

Recent developments in housing law



Jan Luba QC and Nic Madge continue their monthly series. They would like to hear of any cases in the higher or lower courts relevant to housing. In addition, comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Help for homeowners

The Council of Mortgage Lenders (CML) has reported that in the three months April to June 2009, lenders took possession of 11,400 homes and a further 270,400 borrowers now owe more than three months' arrears of repayments: CML press release, 14 August 2009. In a separate note, the CML has indicated its preferred measures of mortgage default statistics: *Mortgage arrears and possessions statistics – information note* (CML, August 2009).¹

Although the number of mortgage possession claims brought in county courts continues to rise (see September 2009 *Legal Action* 28), the Justice Minister Bridget Prentice MP has suggested that 'the statistics are levelling out after the major impact felt when Mortgage Pre-Action Protocols were first introduced': Ministry of Justice news release, 14 August 2009.²

The Mortgage Rescue Scheme, under which social landlords buy the homes of vulnerable households unable to meet mortgage commitments, has been boosted by the opening on 1 September 2009 of a new Mortgage Rescue Fast Track (MRFT) applications service based at the Government Office in Birmingham: Communities and Local Government (CLG) news release, 14 August 2009.³

The creation of this new MRFT team follows criticism of the slow start to the scheme which was intended to help 6,000 homeowners, but through which only 14 borrowers had converted to social housing tenancies by August 2009.⁴

Shelter has published research by Professor Janet Ford and Dr Alison Wallace of the Centre for Housing Policy at the University of York on how mortgage arrears and possessions are being managed by lenders and borrowers in the current economic climate: *Uncharted territory? Managing mortgage arrears and possessions* (Shelter,

July 2009).⁵ Their study looked at the measures that have been in place to assist borrowers and identified what more needs to be done to protect homeowners over the longer term.

The latest edition of the Homelessness Action Team's *HAT update* (Tenant Services Authority (TSA), August 2009) contains a useful review of the extent to which timely money advice can avoid homelessness among homeowners in mortgage difficulties, together with examples of best practice.⁶

In August 2009, the government issued a new package of information on the 'Directgov' website for mortgage borrowers in arrears. The material includes interviews and articles and features video clips made with District Judge Stephen Gold.⁷

A new report outlines the measures being taken by local authorities in response to the recession but warns that councils should prepare for a worsening social impact as unemployment rises: *When it comes to the crunch* (Audit Commission, August 2009).⁸

Representation in possession cases

There are now hundreds of duty schemes in place, providing last-minute assistance to defendants in possession cases in county courts. A Housing Possession Court Desk Community has been established on the internet to help advisers participating in the schemes to exchange information.⁹

In August 2009, CLG announced that it had doubled the extra funding to duty schemes and that: 'There is now universal access to this service for people attending repossession hearings at county courts in England': CLG news release, 14 August 2009.¹⁰

Those representing borrowers and tenants on county court possession schemes but troubled by negative equity cases or the correct form of order to seek where social housing tenants are in arrears will find assistance in 'Stretching it' by District Judge Julie Exton [2009] 153 *Solicitors Journal* Issue 32.¹¹

Housing and anti-social behaviour

Since 31 August 2009 local authorities have been able to apply for drinking banning orders in county courts when taking other legal action arising from drink-related anti-social behaviour (for example, in possession claims or injunction applications). New official guidance explains the circumstances in which such orders can be sought and granted: *Guidance on drinking banning orders on application for local authorities, police forces, magistrates and course providers within England and Wales* (Home Office, August 2009).¹²

Right to buy

In 2007/08 there were 15,110 right-to-buy sales of social housing in England but that number fell to 3,860 sales in 2008/09. Of those sold, 2,860 were council houses and 1,000 were registered social landlord properties. A further 3,200 social housing properties were sold voluntarily: *Social housing sales to sitting tenants, England, 2008–09* (CLG housing statistical release, August 2009).¹³

Restricting shared ownership

The government announced in August 2009 that it would exercise new powers to cap shared ownership in 13,000 rural settlements. The objective is to prevent properties designed for low-cost social housing from being sold into the private market by tenants who complete shared-ownership staircasing: CLG news release, 12 August 2009.¹⁴ The powers are contained in Housing and Regeneration Act (H&RA) 2008 ss300–302 which were brought into force on 7 September 2009 but have effect only in respect of tenancies granted after the commencement date or granted after the commencement date where an agreement for that tenancy was entered into before the commencement date: the Housing and Regeneration Act 2008 (Commencement No 6 and Transitional and Savings Provisions) Order 2009 SI No 2096.¹⁵

