris Buttler (instructed by Keith Ashcroft, Senior Lawyer, Equality and Human Rights  
Commission) for the Intervener**

Hearing date: 22 July 2014

Further written submissions: 25 July 2014

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**Approved Judgment**

**Mr Justice Hickinbottom:**

**Introduction**

1. Council tax is a tax, administered by local authorities and levied to assist in funding local government services.
2. Until April 2013, people on low income were provided with financial help in paying the tax by way of council tax benefit (“CTB”), a means-tested benefit that effectively rebated the tax in whole or in part, depending upon the taxpayer’s level of income and capital. The benefit was funded by central government, but administered locally.
3. From 1 April 2013, CTB was abolished in favour of a new system, which required each local authority in England to make a Council Tax Reduction Scheme (“CTR Scheme”) which, instead of providing for those in need with a welfare benefit to pay the tax, reduced their liability it.
4. The Defendant Council (“the Council”) adopted a CTR Scheme that, for working age taxpayers, was restricted to those who have lived in the borough for the previous two years (“the residence requirement”). Since April 2013, about 3,600 people, including the three Claimants, have been refused a council tax reduction because they have not met the residence requirement. In this claim, the Claimants contend that that requirement is unlawful.
5. By an Order of Master Gidden, and by consent, on 21 March 2014 it was directed that the application for permission to proceed be adjourned to an oral hearing, with the substantive hearing to follow on immediately if permission be granted; and I heard that rolled-up hearing on 22 July 2014. At that hearing, Richard Drabble QC with Tom Royston appeared for the Claimants; Kelvin Rutledge QC and Sian Davies for the Council; and Chris Buttler for the Equality and Human Rights Commission which intervenes in the claim by permission dated 11 July 2014. I thank them all for their considerable assistance.

**The Statutory Scheme**

6. The Local Government Finance Act 1992 (“the 1992 Act”) made new provision for local government finance by abolishing the community charge, and establishing a new tax, namely council tax. Section 1(1) provided that each billing authority (which, for Sandwell, is the Council) is under a duty to levy and collect council tax in respect of dwellings situated in its area. The person liable to pay the tax is dealt with in section 6: any resident or owner of the dwelling on any day is liable, jointly and severally. Section 10 sets out the amount payable, by reference to a formula. Sections 11, 11A and 11B provide for discounts of 50% where there is no resident of the dwelling, and 25% for a sole resident, subject to the power of prescribing a class of dwellings where a lower percentage will apply. By section 13, the Secretary of State may provide a reduced amount of council tax where prescribed conditions are fulfilled.
7. Sections 123 and 131 of the Social Security Contributions and Benefits Act 1992 gave those on low income assistance with payment of the tax, in the form of an entitlement to a national, means-tested and tapered, social security benefit, i.e. CTB.

8. In its first Spending Review in 2010, the Coalition Government announced that it would localise support for council tax from 2013-14, reducing expenditure by 10%. On 17 February 2011, the Government published the Welfare Reform Bill as a vehicle for these changes. In July 2011, the Department for Communities and Local Government (“the DCLG”) published a consultation paper, “Localising Support for Council Tax in England”, which, amongst other things, confirmed the Government’s commitment “to ensuring that local authorities continue to provide support for council tax for the most vulnerable in society...”; and emphasising that “the localisation of support for council tax is taking place within a wider programme of welfare reform which is intended to help people back into work” (paragraph 1.3), localised schemes being expected to support positive work incentives (paragraphs 1.3, 3.2 and 6.9-6.12). The new scheme was to “continue to provide support to households as a reduction in the amount of council tax payable, rather than a cash payment” (paragraph 3.2). A minimum level of consistency between schemes was also identified as being desirable (paragraphs 9.9-9.10).
9. From 1 April 2013, CTB was abolished by section 33(1)(e) of the Welfare Reform Act 2012; and was replaced by a new scheme provided for by section 10 of the Local Government Finance Act 2012 which inserted a new section 13A and schedule 1A into the 1992 Act.
10. Section 13A(1) provides:

“(1) The amount of council tax which a person is liable to pay in respect of any chargeable dwelling and any day (as determined in accordance with sections 10 to 13) –

(a) in the case of a dwelling situated in the area of a billing authority in England, is to be reduced to the extent, if any, required by the authority’s reduction scheme (see subsection (2));

(b) ...

(c) in any case, may be reduced to such extent (or, if the amount has been reduced under subparagraph (a)..., such further extent) as the billing authority for the area in which the dwelling is situated thinks fit.”

Therefore, an authority must reduce an individual’s council tax as required by a CTR Scheme (section 13A(1)(a)), and nevertheless has a residual discretion to do so outside the scheme (section 13A(1)(c)).

11. Section 13A(2), key to this claim, provides for the setting up of such a scheme.

“(2) Each billing authority in England must make a scheme specifying the reductions which are to apply to amounts of council tax payable, in respect of dwellings situated in its area, by –

- (a) persons whom the authority considers to be in financial need, or
- (b) persons in classes consisting of persons whom the authority considers to be, in general, in financial need.”

12. Section 13A then continues, so far as relevant to this claim:

(3) Schedule 1A (which contains provisions about schemes under subsection (2)) has effect.

...

(7) The power under subsection (1)(c) may be exercised in relation to particular cases or by determining a class of case in which liability is to be reduced to an extent provided by the determination.

...

(9) In this Part ‘council tax reduction scheme’ means a scheme under subsection (2)...”

13. Section 16 gives a right to appeal to the Valuation Tribunal for England if a person is aggrieved by a decision that he is liable to pay council tax, or the calculation of the tax he is required to pay. However, the tribunal takes the view that it does not have jurisdiction to entertain a challenge to a residence requirement such as the Council’s, and that such challenges can only be by way of judicial review (SC v East Riding of Yorkshire Council [2014] EW Misc B46 (VT)).

14. Schedule 1A to the 1992 Act makes further provision for CTR Schemes, which it defines as schemes under section 13A(2) (paragraph 1). The schedule then provides as follows:

**“2. Matters to be included in schemes**

(1) A scheme must state the classes of person who are to be entitled to a reduction under the scheme.

(2) The classes may be determined by reference to, in particular –

- (a) the income of any person liable to pay council tax to the authority in respect of a dwelling;
- (b) the capital of any such person;
- (c) the income and capital of any other person who is a resident of the dwelling;
- (d) the number of dependants of any person within paragraph (a) or (c);

(e) whether the person has made an application for the reduction.

(3) A scheme must set out the reduction to which persons in each class are to be entitled; and different reductions may be set out for different classes.

....

(8) The Secretary of State may by regulations prescribe other requirements for schemes.

(9) Regulations under sub-paragraph (8) may in particular –

(a) require other matters to be included in a scheme;

(b) prescribe classes of person which must or must not be included in a scheme;

(c) prescribe reductions, including minimum or maximum reductions, which must be applicable to persons in prescribed classes;

....

(10) Regulations under sub-paragraph (8) may in particular set out provision to be included in a scheme that is equivalent to –

(a) provision made by a relevant enactment, or

(b) provision that is capable of being made under a relevant enactment, with such modifications as the Secretary of State thinks fit.

(11) Subject to compliance with regulations under sub-paragraph (8), a scheme may make provision that is equivalent to –

(a) provision made by a relevant enactment, or

(b) provision that is capable of being made under a relevant enactment, with such modifications as the authority thinks fit.

....

### **3. Preparation of a scheme**

(1) Before making a scheme, the authority must (in the following order)—

- (a) consult any major precepting authority which has power to issue a precept to it,
- (b) publish a draft scheme in such manner as it thinks fit, and
- (c) consult such other persons as it considers are likely to have an interest in the operation of the scheme.

