

Report

on an investigation into
complaint no 10 008 622 against
London Borough of Havering

12 January 2012

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Key to names used

- Miss Ford – the complainant
- Anna – the complainant's oldest daughter

The Local Government Act 1974, section 30(3), requires me to report without naming or identifying the complainant or other individuals. The names used in this report are therefore not real names.

Report summary

Subject

Miss Ford lives in a three-bedroom house, with her three daughters. The eldest, Anna, suffers from Multiple Sclerosis which has affected her mobility, vision, continence and some cognitive processes. Miss Ford says that Anna has difficulty managing the stairs at her home and is unable to access her bedroom or bathroom, both located on the first floor, without assistance.

Miss Ford made a housing waiting list application which was supported by an occupational therapist's report. This said that Anna's mobility was likely to deteriorate and that she may require a ground floor bedroom and bathroom. The application was placed in band A (the highest priority) with three-bedroom eligibility.

In July 2010 a three-bedroom 'parlour' style property became available. Miss Ford bid for the property because Anna could use the ground floor parlour room as her bedroom. Her bid had the highest priority, but the Council decided it was unsuitable. Anna required a ground floor bedroom and if she used the parlour as a bedroom there would be four bedrooms and Miss Ford's family were only assessed to need three. The Council confirmed the bid would have been successful if Anna had not needed to use the parlour as a bedroom.

The Ombudsman concluded that, had it not been for Anna's disability, Miss Ford's family would have been rehoused. The Council failed to give due consideration to the family's circumstances and its obligations under the Disability Discrimination Act 2005 (now replaced by the Equality Act 2010) and failed to follow its own Equalities and Diversity Policy. She also noted that the Human Rights Act 1998 makes it unlawful for a public authority to act in a way that is incompatible with the European Convention on Human Rights. Article 8 to that convention says that everyone has the right to respect for his private and family life. Public authorities must take positive measures to secure respect for family life. The Ombudsman concluded the Council had failed to consider appropriately its obligations under the Act. She also concluded that the Council's lettings policy is ambiguous and that the Council had not applied it fairly and properly.

Finding

Maladministration causing injustice

Recommended remedy

The Council should:

- a) make Miss Ford a suitable offer of accommodation without delay
- b) pay £4,000 to Miss Ford and her family in recognition of the injustice they have been caused and the loss of opportunity to be rehoused in more suitable premises
- c) arrange and pay for an additional week of respite care for Anna, and
- d) review the wording of its lettings policy

Introduction

1. Miss Ford is the tenant of a registered social landlord and lives in a three-bedroom house with her three daughters aged 12, 23 and 24. There is one ground floor reception room and the property's three bedrooms and bathroom are located on the first floor. Miss Ford's eldest daughter, Anna, suffers from MS which has affected her mobility, vision, continence and some cognitive processes. She also suffers from asthma. Miss Ford says that Anna requires assistance to manage the stairs in the home.
2. Miss Ford complained about the Council's handling of her bid to be rehoused in a three-bedroom parlour-style property, for which she was the highest placed bidder. She said that the Council refused to take her circumstances into account when deciding to offer the property to the second-placed bidder and this has resulted in her family continuing to live in accommodation which is unsuitable for their needs.
3. One of the Ombudsman's investigators has met the complainant and interviewed officers of the Council. She has also examined the relevant files.

Legal and administrative background

Council's Lettings Policy

4. The Council's lettings policy must identify groups who will receive priority for available housing. Its policy is choice based, with five priority bands. Band A represents serious medical or welfare needs and band E represents a very low assessed housing need. Applicants are assigned a priority banding which reflects their housing need and are given a bedroom eligibility based on the size and composition of their household. Applicants are able to bid for any property so long as it does not exceed their bedroom entitlement. In some circumstances applicants are able to bid for a property with one less bedroom than they require. The property is offered to the bidder with the highest band, who has been in that band the longest – so long as they are eligible for the size and type of property.
5. Appended is an extract from the policy showing the size and type of property for which applicants may be eligible, based on household size. This says that a household with two children of the same sex where the eldest is over 16, or two children of the opposite sex where the eldest is over 10, or three children of either sex, or four children of the same sex, or two sons and two daughters are eligible for a three-bedroom flat, maisonette or house. It also says that households with three children of the same sex and one of the opposite sex are eligible for a four-bedroom house, and that four-bedroom houses include three-bedroom houses with parlours. It also says priority for gardens is given to households with a dependent child under 16, and to those with a medical recommendation. It gives an example that a garden may be recommended for an adult "if they have a

severe cognitive impairment that means they do not sense danger, are at risk of wandering and so need constant supervision”.

6. In addressing unsatisfactory housing conditions, the policy says the Council considers that two children of the same sex, where the eldest is under 16, can share a bedroom.