The designated areas are identified in the Housing (Right to Enfranchise) (Designated Protected Areas) (England) Order 2009 SI No 2098.¹⁶ Related changes to restrict enfranchisement of long leases in such areas are made by the Housing (Shared Ownership Leases) (Exclusion from Leasehold Reform Act 1967) (England) Regulations 2009 SI No 2097.¹⁷

The introduction of these measures follows publication of a report on the outcome of a consultation exercise: *Shared ownership and leasehold enfranchisement and designation of protected areas consultation*.

Government response to consultation (CLG, August 2009).¹⁸

Homes for the military

A new report sets out how Ministry of Defence (MoD) accommodation for service personnel will be improved and managed over the next ten years: *Defence accommodation management strategy* (MoD, August 2009).¹⁹ The plan is to spend over £3bn on new-build, upgraded and improved living accommodation for the Armed Forces over the next decade: MoD news article, 21 August 2009.²⁰

Housing for children

For the purposes of the Children Act (CA) 1989, the accommodation needs of children are usually assessed using a Common Assessment Framework (CAF). That guidance has recently been rewritten and published in two separate guides – one for practitioners and the other for managers: *The Common Assessment Framework for children and young people. A guide for managers and The Common Assessment Framework for children and young people. A guide for practitioners* (Department for Children, Schools and Families, July 2009).²¹

Regulating the social housing sector

To address concerns about possible overlap in the arrangements between agencies responsible for oversight of social housing from April 2010, new agreements have been published. The TSA and Audit Commission have entered into a memorandum of understanding: *Tenant Services Authority/Audit Commission memorandum of understanding July 2009*.²² The TSA and the Housing Ombudsman Service have agreed an interim protocol: *Tenant Services Authority and Housing Ombudsman Service interim protocol* (TSA, 2009).²³

New research commissioned and published by the Scottish Government contains a detailed analysis of the aspirations of social housing tenants in respect of their landlords and regulators: *Identifying the priorities of tenants of social landlords* (July 2009).²⁴

Housing law advice

On 3 September 2009, the Legal Services Commission (LSC) published the second edition of its booklet designed to help lawyers and legal advisers to improve the quality of their advice on housing law: *Housing. Improving your quality. A guide to the common issues identified through peer review* (LSC, July 2009).²⁵ The booklet sets out best practice in giving advice on matters relating to housing problems.

HUMAN RIGHTS

Article 6 and article 1 of Protocol No 1: enforcement of orders

■ Olaru v Moldova

App No 476/07,
28 July 2009

Mr Olaru was a police officer. According to the Law on Police Forces, the local public administration was obliged to provide him with social housing. When it failed to do so, he began civil proceedings against the Chişinău Municipal Council. On 16 December 2004, the Centru District Court ordered the council to provide accommodation. The judgment became final and enforceable but no accommodation was provided. Mr Olaru and a number of other applicants in a similar position complained that the failure to comply with the judgments in their favour violated their rights under article 6 and article 1 of Protocol No 1 of the European Convention on Human Rights ('the convention'). The government submitted that the judgments could not be enforced in view of the high number of similar unenforced judgments and the lack of funds on the part of the local public authorities.

The European Court of Human Rights (ECtHR) noted that the judgments had remained unenforced for a period varying between three and 11 years. It had found violations of article 6 and article 1 of Protocol No 1 in numerous cases concerning delays in enforcing final judgments (for example, *Prodan v Moldova* App No 49806/99 and *Luntre v Moldova* App No 2916/02). It noted that of approximately 300 applications concerning non-enforcement of Moldovan final judgments, about 50 per cent concerned the failure of local governments to comply with final judgments awarding applicants housing rights or money in lieu of housing. The problem had its origin in socially-oriented legislation bestowing social housing privileges on a very wide category of persons including judges, prosecutors, police officers, internally displaced persons and employees of the penitentiary system. There was a chronic lack of funds on the part of local governments. There were violations of article 6 and article 1 of Protocol No 1 which reflected a persistent structural dysfunction. It was a practice which was incompatible with the convention. The problem, although not particularly complex, raised issues which went, in principle, beyond the court's judicial function. Accordingly, it abstained from indicating any specific or general measures to be taken. The Committee of Ministers was better placed and equipped to monitor the necessary measures to be adopted by Moldova. It adjourned all future applications

for one year, but provided that the state must grant adequate and sufficient redress, within one year, to all victims of non-enforcement or unreasonably delayed enforcement by state authorities of domestic judgments concerning social housing who had lodged their applications with the court before the delivery of the present judgment.