...

#### **5. Revisions to and replacement of scheme**

(1) For each financial year, each billing authority must consider whether to revise its scheme or to replace it with another scheme.

...

(5) Paragraph 3 applies to an authority when revising a scheme as it applies to an authority when making a scheme.

(6) References in this Part to a scheme include a replacement scheme.”

15. Local authorities were required to create a scheme for the 2013-14 tax year by 31 January 2013. If the authority fails to make a scheme, a standard scheme prescribed by the Secretary of State takes effect by default (paragraph 4 of schedule 1A), which includes effective disincentives for the local authority, such as the obligation to pick up any shortfall.
16. As with CTB, in so far as there are reductions in council tax as the result of a scheme, these are generally funded by central government. However, whilst the scheme funding arrangements for CTB were effectively demand-led, as envisaged in the July 2011 consultation paper, the new scheme is funded by a fixed central government grant with an estimated 10% reduction for the financial year 2013-14. Responsibility for funding was also transferred from the Department for Work and Pensions (“the DWP”) to the DCLG.
17. On 16 October 2012, the DCLG issued a paper, “Localising support for council tax: Transitional grant scheme”, which indicated that £100m had been set aside to provide transitional grants to authorities which adopted schemes which ensured that (i) those who would be entitled to 100% support from council tax benefit would pay no more than 8.5% of their net council tax liability; (ii) the taper rate would not increase above 25%; and (iii) there was no sharp reduction in support for those entering work. Applications for transitional grants had to be made by the same 31 January 2013 deadline.

#### **The Council’s Scheme**

18. In 2012-13, the Council paid £32m in CTB; and, therefore, when it came to consider a CTR Scheme, it did so on the basis that the central government funding would be

£3.2m less for 2013-14. Stuart Kellas is the Council's Director of Strategic Resources. He explains (13 March 2014 Statement, paragraph 4):

“This significant reduction in funding meant that [the Council], like many other councils, had to make some tough decisions about the types and levels of public services it could continue to provide. If [the Council] had continued financial support under its [CTR Scheme] at the same level as that under its previous [CTB] scheme, it would have incurred a significant shortfall with the inevitable result that some important public services would have had to be cut or dispensed with altogether.”

In other words, to retain services, amongst other things the Council had to find ways to reduce the support given previously by CTB.

19. A draft scheme was drawn up by Council officers, and the draft together with an interim equality impact assessment (“EIA”) was presented to the Council's Cabinet at a meeting on 8 August 2012. It was proposed that the CTR Scheme would be the same as the CTB scheme with various specified changes to reduce the funding shortfall, e.g. amending the rules for empty properties, removing the second adult rebate, reducing the capital cut off from £16,000 to £6,000, restricting the calculation of reduction to Band C rate council tax liability, amending the child benefit disregard and increasing the taper. Two classes of persons of working age were identified for a reduction, those entitled to a full reduction (Class D) and those who were entitled to a tapered reduction (Class E), the difference being income-based. The draft did not include a residence requirement, nor was such a possible requirement raised at the meeting. At that stage, it was not in mind.
20. The Cabinet clearly considered that the figures stacked up. It approved the draft scheme for consultation, and a public consultation was held between 28 August and 6 October 2012. The results of that consultation, which did not allude to the possibility of a residence requirement, were published on 22 October 2012. In the meantime, on 16 October, the DCLG had announced the transitional grant arrangements (see paragraph 17 above).
21. The Council's Cabinet considered the consultation results and other preparatory work (including a full EIA dated 22 October 2012) at a meeting on 7 November 2012. It considered the perceived problem that if the Council went ahead with the scheme in its then-current form, it would not be entitled to a transitional government grant of about £675,000. The Cabinet approved and recommended adopting the scheme, but with modifications to make it eligible for that additional funding, by deleting (i) the reduction of capital cut-off limit from £16,000 to £6,000, and (ii) the restriction to the maximum payable on a band C property. It was clearly still considered that the CTR Scheme as drafted would result in an appropriate level of savings, when compared with the previous council tax benefit. The modifications did not include a residence requirement. It was expressly noted that an EIA had been carried out.
22. The scheme went to full Council on 4 December 2012. There is no evidence that, until this point, there had been any consideration of a residence requirement for the CTR Scheme; but it was discussed at this meeting. The minutes record:

“Consideration was given to a recommendation of the Cabinet in relation to the [CTR] Scheme...

The Cabinet Minister for Strategic Resources [Councillor Eling] commented that the new cap on benefits would have a more detrimental effect on people living in areas such as the South East, where the cost of housing was considerably higher than in the West Midlands. It was felt that there could be an increase in people moving from those areas into the borough of Sandwell, which would result in an additional demand on the [CTR] Scheme for those people currently entitled to claim council tax benefits.

In order to reduce the financial impact this may have on the Council, consideration was given to the addition of a requirement that all new claimants for Council Tax benefits demonstrate a minimum of two years residency in Sandwell.

It was moved by Councillor Eling, seconded and unanimously:-

**Resolved**

(1) that the Sandwell [CTR] Scheme be adopted, based predominantly on the existing [CTB] scheme....

...

(4) that for new claims, only those residents that have lived in the Borough of Sandwell for a minimum of two year be eligible for [CTR] (with the exception of service personnel returning to live in Sandwell) unless there is a statutory requirement otherwise;

...”

23. The reason the residence requirement was adopted is therefore clear. Although the figures stacked up, there was a concern that there would be an influx of applicants for a council tax reduction from areas where property was more expensive. The requirement was made to discourage such migration and, if such individuals moved to Sandwell, to ensure that they did not put a further burden on the CTR Scheme. Other than these minutes, there are no contemporaneous documents indicating any other purpose, or indeed indicating the requirement was the subject of any consideration other than at that meeting.
24. The Council’s CTR Scheme as approved was duly published. The provisions for working age applicants were set out in paragraphs 1.12 and following. Paragraph 1.14 stated:

“The Council has resolved that there will be *two* classes of persons who will receive a reduction in line with adopted scheme.... There will be *two* main classes provided for, for



each of which there will be a number of qualifying criteria...”  
(emphasis in the original).

Those criteria, for Classes D and E, are then set out. The scheme continues, under the heading “Residency Requirement”:

“In respect of Classes D and E all applicants must meet the following criteria laid down by the Council...”

There is then set out, in identical terms, the residence requirement set out in paragraph (4) of the Council resolution.

25. In the event, the Council did not acquire the transitional assistance from central government (see paragraphs 17 and 21 above), because those who were on full CTB, but failed to obtain a council tax reduction because of the residence requirement, had a greater than 8.5% impact on their relief from the tax. On the evidence, it appears that this became evident to the Council after the 4 December 2012 decision but before the scheme was implemented. In any event, the introduction of the requirement led to a loss of the £675,000 transitional relief.
26. The 2013-14 CTR Scheme, including the terms as to residence requirement, came into effect in April 2013.
27. As I have indicated, the Council was required to review the scheme for 2014-15. An officers’ report was prepared for the Cabinet meeting on 11 December 2013, which indicated as follows.
  - i) As at 30 September 2013, approximately 1,600 residents had been refused CTR due to failing to satisfy the two year residency requirement (paragraph 6.5). (The evidence before me was that, by May 2014, this number had risen to 3,605.)
  - ii) With regard to consultation, I shall return to the details (see paragraphs 75 and following below). The officers’ report said:

“A consultation exercise regarding existing policy has recently taken place. No feedback or comments have been received.” (paragraph 6.7).