The Council’s Housing Services’ Equalities and Diversity Policy

7. The Council’s Housing Services’ Equalities and Diversity Policy says that it will not directly discriminate against any person or have policies or procedures that are indirectly discriminatory or operate in a way that particular persons are unable or find it disproportionately difficult to get access to housing, housing advice or any other service.

The Human Rights Act 1998

8. The Human Rights Act 1998 makes it unlawful for a public authority to act in a way that is incompatible with a citizen’s rights under the European Convention on Human Rights. Article 8 says that everyone has the right to respect for his private and family life. Article 14 says that the rights and freedoms set forth in the convention shall be secured without discrimination on any ground.
9. In the case of *R v Enfield London Borough Council ex parte Bernard*¹ the court held that the Council had not had due regard to its duty under Article 8. The judge held that the Council’s failure to act upon information which demonstrated the claimant’s needs for alternative housing “showed a singular lack of respect for the claimant’s private and family life. It condemned the claimants to living conditions which made it virtually impossible for them to have any meaningful private or family life for the purposes of Article 8”.

The Disability Discrimination Act 2005

10. Under the Disability Discrimination Act 2005 (now replaced by the Equality Act 2010), a public authority discriminates against a disabled person if, for a reason which relates to the disabled person’s disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply.

Good Administrative Practice

11. Case law² has established that “On well recognised principles public authorities are not entitled to fetter the exercise of discretion or to fetter the manner in which they are empowered to discharge the many duties that are required of them.

¹ [2002] EWHC 2282 (Admin)

² Templeman L.J. in *Attorney General ex rel. Tilley v Wandsworth LBC* [1981] 1 WLR at P. 858

They must at all times in every particular case, consider how to exercise their discretion and how to perform their duties”.

12. The Guidance on Good Administrative Practice issued by the Commission for Local Administration in England says that councils should ensure that where a policy is a positive statement of what will be done, citizens are entitled to expect that the promise is met. It also says that a council should consider any special circumstances, as well as its own policy, to determine if there are exceptional reasons to justify a decision more favourable to the individual than their policy would usually allow. When a council does not consider the possibility of making an exception to its policy, it has fettered its discretion.

Investigation

13. Miss Ford did not consider that her accommodation met her family's needs and in May 2008 she made a housing waiting list application to the Council. This was accompanied by an occupational therapist's report which noted concerns about Anna's mobility, but said that on assessment she was safe on the stairs. It said the deterioration in her health she was experiencing would be likely to affect her mobility and continence in the future and that consideration should be given to level or ramped access to her home. She might require ground floor living in the future, so there should be sufficient space for a ground floor bedroom and toilet/shower room.
14. The application was placed in priority band E with a three-bedroom entitlement: Anna had previously made her own application and so it does not seem that she was included in the household.
15. In September 2008 Anna cancelled her application: she no longer wished to live independently due to her worsening condition, and on 28 December Miss Ford provided the Council with further information about Anna's needs. She described the family's circumstances and, in particular, problems with dealing with Anna's personal needs. The Council's records show that Anna's September request was dealt with on 26 January 2009 and on the same day the housing waiting list application was placed in band A. Miss Ford was told that any successful bids would be subject to an occupational therapist's inspection and recommendations.
16. The three-bedroom entitlement remained unaltered. When addressing unsatisfactory living conditions the Council considers that two children under 16 can share a bedroom. But the Council has explained that for allocation purposes adult family members are treated as children and that just because two of Miss Ford's daughters were over 18 did not mean they were entitled to separate bedrooms.
17. In March 2009 Miss Ford was offered the opportunity to view a property. She did not consider it was suitable for their needs because of Anna's cognitive

impairment: there was a bus stop outside and Anna was prone to wandering and running away from home, had no road safety awareness and was vulnerable to exploitation. There had also been a bus stop outside their previous home and she said that this had affected Anna's asthma.