Article 8 and article 1 of Protocol No 1: order for sale of a home

■ Zehentner v Austria

App No 20082/02,
16 July 2009

In August 1998, in summary proceedings, the Meidling District Court ordered Ms Zehentner to pay 102,330 Austrian schillings (ATS) (approximately €7,440) for the cost of plumbing work carried out in her apartment. In May 1999, the District Court granted the creditor's request for the enforcement of the payment of the order and the costs of the proceedings in the amount of approximately €2,150 by judicial sale of Ms Zehentner's apartment. In November 1999, the District Court sold the apartment for 812,000 ATS (approximately €59,000) to H. GmbH, a limited liability company. In February 2000, Ms Zehentner was evicted from the apartment. In March 2000, after having a nervous breakdown, Ms Zehentner was admitted to a psychiatric hospital. A medical report indicated that she had been suffering from paranoid psychosis since 1994 and a permanent guardian was appointed. In April 2000, Ms Zehentner, represented by the guardian, appealed against the order for judicial sale. That appeal and a number of subsequent appeals were dismissed. Relying on article 1 of Protocol No 1, Ms Zehentner complained that the judicial sale of her apartment had deprived her of her possessions.

The First Section of the ECtHR decided to examine the complaint 'first and foremost' under article 8. It stated that whether or not a particular habitation constitutes a 'home' which attracts the protection of article 8 depends on the factual circumstances. It could see no reason to doubt that the apartment subject to the judicial sale was at the material time Ms Zehentner's 'home'. The judicial sale and the eviction interfered with her right to respect for her home. The interference was in keeping with a law which served the legitimate aim of protecting the rights and freedoms of others, namely creditors, by enabling them to obtain payment of their claims.

An interference is 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the

legitimate aim pursued. A margin of appreciation must be left to the national authorities, which are in principle better placed than an international court to evaluate local needs and conditions. The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal.

While it may be in the interest of efficient enforcement proceedings that the judicial sale of the apartment was authorised on the basis of a payment order which had been issued in summary proceedings, the court doubted whether the debtor's interests were adequately taken into account where such a payment order for a comparatively minor sum could be the basis for the judicial sale of a debtor's 'home'. The court noted that by the time the judicial sale of her apartment took place, Ms Zehentner had lacked legal capacity for years. As a result, she had not been in a position either to object to the payment order or to make use of the remedies available to debtors under the Enforcement Act. In this case, neither the protection of the bona fide purchaser nor the general interest of preserving legal certainty were sufficient to outweigh the consideration that Ms Zehentner, who lacked legal capacity, was dispossessed of her home without being able to participate effectively in the proceedings and without having any possibility to have the proportionality of the measure determined by the courts. It followed that, because of the lack of procedural safeguards, there was a violation of article 8 of the convention. The ECtHR also found a breach of article 1 of Protocol No 1.

Comment: This case raises interesting questions about whether or not the English and Welsh law on charging orders and orders for sale would withstand a similar challenge. It emphasises the importance of creditor claimants ensuring that they make applications for the court to appoint a litigation friend (Civil Procedure Rules (CPR) Part 21) if there is any issue about the debtor defendant's mental capacity and the potential significance of orders for sale (CPR Part 73.10) being a discretionary remedy: courts do not have to make an order for sale even if there is no proposal to pay off a judgment debt protected by a charging order.