However, at appendix 1, some issues are identified under a heading “Local Council Tax Reduction Scheme Feedback”, including:

- Domestic abuse cases who may have to move into the borough for their safety and the safety of their children, cannot receive CTR as they do not meet the 2 year residency.
- Sandwell’s refuges are constantly full therefore we refer all over the country for refuge provision. This breaks the period of residency when they are later housed back in the borough.

- Some people from NASS (National Asylum Support) have not resided within Sandwell for 2 years and are therefore ineligible for [CTR] Scheme. Sandwell is a Government dispersal area along with other [local authorities].

...”

It was considered that providing an operational definition of “statutory requirement otherwise” may help “to ease some of the issues referred to”.

28. At the 11 December 2013 meeting, the Cabinet determined to recommend retaining the scheme in its then-current form, with three changes:
- i) The wording of the requirement changed, by the addition of the following italicised words:

“For new claims, only those residents that have lived in the Borough of Sandwell for a minimum of two years *immediately prior to the date the new claim is received by the Borough of Sandwell* will be eligible for [LCTR] (with the exception of service personnel returning to live in Sandwell) unless there is a statutory requirement otherwise.”
  - ii) Where the Council had a statutory duty to house a person, those individuals would be treated as being resident in Sandwell for the purposes of the two year residence requirement. This was the change to the operational definition of “statutory requirement otherwise” referred to above. It meant that, where individuals were housed by the Council under a duty to house, they would receive a full reduction even if they did not satisfy the residence requirement.
  - iii) There were changes to the means by which the period of residence was to be evidenced.
29. The full Council considered the scheme at a meeting on 7 January 2014, and approved the recommendation. Paragraphs 1.12 and 1.14 of the 2013-14 Scheme are found as paragraphs 1.6 and 1.7 of the 2014-15 CTR Scheme, but with the addition of the words referred to in paragraph 28(i) above.
30. The Claimants now seek to challenge the Council’s decision to include the residence requirement in the 2013-14 and 2014-15 CTR Schemes.

### **The Claimants**

31. The First Claimant, Sheila Winder, was born in Sandwell in 1962, and lived there until 2008, save for a brief period when she lived in Lincolnshire. Because she was suffering from domestic abuse from her husband, in 2008 she moved to Quarry Bank in Dudley, a few miles outside Sandwell. There, she lived near her son, who went to her new address, where he too was abusive, stealing from her and threatening her. Following an assault by him, she moved out of her address, and stayed briefly with

her sister in Dudley, before making a homelessness application to Dudley Metropolitan Borough Council. Dudley Council accepted she was homeless, and housed her in Midland Heart Hostel, a women-only hostel funded by Dudley Council in Blackheath, part of Sandwell.

32. On 20 April 2013, Ms Winder received a letter from Sandwell Council refusing her support under the new CTR Scheme, because she did not meet the residence requirement.
33. On 30 November 2013, Ms Winder accepted a secure tenancy in Sandwell, with the Council as her landlord. Following representations from her representatives, Dudley Council agreed to pay the council tax bill of all Midland Heart Hostel residents affected by the residence requirement, for the first six months residence in Sandwell, but no longer.
34. Ms Winder was on job seekers' allowance. She would be entitled to £71.70 per week, but was sanctioned for non-compliance with conditions of the benefit, and so her weekly benefit was reduced to £42. She has no other income, capital or assets. Out of that she had to pay all day-to-day expenses, including gas (£15 per week), electric (£15), water (£10) food and travel.
35. Her council tax bill for 2013-14 was £660.02, i.e. £880.03 less 25% standard reduction for sole occupancy. She did not pay. On 16 July 2013, she received a summons for £732.02, including costs. The Magistrates' Court issued a liability order on 20 August. On 16 September, she received a pre-bailiff's notification.
36. However, subsequently, she has been housed as homeless by Sandwell – and so, since April 2014, she has received full council tax reduction under the changes made to the scheme from 1 April 2014 (see paragraph 28(ii) above); and her arrears have in fact been cleared by Dudley Council.
37. The Second Claimant, Lisa Downen, was born in Sandwell in 1974, and lived in the borough until 2013. Many of her family live in Wednesbury, which is part of Sandwell. In April 2013, as a result of worsening mental health and increasing financial difficulties, she moved out of her Sandwell accommodation into a flat in Dudley which she shared with four others. In July 2013, she attempted suicide, and spent a month in a psychiatric hospital where she was diagnosed with depression, anxiety and a personality disorder. Upon discharge from that hospital, she took up a place in the Midland Heart Hostel.
38. For the first 26 weeks after her July 2013 breakdown, she received statutory sick pay. Thereafter, her current income has been restricted to employment support allowance, in the sum of £71.70 per week, together with housing benefit. Her day-to-day expenses include weekly electricity (£10) and service charges (£8.50), and monthly telephone (£16), credit card debts (£50.89) and rent arrears (£200). She has no savings or assets, and a debt of about £5,000.
39. Her council tax for 2013-14 was £571.29 less 25% as sole occupier, i.e. £428.47. On 9 August 2013, she applied for a council tax reduction, but was refused because she failed to meet the residence requirement, as she had been absent from Sandwell for part of the previous two years. She would prefer to live in Wednesbury; but, because

of the residence requirement for council tax reduction, she applied to be put on the housing list in Dudley. The only reason she applied for a house in Dudley, she says (13 June 2014 Statement, paragraph 5), is because of the residence requirement for the Sandwell CTR Scheme.

40. Ms Downen has now been granted a 12 month introductory tenancy in Dudley; and Dudley Council has in fact paid off her council tax arrears from Sandwell. She says (paragraph 6 of her statement) that she would like to move to Sandwell in the future, if possible but she does not see how that will be possible in view of the two year residence rule.
41. The Third Claimant, Sarah Hampton, has lived in the West Midlands all her life. From 1996 to 2012 she lived in Lye, Dudley, with her husband. Her husband unfortunately passed away on 20 October 2012; and she found it difficult to pay bills, and rent arrears accrued. She was evicted from her home on 28 May 2013. She presented to Dudley Council as homeless, and on 23 August 2013 she was placed in the Midland Heart Hostel.
42. Her income was then £71.70 per week employment support allowance; but that was increased to £121.65 per week when the DWP accepted that she was unable to work. She has no savings or assets, and she has the usual household expenses.
43. Ms Hampton would prefer to live in Sandwell, but applied to go onto the Dudley housing list because of the Sandwell residence requirement for council tax reduction (11 February 2014 Statement, paragraph 15; and 12 June 2014 Statement, paragraph 5). On 31 March 2014, she was allocated a 12 month introductory tenancy in Quarry Bank, Dudley; and Dudley Council has now in fact cleared her arrears of council tax in Sandwell.

### **The Grounds of Challenge: Introduction**

44. Mr Drabble relied upon various, overlapping or linked grounds of challenge, as follows.

Ground 1: Ultra Vires: The Council does not have the power to impose the residence requirement, because section 13A(2)(b) restricts the criteria by which classes for council tax reduction can be defined to financial. The statutory wording in the 1992 Act is unambiguous on its face; but, insofar as there is any ambiguity, the imposition of the requirement is outside the legitimate purposes of the Act.

Ground 2: Failure to take into account material considerations: Even if within the statutory powers, the requirement is irrational, because, in imposing it, the Council failed to have regard to a number of material considerations, notably the Secretary of State's policy objectives and the wider consequences of other authorities adopting a similar requirement.

Ground 3: Lack of consultation: The requirement was fundamental to the Council's CTR Scheme, and the Council failed to consult upon it.

Ground 4: Barrier to freedom of movement: The requirement disproportionately affects people wishing to exercise European Union (“EU”) free movement rights, and is therefore an unlawful obstacle to freedom of movement.