18. In July 2009 Miss Ford wrote to her local councillor expressing her concern at the length of time it was taking for her to be made an offer of suitable accommodation. The Council's reply said that the occupational therapy team were continuing to look for properties which met the needs of her family.
19. A carer's assessment of Miss Ford was undertaken in February 2010. This referred to Miss Ford's concerns about her youngest daughter who was staying with her grandmother during the week because she had needed to vacate her bedroom due to Anna's condition and inappropriate behaviour.
20. In July 2010 Miss Ford bid for a three-bedroom parlour-style house. It was advertised for applicants eligible for three-bedroom accommodation, in priority band A. The Council says it was advertised as a three-bedroom property because it has three bedrooms, all on the first floor. It said that in future such a property would be advertised as having three bedrooms. It can be used to house a family requiring three or four bedrooms.
21. Miss Ford considered she could use the ground floor parlour as a bedroom to meet Anna's needs. The property also gave her the opportunity to move closer to her sister and aunt, who help with Anna's care.
22. Of those who bid for the property, Miss Ford had top priority. But it was not offered to her: the Council has explained that the family were not considered suitable because all three bedrooms were on the first floor and Anna requires a ground floor bedroom. If the parlour was to be used as a bedroom, the Council suggests it would then become a four-bedroom house and the three remaining family members would be under occupying the three first floor bedrooms. This would be something the Council would seek to avoid because of the shortage of family homes. The Council says all cases are handled on the basis of family need and it was not appropriate to permit a family, whose requirement is for no more than three bedrooms (one of which must be on the ground floor) to move into a property that would not suit those needs. It did not consider it necessary to seek advice from its occupational therapists.
23. The property was offered to the second-placed bidder. This family had four children and a four-bedroom property need. They subsequently moved in. They use the parlour as a bedroom.
24. Immediately afterwards, the Council undertook a re-assessment of Anna's needs. This noted her present accommodation was unsuitable and that her mobility had deteriorated. It said that she has a level of cognitive impairment which requires constant supervision and support with daily living tasks, that she has no

awareness of needs and risks associated with her behaviour. She requires supervision with social activities and sometimes lacks physical coordination and is unaware of this. Therefore, when she is walking she believes she is walking in a straight line, but veers off the road and requires assistance for her safety.

25. During the course of this investigation, Miss Ford was made a direct offer of a three-bedroom flat. This property was designed under the 'Homes for Life' standard to provide accommodation for those needing special needs housing, including allowing for future adaptations. Miss Ford refused the offer because the garden was communal. In March the Council told her the refusal was considered justified, but in April it overturned its decision, saying her wish for a garden was an aspiration, not a need, and that the offer met her needs. She was told that if she refused a further suitable offer her rehousing application would be suspended for six months.
26. Miss Ford says that Anna is having increasing difficulty accessing the first floor bathroom and has to crawl up the stairs to do so. She avoids this by taking Anna to a friend's home, which has an adapted ground floor shower, or by bathing her in a paddling pool during the summer months.

The Council's response to my draft report

27. In response to a draft of this report, the Council said the property was reclassified as four-bedroom accommodation as soon as bidding had closed, because it established that the parlour room was suitable for use as a bedroom; Miss Ford is not eligible for four-bedroom accommodation, and so her bid was disregarded on this basis. This view contradicts its previous comments and I have seen no evidence that substantiates its new stance.
28. The Council acknowledges it was at fault in advertising the property Miss Ford bid for as three-bedroom accommodation and it accepts she would have expected to be offered the property as she was eligible for three-bedroom accommodation and her bid had top priority. To prevent this situation reoccurring, it will now only put properties with parlours forward for bidding once it has established if the parlour room can be used as a bedroom. (So in this case it now would advertise the property as having four bedrooms.)
29. The Council has accepted that there were a number of failings in its handling of Miss Ford's bid and it agrees that Anna's needs were overlooked. However it disagrees that this amounts to discrimination because Miss Ford and Anna were not treated any differently than any other household requiring three-bedroom accommodation that made a bid for a four-bedroom property.

Conclusion

30. The Council has many competing demands on its limited housing stock and it is important to ensure that its policies for allocating housing are fairly and properly applied. It also has a duty to implement its published lettings policy, which should be unambiguous in its meaning. I am not satisfied the Council has applied its lettings policy, which I consider to be ambiguous, fairly and properly.
31. Miss Ford's application was awarded priority band A status in 2009, in recognition of Anna's needs. She was assessed as requiring three-bedroom accommodation. In this assessment, her two adult daughters were treated as children who could share a room. However the policy does not say that adults will be treated as children and I note that in considering the acceptability of housing conditions, they would have been treated as adults requiring separate bedrooms (see paragraph 15). The absence of a definition of 'child' for rehousing purposes, and the application of a different definition to that used in assessing unsatisfactory accommodation is unclear and confusing. It is unclear how extended or other households, where for example there may not be a parent and child relationship, would be treated. I consider the Council's policy, as currently worded, to be ambiguous and therefore faulty.
32. Miss Ford bid for a property which was advertised as having three bedrooms and which could meet Anna's need for a ground floor bedroom. Applicants are entitled to treat what the Council says at face value, but the lettings policy says "4 bedroom houses include 3 bedroom houses with parlours". In relation to Miss Ford's application, the Council treated the property as having four bedrooms. While the Council says it will now check whether parlours can be used as a fourth bedroom, the policy is therefore unclear in its meaning and application. This is also a fault.
33. The Council has said that Miss Ford's bid would have been successful had Anna's disability not meant the parlour would be used as a bedroom. It has not claimed the property is otherwise unsuitable. So, but for Anna's disability, the Council would have rehoused the family in accommodation which would have better met Anna's needs. A family without any disabled members would have been able to use the parlour as a bedroom, and indeed the current tenants do so. Despite what the Council says, I consider that the Council has fettered its discretion and failed to consider its obligations under the Disability Discrimination Act. It has also acted contrary to its Housing Services' Equalities and Diversity Policy which makes reference to the need to ensure policies do not operate in a way which discriminates. I do not see that this test has been met here and, as a result and because of what seems to be deterioration in Anna's condition, she has suffered a severe loss of dignity.