PUBLIC SECTOR

Notices to quit

■ Bradford Community Housing Ltd v Hussain

[2009] EWCA Civ 763,
17 June 2009

Mr Hussain and Ms Kauser were joint assured tenants. Rent was payable weekly in advance for 48 weeks of each year. Clause 2.2 of the tenancy agreement provided that the tenant should 'give the council not less than 28 days' written notice expiring on any Friday should he/she wish to terminate the tenancy'. The tenants' relationship broke down, and on the advice of Bradford Community Housing's (Bradford CH) homelessness advice team, Ms Kauser served a termination notice dated 24 January 2007 giving notice to quit the property 'with effect from Sunday 25/02/2007 or the day on which a complete period of your tenancy expires next after the end of four weeks from the date of this notice'. Bradford CH brought a claim for possession against Mr Hussain. A district judge made a possession order. HHJ Hawkesworth QC dismissed an appeal.

The Court of Appeal dismissed a second appeal. First, the notice to quit was not ambiguous. Patten LJ said that there was:

no basis for construing the notice so as to exclude the operation of the catch-all provision. It was obviously inserted to ensure that the notice expired at the end of a contractual period of the tenancy if that was not Sunday 25 February and it would have been read by the respondent as intending to terminate the tenancy in accordance with clause 2.2 of the tenancy agreement: ... the notice to quit took effect at the end of Friday 23 February ... (para 11).

Second, on the evidence, there was no proper factual basis for the unpleaded allegation that Bradford CH and Ms Kauser had agreed to vary the notice to quit.

Right to buy

■ Scinto v Newham LBC

[2009] EWCA Civ 837,
2 July 2009

Miss Scinto was a secure tenant who sought to exercise the right to buy. In December 1999, Newham sent a landlord's notice offering to sell the property for £56,000. In September 2000, Miss Scinto's solicitors sent Newham a surveyor's structural survey report indicating a number of serious structural problems. They requested that the right to buy be held in abeyance pending investigations by Newham's insurers and any repair work that was necessary as a

result of those investigations. Newham agreed to hold the right-to-buy application open pending the outcome of investigations by its technical repairs manager. In the view of the President of the Queen's Bench Division, by doing so Newham agreed to suspend the right-to-buy process until the identified remedial works were carried out.

However, they had not been carried out in February 2003 when Newham served a Housing Act (HA) 1985 s140 notice requiring Miss Scinto to complete or specify outstanding matters. In response, her solicitor wrote stating that the repairs were outstanding. Newham sent a second notice in April 2003 under s140(1) requiring Miss Scinto to complete the transaction within 56 days. She was unable to do so because Newham had not carried out the repairs.

In December 2004, Miss Scinto issued proceedings for disrepair against Newham. They were compromised in November 2006 without Newham admitting liability. Miss Scinto then sought a declaration that she was entitled to exercise her right to buy on the terms set out in the December 1999 offer. Newham defended on the basis that Miss Scinto had failed to complete under its April 2003 notice and that the notice accordingly claiming to exercise the right to buy was deemed to be withdrawn under s141(4). HHJ Barnett QC gave judgment in favour of Miss Scinto, holding that the repairs were a relevant outstanding matter and that Newham was not entitled to serve the first notice (s140(4)(c)). Newham appealed.

The Court of Appeal dismissed the appeal. In this case, unlike *Ryan v Islington LBC* [2009] EWCA Civ 578; August 2009 *Legal Action* 34, the parties had in essence agreed that the right-to-buy process would be held in abeyance until the outcome of investigations and that the outcome of investigations embraced such repair works as those investigations indicated Newham should carry out. The parties had, by their own conduct and in essence having agreed, embraced the matter of carrying out repairs as being a matter relating to the grant within the meaning of s140. Accordingly, Newham was not able to serve its first notice under s140 because it was forbidden from doing so by the terms of s140(4)(c). The judge was correct to hold that Newham's notices were invalid. Furthermore, the findings of fact which were essential to the whole case were plain and sustained a promissory estoppel that Newham would not proceed with the right-to-buy process until the repairs were effected.

PRIVATE SECTOR TENANCIES

Harassment and unlawful eviction: damages

■ Hunt v Hussain

*Epsom County Court, 31 July 2009*²⁶

Mr and Mrs Hussain were husband and wife. Mr Hussain was the freehold owner of a house. In May 2003, Mrs Hussain granted Mr Hunt an assured shorthold tenancy of a room at a weekly rent of £90. After three months, Mr Hunt lost his job and needed to apply for housing benefit. Mrs Hussain told him that he had to leave. Epsom and Ewell's Environmental Health Department wrote warning her that she required a court order. Despite this Mr and Mrs Hussain changed the locks and refused to readmit him.