Ground 5: Discrimination: The requirement is indirectly discriminatory against non-British people and women, and that discrimination is unjustified. It therefore amounts to (i) indirect discrimination under EU law, (ii) indirect discrimination contrary to section 19 of the Equality Act 2010 and (iii) discrimination contrary to article 14 of the European Convention on Human Rights (“the ECHR”) read with article 1 of the First Protocol to the ECHR (“A1P1).

Ground 6: Public Sector Equality Duty: The public sector equality duty under section 149 of the Equality Act 2010 was engaged; but the Council failed to conduct any EIA on the requirement, or address at all the characteristics protected by the Equality Act and affected by the requirement.

45. Before I deal with these specific grounds, four preliminary points.

- i) I have set out above how the residence requirement came to be adopted. Prior to the full Council meeting on 4 December 2012, a CTR Scheme had been devised which, it was envisaged, would deliver the required savings whilst properly protecting those in financial need. The scheme (excluding the residence requirement) had been the subject of both consultation and an EIA, of which no complaint is made. Whilst presumably, at some point before that meeting, there must have been some consideration of the requirement by someone (at least by Councillor Eling, who raised it at the meeting), there is no evidence that it had been considered by anyone prior to the meeting or, if it was considered, the scope and depth of that consideration. For example, there is no evidence that any thought was given as to whether such a requirement fell within the Council’s statutory powers under the 1992 Act. There is no evidence that any thought was given as to whether the requirement might have an adverse impact on the rights of those who wish to exercise freedom of movement, or be discriminatory of women and/or foreign nationals. It is not suggested that there was any consultation on the requirement, at least before it was introduced in 2013-14. There is no evidence that it was considered, at all, by Council officers. The entire meeting on 4 December is minuted as lasting 39 minutes, and a substantial amount of other business was transacted: and so there is no evidence that any lengthy or particular consideration of the requirement and its potential consequences was given at that meeting. Certainly none is minuted. Therefore, with regard to this requirement, if it be lawful, that would appear to be entirely coincidental, in the sense that few if any of the usual checks against unlawfulness were engaged.
- ii) Mr Kellas says that, if the requirement had not been introduced, for the CTR Scheme to have been affordable the Council “would have had to introduce a minimum payment [of council tax] for every household” (13 March 2014 Statement, paragraph 13). However, the evidential foundation to that proposition appears dubious (a matter to which I shall return: see paragraph 89(i) below); and, in any event, the sole or at least overwhelmingly dominant purpose of the residence requirement was clearly to discourage incomers. Although the council tax books were envisaged to balance, there was a fear

that people would move out of areas such as the South East of England because the cost of housing was higher and the new cap on benefits would therefore have a greater impact on them; and that these people would move to Sandwell, creating additional demand on the CTR Scheme. The purpose of the residence requirement was to discourage such people. This was made clear by Councillor Eling when he raised the possibility of a residence requirement for the first time at the full Council meeting on 4 December 2012 (see paragraphs 22-3 above), and confirmed in these proceedings by Mr Kellas (13 March 2014 Statement, paragraph 9) and Mr Rutledge in the course of his submissions.

- iii) As Mr Rutledge conceded, there is nothing before this court that shows the Council had any evidence that the price of property in the South East and the benefits cap would have such an effect – as the minutes record, it was simply “felt” that there could be an increase in such émigrés – or that, since April 2013, a single individual from the South East of England (or, indeed, elsewhere) has been tempted to move to Sandwell because of the cheaper housing there but has been dissuaded from doing so by the residence requirement or has in fact come to Sandwell and been refused a council tax reduction. Each of the Claimants has lived almost all her life in Sandwell or Dudley – and there is no evidence that house prices in the latter are significantly higher than in the former. The only other evidence of other individuals who have failed to meet the residence requirement are of a man, his partner, their daughter and a disabled adult friend, who moved to Sandwell from Birmingham because their house had a gas leak and was unsafe, and the first affordable flat they could find was in Sandwell (see Claimants’ Application dated 23 June 2014); and a man who was sent to Sandwell by the Secretary of State under the statutory scheme for asylum support accommodation (see Anne McMurdie 21 July 2014 Statement). There is no evidence of a single individual who has been refused a council tax reduction on residence grounds, who has moved to Sandwell voluntarily from anywhere further away than Birmingham.
- iv) Mr Rutledge explained that, in practice, when an application is made for a council tax reduction under the CTR Scheme, the residence requirement acts as a filter. As we shall shortly see, it is the Council’s case that it is class-defining for the purposes of section 13A(2)(b) (see paragraph 51 below); but, in any event, the requirement is applied first. If an applicant fails to satisfy that requirement, it is a knock-out blow: no consideration is given as to whether he would have satisfied the other, financial criteria. Therefore, of the 3,600 applicants who have had their applications for council tax reduction refused by the Council because they have failed to satisfy the residence requirement, it is not known how many would have satisfied the other, financial need requirements. However, Mr Rutledge properly conceded that the three Claimants would have done so: the only reason why they were refused a council tax reduction was because they failed to satisfy the residence requirement.

46. I now turn to deal with the specific grounds of challenge.

### **Ground 1: Ultra Vires**

47. Without detracting from his other bases of challenge, Mr Drabble's primary ground was that the 1992 Act does not confer a power on a billing authority such as the Council to impose a residence requirement as a defining criterion for a class for the purposes of a CTR Scheme.
48. A CRT Scheme is made under section 13A(2) of the 1992 Act, which requires the scheme to specify "the reductions which are to apply to amounts of council tax payable, in respect of dwellings situated in its area, by (a) persons whom the authority considers to be in financial need, or (b) persons in classes consisting of persons whom the authority considers to be, in general, in financial need". It is common ground that section 13A(2)(a) requires criteria referenced on financial need. We are here concerned with section 13A(2)(b).
49. Mr Drabble submitted that the phrase "consisting of persons whom the authority considers to be, in general, in financial need" regulates "classes": whereas section 13A(2)(a) allows an authority to reduce the council tax of particular individuals, (b) allows it to identify a class of people who are in general in financial need, i.e. inclusion in the class is a predictor of, or proxy for, financial need. The class could therefore be dependent upon criteria as to income and/or capital – or, perhaps, age or disability – but the class must be characterised by an increased likelihood of its members being in financial need. The residence requirement is not based upon such a criterion.
50. Mr Drabble submitted that the wording of these statutory provisions is unambiguous; but, if there be any ambiguity, regard can and must be had to the purpose of the power under which the Council acted, which is to assist people most in financial need, section 13A of and schedule 1A to the 1992 Act giving authorities no more and no less than a discretion in how they decide which persons are in such financial need.
51. Mr Rutledge accepted that the Council has determined the class of case in which liability is to be reduced by reference to past residence; and that people who have resided in Sandwell for more than two years is not a proxy or predictor of financial need: indeed, the requirement bears no relationship to financial need. However, he submitted that the class was not hallmarked, nor an authority's discretion so limited, as Mr Drabble suggested. Indeed, it was a deliberately broad discretion. The phrase "consisting of persons whom the authority considers to be, in general, in financial need" did not regulate "classes" but to the earlier "*persons* in classes". Therefore, whilst he accepted that reductions under section 13A(2)(a) are to be made according to financial need alone, (b) enables an authority to make reductions initially by class and thereafter according to financial need (Detailed Grounds of Defence, paragraph 12). A class need not therefore be defined in terms of financial need: any rational criteria will do. Past residence is a rational criterion, because residence is the basis of liability for council tax. Once a class is identified, then section 13(2)(b) allows the authority to identify persons within that class who have a financial need. That is what happens with the Council's CTR Scheme: the class comprises those who have been resident in the borough for at least two years. From within that class, the scheme identifies those who have a financial need, by reference to criteria concerning income and capital etc.
52. Despite Mr Rutledge's efforts, which were certainly no less than valiant, I prefer Mr Drabble's construction, by a considerable margin, for the following reasons.