34. It is for the courts to decide if the Council's actions have been a breach of the Human Rights Act and, if so, to make binding declarations and decisions. I have however considered if Human Rights Act issues were engaged and if they were properly taken into account. I have concluded that Article 8 was engaged and that the Council failed to give this issue due consideration when deciding that Miss Ford was not eligible for the property. This failure constitutes maladministration and has contributed to the injustice caused to her and her family. Much of the indignity Anna has faced could have been addressed if the Council had considered this matter properly.
35. Miss Ford refused the offer made in February 2011 because of the lack of a garden. While there is no right to a garden, I note the Council's policy gives priority to households with dependent children under 16 and those with a medical recommendation (and in particular severe cognitive impairment). Miss Ford's youngest child is under 16, and Anna's assessment of needs refers to her cognitive difficulties, her need for constant supervision and her poor road safety awareness. It is not for me to say Miss Ford must be offered a property with a private garden. But I am satisfied that the Council's decision to regard as unreasonable her refusal of one without such a garden (and therefore to limit her to one further offer) to be inconsistent with Miss Ford's family circumstances and its own policy.

Remedy

36. I consider Miss Ford and her family have been caused substantial injustice as a result of the Council's decision not to offer them the property for which they were the highest placed bidders. They have been left in accommodation which evidently fails to meet their needs and which severely and adversely affects Anna's dignity. Since I issued my draft report I am pleased to note that the Council has made them an offer of accommodation which, subject to internal alterations, would appear to be suitable for Anna's needs.
37. I am concerned about what appears to have been a lack of regard given to Anna's needs and dignity. In recognition of the distress that has been caused over the past 14 months, and is continuing, and the loss of opportunity to be rehoused in more suitable accommodation, the council should also pay Miss Ford, for Anna and the rest of her family, £4,000 compensation. I also recommend that the Council arranges and pays for an additional week of respite care for Anna, in order for Miss Ford to spend some quality time with her youngest daughter.
38. Finally, I am concerned that the Council's lettings policy lacks clarity. I recommend, as a matter of urgency, that the Council undertakes a review of the wording of its policy. As part of this, it should make clear its approach to houses

with parlours: it does not seem appropriate that the bedroom classification of a property is altered by the manner in which it is occupied.

**Dr Jane Martin
Local Government Ombudsman
10th Floor
Millbank Tower
Millbank
London SW1P 4QP**

12 January 2012

Appendix

Extract from the Council's allocations policy

5.2 What Size and type of property am I eligible for?

	Studio flat	Studio bungalow	1 bedroom flat / maisonette	1 bedroom bungalow	1 bedroom house	2 bedroom flat / maisonette up to the 6 th floor	2 bedroom flat / maisonette on or above the 7 th floor	2 bedroom bungalow	2 bedroom house	3 bedroom flat / maisonette	3 bedroom house	house3 bed with parlour or 4 bedroom	Larger than 4 bedroom house depending on circumstances of the household
Single person under 60	✓	✓	✓				✓						
Single person 60 or over	✓	✓	✓	✓			✓*						
Childless couple, under 60			✓		✓		✓						
Childless couple, 60 or over			✓	✓	✓		✓						
Household with 1 child, or 2 children of same sex where eldest is under 16, or 2 children of the opposite sex where the eldest is under 10 **						✓		✓	✓				
Household with 2 children of same sex where eldest is 16 or over, or 2 children of the opposite sex where eldest is over 10, or 3 children of either sex, or 4 children of the same sex, or 2 sons and 2 daughters **										✓	✓		
Household with 3 children of the same sex and one of the opposite sex **												✓	
Household with 5 or 6 children **												✓	✓
Household with more than 6 children **												✓	✓

Please note:
 'Household' includes a single adult or couple
 'Couple' includes same-sex couples
 4 bedroom houses include 3 bedroom houses with parlours
 We usually offer a bungalow only if you or someone in your household has a disability which requires a bungalow
 * single person with access rights to children
 ** priority for a property with a garden will be given to households with a dependant child aged under 16 and those with a medical recommendation for a garden – see section 6.5.1.