Mr Hunt, who was aged 45, was street homeless for some three months before he was able to secure alternative accommodation. Occasionally, he stayed with friends. Most of the time he slept in a broken-down car or slept where he could in his sleeping bag. He suffered from bronchial asthma which was worsened by living rough. He developed depression and feelings of self-harm. Some four years after the eviction, a psychiatrist confirmed that he was suffering from severe depression, agoraphobia and paranoid ideation. He was not fit to return to work and it was difficult to predict whether he would become fit to work in the future. The psychiatrist concluded that the trauma of the eviction on someone with his background and personality had generated this radical deterioration in his mental health.

The local authority prosecuted Mrs Hussain under Protection from Eviction Act 1977 s1. She was fined £300 and ordered to pay costs of £250. In civil proceedings, relying on breach of contract and tort, judgment in default was entered against Mr and Mrs Hussain.

HHJ Reid QC awarded damages totalling £56,678 under the following heads:

- the eviction: damages were assessed at £125 per day over a period of 65 days. The judge was not willing to assess damages over the full period of 76 days that Mr Hunt was homeless on the ground that Mr and Mrs Hussain could have lawfully determined the tenancy by serving a HA 1988 s21 notice;
- damages for personal injury were assessed at £45,000. The judge had regard to the Judicial Studies Board guidelines on awards for psychiatric damage. He also had regard to the adverse impact of the homelessness on Mr Hunt's asthma. The judge was satisfied that it fell into the most severe category of psychiatric damage for which the guideline is between £35,000 and

£74,000. However, it was apparent that Mr Hunt was particularly vulnerable as a result of his unsettled background. The judge was satisfied that he had a predisposition to mental health problems. He was not persuaded that the case was covered by the eggshell skull principle. Damages were therefore not assessed at the top end of the scale;

- special damages were awarded in the sum of £100 (£730 was claimed);
- interest of £3,453; and
- the judge granted a freezing injunction restraining Mr Hussain from dealing with the two properties in which he still retained a beneficial interest.

HOUSING ALLOCATION

Public Services Ombudsman for Wales

Complaint

■ Neath Port Talbot CBC

2008/01411,

4 August 2009

The complainants, a married couple, were council tenants of a two-bedroom house. Both were registered disabled. The wife received higher rate disability living allowance. In February 2008 they applied under HA 1996 Part 6 for a transfer to alternative two-bedroom council accommodation, adapted for the disabled, in a different part of the council's area. The council referred the application to its medical adviser who rejected the claim. The application was then classified by the council as being for one-bedroom general needs properties.

The complainants submitted reports from a GP, psychiatrist and an occupational therapist indicating why they needed separate bedrooms on account of their disabilities but, despite using the council's review and appeals procedures, it was not until the end of November 2008 that they were reclassified for two-bedroom adapted properties.

The Ombudsman found maladministration on the grounds that:

- the advice of the council's medical adviser was not being treated by the council as advice but as determinative of decisions the council should have taken for itself;
- the council had failed initially to give reasons why it had not changed the couple's classification in light of the reports submitted; and
- the reconsideration of the application had been delayed to await an occupational therapist's report but that had itself caused a delay of over three months.

The Ombudsman recommended £500 compensation.

■ R (Odhams Walk Residents' Management Ltd) v Westminster City Council

[2009] EWHC 1712 (Admin), 13 July 2009

The claimant was a tenant management organisation established to operate as managing agent for some of the council's housing stock. It employed a resident caretaker. The council agreed to make a one-bedroom flat available to the claimant on licence so that it could be made available, again on licence, to the caretaker for the better performance of his duties. When the caretaker established a family with a partner and two children, the claimant asked the council to provide a larger property. The council declined. It had adopted a policy that, given the pressure on family-sized housing needed for allocation under its allocation scheme, it would not release accommodation other than studio or one-bedroom flats to managing agents to use as residential accommodation for their staff.

The claimant sought judicial review on the basis that the policy discriminated unlawfully against those employees with families (who were more likely to be women), and thus infringed the Sex Discrimination Act (SDA) 1975. Alternatively, the policy was in breach of the council's duty to have regard to the need to eliminate discrimination and promote equality: SDA s76A.