53. First, I agree with Mr Drabble’s submission that the wording of section 13A(2)(b) is, on its face, clear and unambiguous: the phrase “consisting of persons whom the authority considers to be, in general, in financial need” relates to “classes”, which it immediately follows. I do not consider it is arguable that it refers back to the earlier word “persons”: it must be the *class* that “consists of persons... in financial need”. In other words, the class must be defined by reference to financial need, albeit by reference to criteria which the authority considers identify those who are, in general, in financial need. There is therefore considerable discretion in the authority as to the criteria adopted to identify financial need. However, criteria which do not identify those who are at least more likely to be in financial need fall outside the powers granted to an authority by Parliament.
54. The difference between section 13A(2)(a) and (b) is therefore not (as Mr Rutledge would have it) between (a) cases where a reduction is made necessarily on financial need criteria alone and (b) cases where it is not; but between (a) cases where all individuals are in financial need and (b) cases in a class of people where inclusion in the class is predictive because they are more likely to be in financial need, i.e. they are “in general” in financial need.
55. With respect to the various other arguments of Counsel, in my judgment, that short point effectively disposes of this claim.
56. However, in construing statutory provisions, I accept that one must proceed with caution: the difficulties and dangers of resorting to the common usage of words are well-recognised (see, e.g., Customs and Excise Commissioners v Top Ten Promotions Limited [1969] 1 WLR 1163 at 1171 per Lord Upjohn). Recently, in construing another residence requirement (albeit in a very different context, namely for legal assistance under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment to Schedule 1) Order 2013 (SI 2013 No 748)), Moses LJ rightly reminded us that:

“The power to make delegated legislation must be construed in the context of the statutory policy and aims such legislation is designed to promote” (R (Public Law Project) v Secretary of State for Justice [2014] EWHC 2365 (Admin) at [34]).

57. The general underlying principle derives from the leading cases of Padfield v Minister of Agriculture, Fisheries and Food [1968] 997 (especially at page 1030 per Lord Reid), and Porter v Magill [2002] [2001] UKHL 67 (especially at [19] per Lord Bingham): powers conferred by Parliament are never open-ended, their exercise always being limited to the furtherance of the statutory purpose. As Lang J helpfully summarised the position in R (Attfield) v Barnet London Borough Council [2013] EWHC 2089 (Admin) (a case involving the misuse of the power to charge for residents’ parking permits) at [38]:

“It is a general principle of administrative law that a public body must exercise a statutory power for the purpose for which the power was conferred by Parliament, and not for any unauthorised purpose. An unauthorised purpose may be laudable in its own right, yet still be unlawful. The issue is not whether or not the public body has acted in the public interest,



but whether it has acted in accordance with the purpose for which the statute was conferred. Where a statutory power is exercised both for the purpose for which it was conferred and for some other purpose, the public body will have acted unlawfully unless the authorised purpose was its dominant purpose.”

58. The statutory purpose behind the provisions of section 13A of the 1992 Act (and, in particular, CTR Schemes that are required under those provisions) is to relieve those in financial need of the full burden of council tax. The purpose of section 13A(2) is to identify those who are in such need. As I have described (see paragraphs 23 and 45(ii) above), the purpose of the residence requirement is also clear: it is to discourage those from areas of higher housing costs (such as the South East of England) from moving to Sandwell and, if they were to move there, save for any applicant whom the Council had a duty to house from April 2014, to ensure that, irrespective of an individual applicant’s financial need, the Council would not subsidise their council tax liability. On any view, even if (contrary to my firm conclusion) imposing the residence requirement did not fall outside the clear and unambiguous words of the statutory provisions under which the Council acted, this was and is use of the power for an unauthorised purpose.
59. Dealing with other points raised in argument:
- i) Mr Rutledge submitted that the breadth of an authority’s discretion in respect of criteria for council tax reduction derives from section 13A(1), which provides that the amount of council tax to be payable is to be reduced to the extent “if any” required by the authority’s CTR Scheme. The use of the words “if any”, he submits, emphasises the breadth of the discretion. However, section 13A(1) is not the relevant focus – it merely provides for the amount of council tax payable. It is section 13A(2) that imposes the duty on an authority to make a scheme, and sets out (in paragraphs (a) and (b)) the criteria by which reductions are to be made, i.e. financial need criteria. As Mr Drabble submitted, the words “if any” in section 13A(1) merely reflect the fact that any scheme will not reduce the council tax of every applicant.
  - ii) Mr Rutledge relied upon the fact that under the provisions of section 13A (not section 13), the Secretary of State has made regulations excluding classes of persons from council tax reduction on criteria other than financial. The Council Tax Reduction Schemes (Prescribed Requirements) (England) Regulations 2012 (SI 2012 No 2885) were made by the Secretary of State under schedule 1A to the 1992 Act (to which, of course, effect is given by section 13A of that Act). By regulation 13, persons subject to immigration control (as defined in section 115(9) of the Immigration and Asylum Act 1999) are a class of person prescribed for the purposes of paragraph 2(9)(b) of schedule 1A and which must therefore not be included in any authority’s scheme. That shows, Mr Rutledge submitted, that it was envisaged that a section 13A CTR Scheme can have class-descriptive criteria which are not referenced by financial need. However, in my view this does not assist Mr Rutledge. In prescribing those subject to immigration control as an excluded category, the Secretary of State was exercising a power, not under section 31A(2)(b), but under paragraphs 2(8) and (9)(b) of schedule 1A. Paragraph

(9)(b) does not contain any restrictions referenced by financial need. Indeed, given the difference in wording between that paragraph (which scopes the Secretary of State's power) and section 31A(2)(b) (which scopes the authority's power), if anything this is supportive of the difference in substance for which Mr Drabble contends.

- iii) Mr Rutledge submitted that past residence was not an irrational basis for classification, because residence is the basis for council tax liability. He submitted that it was appropriate to "reward" individuals for local connection by way of council tax reduction. However, although residence is a basis – indeed, the usual basis – for council tax liability, (a) it is current residence, not past residence; and (b) it is not a necessary requirement for liability, as owners of a dwelling too may be liable on the basis of their ownership, even if not resident. In any event, we are here concerned with construction, not rationality. Even if continuous two year residence were a rational criterion, that would not in itself assist in construing the statutory wording.
- iv) As I understood it, Mr Rutledge initially sought to gain support for his submission outlined in (iii) from the provisions of section 166A of the Housing Act 1996, which concern the allocation scheme of housing authorities; and in particular the reasonable preference provisions of subsection (3). When determining priorities, subsection (5) gives an authority the power to take into account "any local connection... which exists between a person and the authority's district". If such a connection can be taken into account in a scheme for allocation of housing, it is not surprising (he submitted) that the statutory scheme for council tax benefit allows a similar factor to be taken into account. However, the statutory schemes are entirely different. The Housing Act requires residence in an authority's area before consideration is given to granting an individual council housing; and the Housing Act expressly allows "local connection" to be taken into account, whereas the 1992 Act does not. Mr Rutledge rightly conceded during the course of debate that he has no substantial support from this other and different statutory scheme so far as the construction issue is concerned. Indeed, again, Mr Drabble forcefully submitted that section 166A of the Housing Act shows that, where Parliament wishes to enable a local authority to take into account local connections, it is able to give an express power so to do. If anything, this point too favours the construction urged by Mr Drabble.
- v) As I have indicated (paragraph 45(iv) above), Mr Rutledge explained that, in practice, when an application is made for a council tax reduction under the CTR Scheme, the residence requirement is applied first. He suggested that that was at least consistent with the Council's stance that it is that requirement that scopes the class for the purposes of section 13A(2)(b), to which financial need criteria are then applied. However, ingenious as that submission might be, it is not borne out by the terms of the Council's CTR Schemes themselves. The 2013-14 and 2014-15 Schemes are, in this respect, materially identical. It is quite clear from the terms of the schemes (set out in paragraph 24 above) that the classes are identified, not by virtue of past residence, but by reference to financial need criteria. Paragraph 1.14 of the 2013-14 Scheme (paragraph 1.7 of the 2014-15 Scheme) states:

“The Council has resolved that there will be *two* classes of persons who will receive a reduction in line with the adopted scheme.... There will be *two* main classes prescribed for, for each of which there will be a number of qualifying criteria...” (emphasis in the original).