Cranston J dismissed the application. He held that:

- the council was not the employer of the caretaker. He was a member of the claimant's staff. His terms and conditions were a matter for the claimant and not for the council. The latter was, accordingly, not discriminating in the treatment of any of its employees; and
- the claim for breach of the s76A duty had been introduced late and the council had had no opportunity to bring forward evidence on it; however, in any event, the relevant policy was not concerned with services for individuals (ie, persons who might be victims of discrimination or unequal treatment) but with relations between the council and its housing management organisation.

HOMELESSNESS

Eligibility

■ Harrow LBC v Ibrahim

[2008] EWCA Civ 386, 21 April 2008

■ Teixeira v Lambeth LBC

[2008] EWCA Civ 1088, 10 October 2008

In each of these cases – relating to eligibility

for homelessness assistance under HA 1996 Part 7 s185 for EU nationals and their families – the Court of Appeal referred questions to the European Court of Justice in Luxembourg. In September 2009, that court held the public hearing of the referred questions. The advocate-general will now deliver an opinion, after which the judges of the court will deliberate and deliver their judgment.

■ **Konodyba v Kensington and Chelsea RLBC**

[2009] EWCA Civ 890,
29 June 2009

The council decided that the claimant was not eligible for homelessness assistance. Although she was an EU national and a 'worker', she was a national of an accession state (Poland) and subject to the UK's transitional derogation provisions: EC Treaty article 39. She appealed on the basis that, as the mother of a child who had been introduced into school in this country while she was temporarily working here, albeit not for the 12 months required under the UK's transitional provisions, she was entitled to reside here as the primary carer of that child: see *Baumbast and R v Secretary of State for the Home Department* Case C-413/99; [2002] ECR I-7091 and article 12 of Regulation (EEC) No 1612/68. HHJ Behar dismissed the appeal but Rix LJ gave permission for a second appeal on the point (which had also been raised in *Harrow LBC v Ibrahim* (see above)).

At the hearing, the appellant expressly abandoned the '*Baumbast* point' and sought an adjournment to enable her to develop an argument based either on her rights as a former self-employed person (a position earlier rejected by the council) or on article 7.3 of Directive 2004/38/EC which provides that: 'For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances: (a) he/she is temporarily unable to work as the result of an illness or accident.'

The court rejected the application to adjourn and dismissed the appeal on the basis that the claimant had abandoned the only ground that she had permission to argue. It was open to the claimant to raise the second point, a wholly new point, with the council as a fresh basis for her application.

Priority need

Local Government Ombudsman Complaint

■ **Lambeth LBC**

08/006/663,
10 August 2009

The council accepted that the complainant, a single, teenage man, was homeless and in priority need by reason of his medical condition (he had severe Haemophilia A). It secured temporary bed and breakfast hotel accommodation for him. For over a year his parents pressed the council and its medical adviser to secure more appropriate accommodation for occupation by him and a carer. Without that help and support he ran up arrears of temporary accommodation charges over many months, caused damage to his room, was asked to leave and was found intentionally homeless. Through his father, he complained about the handling of his homelessness application and the failure to provide him with support.

The Ombudsman's investigation found that:

- although the council had accepted his vulnerability, it did not take action to assist him in completing housing benefit applications or advise him of the implications of increasing rent arrears when there was still a reasonable prospect of recovering them; and
- there were instances of poor communication by the council, particularly in the failure to pass on information from the council's medical adviser to the applicant or his father, and to make it clear that he would be considered for one-bedroom accommodation only.

The Ombudsman found maladministration causing injustice and recommended that the council should:

- offer a tenancy of one-bedroom accommodation that met the applicant's identified needs (this would put him in the position he should have been in earlier);
- write-off all the arrears he incurred apart from £11.05 per week (the amount of the charge he was initially advised that he was liable to pay);
- offer to pay him £2,000 in recognition of the injustice he had experienced; and
- pay £250 to his father in recognition of his time and trouble pursuing this complaint on his son's behalf.

Reviews

■ **De-Winter Heald and others v Brent LBC**

[2009] EWCA Civ 930,
20 August 2009

The four claimants sought reviews (under HA 1996 s202) of initial adverse decisions made

by the council on their applications for homelessness assistance. The decisions related to homelessness, priority need and the suitability of accommodation. In each case, the review was conducted by the council's contractor Housing Reviews Limited (HRL) and the review decision notification was prepared by Mr Perdios of HRL who had previous experience as an in-house local authority reviewing officer. The claimants each unsuccessfully appealed to the county court against the review decisions. The Court of Appeal heard second appeals confined to the issues of whether or not contracting-out of the review function was permissible and (if it was) whether or not such an arrangement for review by a third party infringed convention rights under article 6.

The Court of Appeal held that:

- the conduct and determination of a s202 review was a function of a housing authority under HA 1996 Part 7. Notwithstanding the views expressed by Lords Bingham, Hoffmann and Millett in *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, contracting-out of that function was permitted by the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 SI No 3205 article 3; and
- the fact that review decisions were normally taken by employees did not infringe article 6 (see *Runa Begum* above) so the true question was whether HRL was less impartial or independent than an employee would have been. The evidence adduced did not support the proposition that the company did not reach review decisions fairly or that Mr Perdios displayed bias.

Comment: A number of local housing authorities use the services of Mr Perdios's company, HRL. Before this judgment, complaints of apparent bias arising from the content of its website had caused some judges to allow appeals under HA 1996 s204 (see, for example, *Augustin v Barnet LBC* Central London County Court, 22 May 2009, Recorder Hollington QC) and others – as in the four cases considered by the Court of Appeal – to dismiss them. The matter may be considered by the new Supreme Court if permission to appeal is granted (see page 20 of this issue).

HOUSING AND CHILDREN

■ **R (S) v Plymouth City Council**

[2009] EWHC 1499 (Admin),
3 June 2009

The claimant was a boy aged 11. He lived with his younger brother and his mother in her two-bedroom council flat. By reason of his

disabilities, in particular autism, he needed his own bedroom. The council accepted that he was a child in need for the purposes of CA 1989 s17 and produced an assessment and action plan which recognised, among other matters, his need for other accommodation. His mother had applied for a transfer but the council operated a choice-based lettings scheme under which she had to bid for advertised properties. Nothing suitable had been advertised. The council recognised that three-bedroom accommodation could be obtained in the private rented sector, offered to help with a deposit and rent in advance, but refused to agree to meet any shortfall between the rent payable and the housing benefit the mother might receive. That was because it considered that the mother could secure rehousing by the council if she bid for a wider range of types of property in different areas of its district.

Holman J granted a declaration that the assessment of the claimant's needs did not provide a realistic plan of action with regard to accommodation. He said of that aspect of the assessment:

It does not identify any sample property, or properties, that Plymouth City Council put forward as appropriate for the family in the private market. It does not, accordingly, engage with the actual cost of renting such a property, nor the difference between that cost and the housing benefit to which the mother is, or may be, entitled. In other words, it is long on principle but very short on detail.

It does seem to me that the local authority have got to be much more proactive in working together with the mother to see exactly what might be available in the private sector, what it would cost, the extent of housing benefit that the mother can obtain towards that cost and the extent, if any, to which Plymouth City Council ought to, and is willing to, bridge any difference. In short, the alternative of renting in the private sector with financial help from Plymouth City Council needs a great deal more exploration than has so far been done. It is only when Plymouth City Council, working no doubt in co-operation with the mother, have come up with a fully-costed and detailed alternative for renting in the private sector that they can be said to have actually produced a realistic plan of action in relation to accommodation (paras 34–35).

■ R (M) v Birmingham City Council

[2009] EWHC 1584 (Admin),
16 June 2009

The claimant, a single man aged 17, was homeless. He had spent time since release from custody living in bed and breakfast, sofa-

surfing and occasionally staying with his mother from whom he was estranged. He sought permission to bring a claim for judicial review of the council's failure to secure accommodation for him under CA 1989 s20. At a renewal hearing, the council opposed the application on the grounds that:

- CA 1989 s20(1)(c) was not made out because even if the claimant's mother could not cope with him given the demands of her other three children, she was not 'prevented' from accommodating him;
- the claimant had said to a social worker that he did not want to become a 'looked-after' child; and
- the legislation imposed the function of assessing children's needs, wishes and feelings on the authority and not on the court.