There are then set out the criteria for Class D and Class E, followed by the residence requirement which is superimposed. However, it is clear from the CTR Scheme that there are two classes based on financial criteria, not a single class based on residence. The wording of the Council’s own scheme does not therefore bear out its construction of section 13A(2)(b), or the analysis urged by Mr Rutledge.

60. For those reasons, it is my firm view that, on the true construction of section 13A of the 1992 Act, the Council has no power to define a class for the purposes of section 13A(2)(b) by reference to non-financial need criteria, as it has purported to have done; and the imposition of the residence requirement in both the 2013-14 and 2014-15 CTR Schemes was ultra vires and thus unlawful.
61. My conclusion on Ground 1 is sufficient to dispose of this claim, and I can therefore deal with Mr Drabble’s other grounds more shortly.

## **Ground 2: Failure to take into account material considerations**

62. It is trite law that a local authority acts unlawfully if, in making a decision, it fails to take into account a material consideration (see, e.g., R (Alconbury Investments Limited) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23 at [50]). For these purposes, a consideration is material if the decision-maker might have decided the matter differently had he taken it into account (R v Royal Borough of Kensington and Chelsea ex parte Kassam (1994) 26 HLR 455 at page 465).
63. Mr Drabble submitted that, even if within the statutory powers, the residence requirement is unlawful, because, in imposing it, the Council failed to have regard to two associated material considerations, namely the Secretary of State’s policy objectives and the wider consequences of other authorities adopting a similar requirement. As I have described (paragraph 8 above), it was central government policy to “continue to provide support for council tax for the most vulnerable in society...”; to avoid disincentives to move into work; and also, despite the principle of localism, to maintain a certain amount of consistency.
64. Mr Drabble submitted that, under the Council’s CTR Scheme, financed by national funds, the Claimants (and any other affected person moving into Sandwell and in receipt of means-tested benefit) would spend two years on an income perhaps £10-20 per week lower than that specified by central government as the basic subsistence level, which might be as much as 25% of cash income. It could mean that an individual would be better off on unemployment benefit, than moving to Sandwell to take low paid work. It could make it more difficult for people to flee abusive relationships, or to move to care for relatives. If the Council’s CTR Scheme were adopted by other authorities, the problems would be compounded. A person who fails to satisfy the residence requirement of course receives no support at all for council tax

payments. In the event, the requirement is inconsistent with central government policy, in that it has the potential adversely to affect vulnerable individuals such as those fleeing from domestic violence, and may act as a disincentive to move to look for work. Whilst it might have been open to the Council to decide to take a course that was inconsistent with central government policy, that policy was at least a material consideration and the Council failed to take it into account or have any regard to it at all.

65. Furthermore, Mr Drabble submitted that the Council ought to have taken into account a further factor, namely that, if other authorities adopted a similar requirement, this would compound the difficulties for individuals, and could lead to some with financial need not being entitled to a council tax reduction anywhere in the country. This, it seems to me, links in with the central government's policy that there should be some consistency between schemes: this requirement could not be adopted by all authorities.
66. This ground is not of course entirely discrete. It has to be seen in the context that the Council had no evidential basis for the proposition that any individuals were likely to come to Sandwell as benefit tourists, and still there is no evidence that a single individual has sought to do so since April 2013. All of the three Claimants have lived in Sandwell (or at least very close to the borough) for most of their lives, in modest accommodation. Each, in her own way, is or was vulnerable.
67. No thought appears to have been given by the Council to the adverse impact the residence requirement might have on the wider and clearly stated policy objectives of the council tax reduction provisions at national level, or on the wider potential consequences of other authorities adopting such schemes. Certainly, the Secretary of State's wider policy objectives were a material consideration that the Council ought to have taken into account before adopting the restriction. They singularly failed to do so.
68. It is no answer to the point that the Council may, in an individual case of hardship, exercise its discretion to reduce council tax liability under section 13A(1)(c). Mr Rutledge properly conceded that each of the Claimants would have satisfied the financial need criteria of the CTR Scheme, i.e. all of the criteria except the residence requirement. It would be odd if an individual who satisfied the financial need criteria of the scheme was denied a reduction as of right under the scheme, but was then able to apply on the basis of the same financial hardship for a reduction outside the scheme. In any event, the Council has no sensible policy for determining how such applicants would be able to show they should have the Council's discretion exercised in their favour. I do not accept that the training document dated 20 May 2014 (upon which Mr Rutledge relied) alone is a sufficient policy. I stress that this document is the only evidence relied upon by the Council that it has a policy for the exercise of its discretion under section 13A(1)(c). It sets out brief descriptions of those who (apparently whilst in the course of applying or being transferred) might be awarded a council tax reduction, and it confirms that those who have been housed under a statutory duty etc should be given a reduction – but it does not say how the discretion will be exercised, and suggests that there is no discretion where an applicant does not fall within one of the codes. In my view, that document alone does not suggest that the Council have a policy for the exercise of its general discretion to reduce council tax outside the scheme, anything like sufficient to make the residence requirement

lawful; although it does suggest that the Council belatedly accepts that the residence requirement might have a substantial adverse impact on a wide variety of vulnerable people. Section 13A(1)(c) simply does not assist Mr Rutledge on this point.

69. For those reasons, in my judgment, there is no defence to this ground.

**Ground 3: Lack of consultation**

70. The law in relation to consultation is well-trodden (including recently by me in R (Sumpter) v Secretary of State for Work and Pensions [2014] EWHC 2434 (Admin) at [94]), and uncontroversial.

71. Whether required by statute (as in this case: paragraph 3 of schedule 1A to the 1992 Act, quoted at paragraph 14 above) or voluntary, if performed, consultation must be carried out properly (R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at paragraph 108). Various elements that are required by fairness have been identified from time-to-time, notably in R v Brent London Borough Council ex parte Gunning (1985) 84 LGR 168 at page 189 where Hodgson J identified the following:

- (a) consultation is undertaken at a time when the relevant proposal is still at a formative stage;
- (b) adequate information is provided to consultees to enable them properly to respond to the consultation exercise;
- (c) consultees are afforded adequate time in which to respond; and
- (d) the decision-maker gives conscientious consideration to consultees' responses.

72. The so-called "Gunning criteria", approved by the Court of Appeal in Coughlan at paragraph 108, are facets of fairness, and consideration of them is often helpful. However, fairness is the touchstone. For consultation to be lawful, it must be fair: that is the test. Whether the consultation process is fair is a fact-sensitive question that depends upon all the circumstances of the particular case looked at as a whole, and without drawing artificial distinctions between particular stages of the whole process. It is a matter for the court to decide whether a fair procedure was followed: its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required.

73. Proper consultation is an important part of the decision-making process. The reasons for requiring fairness in procedural matters such as consultation is to ensure high standards of decision-making by public bodies, to enable parties interested in the subject matter to identify and draw to the attention of the decision-maker relevant factors of which he may otherwise be unaware to enable responses that will best facilitate a sound decision, and to avoid the sense of injustice which a person affected by a decision may otherwise feel if not given a proper opportunity to have their views known and taken into account (R (Osborn) v Parole Board [2013] UKSC 61 at [67]-[70]) per Lord Reed JSC, and R (J L and A T Baird) v Environment Agency [2011] EWHC 939 (Admin) at [52] per Sullivan LJ).

74. In this case, there is no factual dispute with regard to the 2013-14 Scheme: the Council consulted on its CTR Scheme excluding the residence requirement (about which Mr Drabble has no particular complaint), but never consulted at all on that requirement (about which he does complain). A complete absence of consultation cannot arguably be sufficient consultation.
75. The position with regard to the 2014-15 Scheme is more complicated. At the hearing, Mr Rutledge relied upon the feedback set out in the officers' report for the 11 December 2013 Council meeting as showing there must have been some form of consultation, out of which these were responses. However, that does not seem to be right; because, although the officers' report for that meeting says there was consultation, it states in terms that no feedback at all was received from it (paragraph 6.7, quoted at paragraph 27(ii) above). Mr Kellas says that views from the public were sought by putting a link on the Council's web page for a three month period from October 2013 (to which I return below: paragraph 76): but he too says that the Council did not receive any queries or comments as a result of this (13 March 2014 Statement, paragraph 15). That is also confirmed by Mr Rutledge's skeleton argument (paragraph 59). Therefore, the genesis of those comments is a mystery; but they do not appear to have resulted from either the web page to which Mr Kellas refers, or any other form of consultation exercise.
76. The web page attached to Mr Kellas's statement had a link to the scheme, but that page did not ask for any response. Following the hearing, the Council's solicitor submitted further web pages which he says (and I accept) were on the Council's web site for a three month period from October 2013. These refer to the two year residence requirement, and say:

“Consultation on the scheme took place during the period August to October 2012.

Sandwell Council is proposing to make no changes to its [CTR Scheme] for 2014-15 and is now seeking your views and feedback on the scheme. Please email your comments to [and there is then given a Council email address].”

Mr Kellas regards these web pages as adequate consultation (13 March 2014 Statement, paragraph 27). However, I doubt that it was. It (wrongly) suggests that there had been consultation on the scheme with the residence requirement in 2012; and it gives no information at all as to the effect of the requirement, either in terms of the actual effect from April 2013 (of which the Council were aware by October 2013) or the potential future effect, without which it is strongly arguable that informed comments were not possible. In all the circumstances, it is not at all surprising that, as a result of the web pages, the Council says it did not receive a single comment. In my judgment, although this is not determinative of this claim, even for 2014-15, this was not a fair consultation on the residence requirement.

77. Mr Rutledge did not seek to argue that the imposition of the requirement was not a vital part of the CTR Scheme: he could not do so, given that it was his submission that the requirement was the sole criterion for identifying the class in respect of which a reduction might be made.

78. In my view, for its 2013-14 CTR Scheme, the Council clearly erred in not consulting on the requirement at all – consultation which might have elicited responses from potential applicants, but also from adjacent local authorities which, like Dudley Council, may be adversely affected by it. For 2014-15, there was a vague request for feedback on the scheme as a whole; but, in my view, although not so clear cut, these were insufficient attempts to elicit informed views – with the result that, in fact, no comments were received as a result of it. In Baird at [51], Sullivan LJ said that “a conclusion that a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong”. In my view, here, in each year, something did go clearly and radically wrong: as a result, there was no fair consultation, in either year, in respect of this fundamental requirement.
79. Without such consultation on the residence requirement, in my judgment the procedure leading to the requirement being imported into the CTR Scheme was unfair, and thus unlawful. Indeed, had the Council consulted on this requirement as it ought, it might have resulted in feedback which may have prevented it from plunging into the unlawfulness into which it did plunge by adopting a CTR Scheme with a residence requirement.

#### **Grounds 4 and 5: Barrier to freedom of movement and Discrimination**

80. These two grounds can be conveniently dealt with together.
81. Mr Drabble, supported on these grounds by Mr Buttler for the Equality and Human Rights Commission, submitted that the residence requirement disproportionately affects people wishing to exercise EU free movement rights, and is therefore an unlawful obstacle to freedom of movement.
82. He relied upon the general EU freedom of movement provisions (article 21 of Treaty on the Functioning of the European Union (“TFEU”)), and the provisions which protect freedom of migrant workers (article 45 of TFEU, and article 7(2) of EU Regulation 492/2011 which provides that a migrant worker “shall enjoy the same social and tax advantages as national workers”). He also relied on article 45 of TFEU, which prohibits any discrimination on the grounds of nationality. Mr Drabble referred me to Gebhard v Consiglio Dell’Ordine degli Avvocati E Procuratori di Milano [1996] 1 CMLR 603, a case concerning freedom of establishment, in which the European Court of Justice said, generally of the fundamental EU rights and freedoms (at [37]):
- “...[N]ational measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it...”.
83. Mr Rutledge submitted that the requirement did not pose an obstacle to freedom of movement within the EU, because (i) it affected movement within the UK (and was

indeed designed to discourage such movement) as well as movement as between Member States, and (ii) the obstacle was the imposition of council tax, not the failure to reduce it. However:

- i) It might not have been intended to affect movement as between Member States, but that is its potential effect and it is intrinsically more likely to affect a non-British EU citizen than a British EU citizen. It is therefore indirectly discriminatory.
- ii) The CTR Scheme does not provide a welfare benefit: it determines liability for tax. It is therefore capable of creating an obstacle to freedom of movement by the differential imposition of tax.

84. Therefore, on the face of it, the requirement imposes an obstacle to freedom of movement within the EU. Such an obstacle may, of course, be justified. I deal with justification below (see paragraph 88 and following).

85. In addition, Mr Drabble submitted that the requirement was indirectly discriminatory, on two primary factual bases. First, and closely linked to Ground 4 (Barrier to freedom of movement), in addition to hampering the exercise of free movement rights of UK nationals contemplating leaving Sandwell temporarily for work elsewhere in the EU, the residence requirement is indirectly discriminatory because it is liable to affect a larger proportion of foreign (including EU) nationals than British nationals, because the former are inherently less likely to have lived their lives (and, in particular, the last two years) in Sandwell. Second, it is discriminatory against women, because women are substantially more likely than men to suffer from domestic violence which requires them, for reasons of safety, to flee to a different local area. A person fleeing to Sandwell will fall foul of the residence requirement. In respect of women, he relied upon the history of the First Claimant, Ms Winder (see paragraphs 31-36 above); and the evidence of Polly Neate, the Chief Executive of the Women's Aid Federation of England, a national domestic violence charity. In her 19 March 2014 Statement, Ms Neate says that research consistently shows that more women than men are the victims of domestic violence and abuse (paragraph 6); such victims often have to leave their homes for safety (paragraph 7); and those fleeing violence often have very limited resources (paragraphs 13-14).

86. The legal bases for the discrimination claims were as follows:

- i) European law: Mr Drabble relied upon article 45 of TFEU, referred to above (paragraph 82), which prohibits any discrimination on the grounds of nationality.
- ii) Domestic law: Section 29 of the Equality Act 2010 prohibits a person exercising a public function from doing any discriminatory act. Section 19 describes indirect discrimination in terms that makes unlawful a scheme putting persons with a protected characteristic (which terms includes race – itself incorporating nationality and national origins – and sex) at a particular disadvantage in comparison with persons without that characteristic; unless it is a proportionate means of achieving a legitimate aim.