Holman J granted permission to claim judicial review. He held that it was 'patently arguable' that the claimant was within s20(1)(c) or that the contrary could not be reasonably contended by a local authority. The claimant obviously wished to pursue accommodation from the council as witnessed by the proceedings. The claimant could not be driven from his claim 'by mere assertion' by the authority about what were his true wishes and feelings.

■ R (P) v Croydon LBC [2009] EWHC 1993 (Admin), 3 July 2009

The claimant was a young asylum-seeker from Afghanistan. On his application to the council for assistance with accommodation, an issue arose about his age. The council conducted an assessment and determined that he was 17. That decision was upheld on an internal review. The claimant sought judicial review.

Burton J granted permission to apply for judicial review, allowed the claim and quashed the review decision. The reviewer had failed to deal with an item of relevant evidence that had perhaps not reached the reviewer in time. If it had reached the reviewer, the conclusions were vitiated by failure to deal with it. The judge said: 'The proper course in my judgment would have been that the defendant should have told the claimant's advisers that they were planning to hold a review, and given them the opportunity to put in any final comments or documentation, which would have expressly put on the green light for the production of [the relevant] statement' (para 46).

- 1 Available at: www.cml.org.uk/cml/media/press/2357.
- 2 Available at: www.justice.gov.uk/news/news_release140809a.htm.
- 3 Available at: www.communities.gov.uk/news/housing/1312588.
- 4 See: www.communities.gov.uk/documents/housing/xls/1312376.xls.

- 5 Available at: http://england.shelter.org.uk/_data/assets/pdf_file/0017/203705/Uncharted_Territory.pdf.
- 6 Available at: www.tenantservicesauthority.org/upload/pdf/HAT_update_Aug09.pdf.
- 7 See: www.direct.gov.uk/en/HomeAndCommunity/Keepingyourhomeevictionsandhomelessness/Mortgagesandrepossessions/DG_179893.
- 8 Available at: www.audit-commission.gov.uk/localgov/nationalstudies/Pages/whenitcomestothe crunch12aug2009_copy.aspx.
- 9 See: www.communities.idea.gov.uk/reg/register.do.
- 10 Available at: www.communities.gov.uk/news/housing/1312588.
- 11 Available at: www.solicitorsjournal.com/story.asp?sectioncode=3&storycode=14728&c=1.
- 12 Available at: www.crimereduction.homeoffice.gov.uk/dbo002.htm.
- 13 Available at: www.communities.gov.uk/documents/statistics/pdf/1319692.pdf.
- 14 Available at: www.communities.gov.uk/news/corporate/1310437.
- 15 Available at: www.opsi.gov.uk/si/si2009/uksi_20092096_en_1.
- 16 Available at: www.opsi.gov.uk/si/si2009/uksi_20092098_en_1.
- 17 Available at: www.opsi.gov.uk/si/si2009/uksi_20092097_en_1.
- 18 Available at: www.communities.gov.uk/documents/housing/pdf/1310607.pdf.
- 19 Available at: www.mod.uk/NR/rdonlyres/980B4CAC-40AC-4BFA-941D-166A5BFF74FE/0/DefAccomMgtStrategy.pdf.
- 20 Available at: www.mod.uk/DefenceInternet/DefenceNews/EstateAndEnvironment/TenyearVisionForMilitaryAccommodationLaunched.htm.
- 21 Available at: www.dcsf.gov.uk/everychildmatters/resources-and-practice/IG00063/.
- 22 Available at: www.tenantservicesauthority.org/upload/pdf/MoU-Audit-Commission.pdf.
- 23 Available at: www.tenantservicesauthority.org/upload/doc/Interim_protocol_between_TSA_and_HOS.doc.
- 24 Available at: www.scotland.gov.uk/Publications/2009/07/23173456/0.
- 25 Available at: www.legalservices.gov.uk/docs/cls_main/FINAL_Housing_Brochure_TO_PUBLISH_Aug_09.pdf.
- 26 Dambudzo Matiti, solicitor, Surrey Law Centre® and Robert Latham, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Readers can visit their personal websites at: www.nicmadge.co.uk and at: www.gardencourtchambers.co.uk/barristers/jan_luba_qc.cfm. The authors are grateful to the colleagues at note 26 for the transcript or note of the judgment.