- iii) Human Rights: Article 14 of the European Convention on Human Rights provides that, where a ECHR right is engaged, its enjoyment shall be free from discrimination. A1P1 provides that every person is entitled to the peaceful enjoyment of his possessions. Mr Drabble submitted that the CTR Scheme engages A1P1 because it involves compulsory taxation, which means that discrimination in its operation will breach article 14 and thus section 6(1) of the Human Rights Act 1998.
87. Of course, a claimant does not have to produce statistical evidence, or evidence of the actual effect of a provision in practice, to pursue a claim based on discrimination (Secretary of State for Work and Pensions v Bobezes [2005] EWCA Civ 111 at [45] per Lord Slynn of Hadley); but, in any event, (i) there is here evidence of actual effect in respect of at least some of the discriminatory subgrounds relied upon (e.g. the effect on Ms Winder as a woman fleeing from domestic violence); (ii) the “feedback” at the end of 2013, from wherever it came, reflects the potential discrimination of the requirement; and (iii) that potential is obvious from the nature of the requirement.
88. The discrimination is indirect. Mr Rutledge rightly submitted that indirect discrimination can be lawful, if objectively justified on grounds independent of the characteristic in respect of which there has been discrimination, in this case nationality and gender (Patmalniece v Secretary of State for Work and Pensions [2011] UKSC 11 at [20] per Lord Hope); and if the means employed were proportionate to that that objective. The objective justification here was to prevent the additional demand for council tax reduction that might arise from people relocating from the more expensive South East of England. The purpose was thus to discourage such migration. The residence requirement was, he submitted, proportionate having regard to:
- i) the need to achieve financial savings and fairly to distribute the effect of the cut in central Government funding;
  - ii) the totality of the CTR Scheme, and the Council guidance since April 2014 which insulates the homeless or those in a Housing Act 1996 reasonable preference category; and
  - iii) the discretion in section 13A(1)(c) to take account of the financial circumstances of an individual who falls outside the CTR Scheme.
89. Unfortunately, this submission has no evidential foundation.
- i) I have already dealt with the reason for the imposition of the residence requirement (see paragraphs 23 and 45(i) and (ii) above): it was made to discourage such migration and, if such individuals moved to Sandwell, to ensure that they did not put a further burden on the CTR Scheme. Mr Rutledge submitted that financial pressures compelled the Council to adopt the residence requirement. Mr Kellas says that, if the requirement had not been introduced, for the CTR Scheme to have been affordable the Council “would have had to introduce a minimum payment [of council tax] for every household” (13 March 2014 Statement, paragraph 13). However, there does not appear to be any sound evidential basis for that assertion. Prior to the requirement being imposed, it seems that it was considered that the Council’s

council tax figures balanced. The requirement was introduced to discourage further migrants from the South East of England. There is no evidence that they have been discouraged, or that any have moved to Sandwell and failed to obtain a council tax reduction (despite financial need) because of the residence requirement. There is no evidence that any of the Council savings from the 3,600 individuals who have failed to satisfy the residence requirement has fallen on migrants from areas with more expensive housing; or on anyone but those with financial need who have moved to Sandwell for other reasons, including the fact that they originate from Sandwell and have moved back there. Any saving from such individuals has been an *extra* saving.

- ii) In any event, there is no evidence that “benefit tourists” from the South of England were or were likely to be a problem, and thus no evidence that the measure was necessary. The Council members merely “*felt* that there could be an increase in people moving from those areas into the borough of Sandwell, which would result in an additional demand on the [CTR] Scheme” (see paragraph 22 above: emphasis added). If it were necessary, Mr Rutledge failed to explain why other authorities in the same position as the Council did not consider it necessary to adopt a similar measure for a similar reason. It seems that only two other authorities have imposed a residence requirement on council tax reduction, both in Essex.
  - iii) Insofar as the measure was necessary, there was in any event (a) no evidence as to the extent of the problem to be addressed, or the money that would be saved by adopting it particularly in the light of the fact that the adoption of the residence requirement meant the loss of the transitional central government money (see paragraph 25 above); and (b) no evidence of any alternatives being addressed.
  - iv) On the other side of the coin, there is no evidence of any assessment of what Mr Drabble called “the collateral damage” that the residence requirement would cause, i.e. the adverse impact on the vulnerable and others in financial need, or on those who might wish to exercise their freedom of movement within the EU. There is no evidence of such an assessment for either year, despite the feedback towards the end of 2013 which suggested that, in some cases, vulnerable individuals were suffering substantial adverse effects (see paragraph 27(ii) above).
90. In the absence of any assessment of the looked-for beneficial effects of the measure on the one hand, or of the unwanted adverse effects on the other, the Council cannot begin to justify the impact of the measure. Mr Rutledge’s submission simply sinks into an evidential void.
91. For those reasons, even if the residence requirement had been *intra vires*, it would have failed for being discriminatory and as a barrier to freedom of movement within the EU.

#### **Ground 6: Public Sector Equality Duty**

92. Section 149 of the Equality Act 2010 provides that a public authority must, in the exercise of its functions, have “due regard” to the need to (a) eliminate discrimination,

harassment, victimisation and any other conduct that is prohibited by or under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. The protected characteristics include race and sex (section 149(7)). The duty requires a “conscious directing of the mind to the obligations” (R (Meany) v Harlow District Council [2009] EWHC 559 (Admin) per Davis J (as he then was)), “due regard” being the appropriate regard in all the circumstances. Whilst the courts have stressed that the obligation imposed upon a public body must not be so great as to hamper effective decision-making, the importance of the duty has also been emphasised: a failure to comply might be a public law error of “very great” importance (R (C) v Secretary of State for Justice [2008] EWCA Civ 882).

93. Mr Drabble accepted that the EIA for the CTR Scheme may have been adequate; but it was not performed at a time when the residence requirement was an option. The potential impact of that requirement on those with protected characteristics – notably race and sex – was never considered, in a formal EIA or in any other way. Mr Drabble submitted that the Council was in clear breach of its duty to have due regard to the effect of its measure on people with those characteristics.
94. Industrious as he was, Mr Rutledge could not make bricks without straw; or, in this case, a defence without evidence. Section 149 was undoubtedly engaged: indeed, that was well- recognised by the Council, in the way in which it conducted an EIA at various stages before the residence requirement was tabled on 4 December 2012. However, there is simply no evidence that the Council conducted any assessment at all of the race or gender impact of the residence requirement at or before it adopted the 2013-14 CTR Scheme; and scant evidence that it did so prior to the 2014-15 Scheme. I do not consider that the evidence that there is (e.g. with regard to feedback towards the end of 2013, from wherever it came: see paragraphs 27(ii) and 75 above) is sufficient to show that the Council grappled at all with the effects of the requirement on those with the identified protected characteristics.
95. On the evidence, I cannot but find that the Council was in breach of its section 149 duty. That duty is important; and, had the Council been rigorous in satisfying its obligation to have due regard to the relevant characteristics, then, again, it may not have proceeded with the unlawful course that it followed.

### **Conclusion**

96. For the above reasons, I am firmly satisfied that the Council did not have power to impose the residence requirement that it did impose in its CTR Scheme for either 2013-14 or 2014-15. However, even if it had that power, for the further reasons I have given, I would in any event have found the requirement unlawful.
97. This is a rolled-up hearing. I grant permission to proceed, and allow the claim. The parties are agreed that, on the basis of my findings, the appropriate relief is that I simply make a declaration that the residence requirements were and are:

(i) outside the relevant statutory powers for the reasons given in paragraphs 47-60 above, and

(ii) unlawful for the reasons given in the judgment in relation to grounds 2, 3, 4, 5 and 6.

I so declare.